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SUPPORTING OPEN PLURILATERAL NEGOTIATIONS FOR

**MULTILATERAL
LIBERALISATION OF TRADE**

ANWARUL HODA

JANUARY 2023

415

**WORKING
PAPER**

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I take full responsibility for any errors of fact or analysis that might have remained.

Abstract

For many years now, lack of progress in multilateral trade negotiations has been a major cause of concern among WTO members. With diversity in the economic situation of members and differences in their stages of development, delay in concluding trade agreements is inevitable. However, the negotiating process has also been an obstacle to progress. All decisions must be taken by consensus and the full membership must be involved at every stage. Decision making by consensus is a legacy from the GATT 1947 days and is difficult, if not impossible, to change. Developing countries are strongly attached to the requirement as they consider it an important safeguard against the imposition of new obligations on them against their will and interest.

This study is about the alternative of open plurilateral agreements (OPAs) that has given hope of a solution to the problem of process in negotiations by sidestepping the requirement for a consensus. The paper gives a detailed account of the use of OPAs in the GATT 1947 era and of its revival under the WTO Agreement. It describes the various areas of the WTO Agreement in which OPAs can be successfully employed to make progress in liberalisation as well as in rule-making. It also contains a description of the way in which the results of plurilateral agreements can be assimilated in the architecture of the WTO Agreement.

Support has been growing for OPAs but certain issues have also been raised. The paper includes a critical analysis of the objections as well.

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Supporting Open Plurilateral Negotiations for Multilateral Liberalisation of Trade

Anwarul Hoda

1. Introduction

For many years now, the virtual standstill in the liberalisation of trade through multilateral trade negotiations has been a matter of wide concern. Undoubtedly, there have been two notable successes. At the Bali Ministerial Meeting in 2013, the Trade Facilitation Agreement was concluded and at the Nairobi Ministerial Meeting in 2015, agreement was reached on the third pillar of export competition in agriculture to eliminate export subsidies and strengthen disciplines on export credits, export credit guarantees or insurance programmes, state trading enterprises exporting agricultural products and international food aid. But two agreements in 27 years is not good going.

Multilateral negotiations in the WTO are bound to take time as they deal with complex issues. The diversity in the economic situation of WTO members and differences in their stages of development compound the problem. The negotiating process is an additional obstacle to progress. All decisions must be taken by consensus and the full membership must be involved at every stage. As a result, multilateral negotiations are delayed and even blocked in some cases.

Decision making by consensus is a legacy from the GATT 1947 and is difficult, if not impossible, to change. Developing countries are strongly attached to the requirement as they consider it an important safeguard against the imposition on them of new obligations against their will and interest.

In this situation, WTO members have been considering and even engaging in the alternative of open plurilateral negotiations (OPAs). In these negotiations, a subset of members accounting for a substantial proportion of world trade (critical mass) decided to go ahead with plurilateral agreements for the liberalisation of trade on MFN basis in selected areas. Plurilateral negotiations cut through the delays by requiring agreement only among participating members. Within a few years of the conclusion of the Uruguay Round, groups of WTO members entered

into three plurilateral agreements on information technology products (1996), telecommunication services (1997) and financial services (1999).

In recent years, the plurilateral approach has gathered momentum. In 2015, a group of participants in the agreement on information technology products agreed to expand the list of products for liberalisation of import tariffs. And then at the 11th Ministerial Conference held in December 2017 at Buenos Aires, large groups of members sponsored the Joint Statement Initiatives (JSIs) to begin plurilateral negotiations and discussions in four different rule-making areas, viz., domestic regulation of services, electronic commerce, investment facilitation for development and increasing the opportunities in international trade for micro, small and medium enterprises (MSMEs).

A review of the status of negotiations on JSIs in November-December 2021 showed that these groups have made steady progress.

The promise shown in open plurilateral trade negotiations on the one hand and the continued stasis in multilateral trade negotiations on the other raise an important question. Is open plurilateral negotiations the way forward both for achieving further liberalisation of market access and expanding rule-making to cover concerns that are continually emerging from the evolution of international trade? The plurilateral approach for the liberalisation of trade is not new to the multilateral trading system. In the GATT 1947 days, it was extensively used, particularly to make advances in the rule book for non-tariff measures. The WTO Agreement aimed to bring an end to the practice but pragmatism brought it back very early in the WTO days.

However, some WTO members, such as India and South Africa, have raised issues on the consistency of initiatives for plurilateral negotiations with the norms embodied in the WTO Agreement and doubted the legitimacy of the plurilateral approach.

This paper undertakes an examination of all relevant

aspects and endeavours to come to an assessment of the contribution that plurilateral negotiations can make to keep liberalisation of world trade on a non-discriminatory basis moving and, at the same time, foster changes to adapt trade rules to new developments.

Section 2 chronicles the experience with plurilateral agreements in the GATT 1947 days; in Section 3, we describe the related developments in the WTO era. In Section 4, we examine critically the objections raised against the plurilateral approach. Section 5 concludes.

2. Open plurilateral agreements: experience in GATT 1947

What are open plurilateral agreements?

In the GATT 1947, a practice developed over the years of open plurilateral agreements (OPAs), which followed the pathway of liberalisation and rule-making on a non-discriminatory basis. The WTO Agreement aimed to discontinue the practice but pragmatism has brought it back. Negotiations for OPAs are open to all WTO members that are willing to join in undertaking new or higher levels of obligations while at the same time extending benefits on an MFN basis to all non-participating members.

It is necessary to mention here that some of the provisions of the WTO Agreement also allow exclusive plurilateral negotiations and agreements among a subset of WTO members, viz., Article XXIV of GATT 1994 (FTAs and customs unions), paragraph 2 (c) of the GATT 1994 Decision known as the Enabling Clause (regional or global arrangements among developing countries), Article V of the GATS (economic integration), and paragraph 3 of Article II of the Marrakesh Agreement (plurilateral trade agreement). These provisions and negotiations under them result in discriminatory liberalisation of trade in which benefits are not extended to non-parties. This paper is about open plurilateral agreements, not exclusive plurilateral agreements, which are omitted from the analysis undertaken in it. We start with an analysis of open plurilateral agreements undertaken during the GATT 1947 times.

Bilateral and Plurilateral Tariff Negotiations (1951-63)

Negotiations for the reduction of tariff in GATT 1947 times took place predominantly in general tariff conferences or rounds of negotiations, but there were procedures also for bilateral and plurilateral negotiations. These negotiations were also referred to as supplementary negotiations and the concessions made during such negotiations as supplementary concessions. The procedures¹ for such negotiations approved in 1950 required that other contracting parties would be notified of the date and place of negotiations and allowed to join in if they had a substantial interest in the originally proposed negotiations. Ten negotiations were held under these procedures, of which the one held in 1956 involved a large number of contracting parties and is counted as one of the eight rounds of major multilateral trade negotiations. The other nine were bilateral negotiations between Germany and South Africa (1951), Germany and Austria (twice, 1952 and 1957), Denmark and Germany (1955), Germany and Norway (1955), Germany and Sweden (1955), Cuba and the United States (1957), Finland and Germany (1958) and Japan and New Zealand (1963). The results of these negotiations were annexed to the First to Tenth Protocols of Supplementary Concessions to the GATT.

The 1950 procedures for bilateral and plurilateral negotiations were relevant in times when tariff negotiations were held primarily on a product-by-product basis and are now outdated. In recent times, in plurilateral tariff negotiations in goods, members have used the critical mass methodology² for taking negotiations forward.

Plurilateral agreements on non-tariff-measures (NTMs) in GATT 1947

Plurilateral agreements were extensively used for NTMs during the period 1960 to 1979. In these agreements contracting parties to GATT 1947 assumed a higher level of obligations on the use of NTMs than that envisaged in the text of GATT 1947. Table 1 gives the full list of such agreements and is followed by brief comments on each of the agreements.

1 Procedures for Negotiations between Two or More Contracting Parties GATT, Basic Instrument and Selected Documents, Vol. I, p. 116-119

2 For details of this methodology, see paragraphs 3.02-3.05 below on Information Technology Agreement (1997) and Expansion of Trade in Information Technology Products (2015)

Table 1: Open plurilateral agreements on NTMs in GATT 1947

Year	Name of Agreement	Objective of the Agreement	Parties to the Agreement
1957	Standstill Agreement	Standstill on export subsidies on non-primary products	Austria, Belgium, Canada, Denmark, France, Germany, Italy, Japan, Luxemburg, Netherlands, Norway, Sweden, Switzerland, the UK and the USA
1960	Declaration giving effect to Article XVI:4	Prohibition of export subsidy on non-primary goods	Austria, Belgium, Canada, Denmark, France, Germany, Italy, Luxemburg, Netherlands, Norway, Sweden, Switzerland, the UK and the USA
1967	Anti-Dumping Code, 1967	Interpretation of Article VI of GATT 1947	Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Greece, Germany, Italy, Japan, Luxemburg, Norway, Sweden, Switzerland, the UK, the USA, Yugoslavia and EEC.
1979	Agreement on Technical Barriers to Trade	To minimise obstacles due to the use of technical regulations and standards	Developed countries and Brazil, Chile, Colombia, India, Korea, Pakistan, Philippines, Singapore and Yugoslavia*
1979	Agreement on Interpretation and application of Articles VI, XVI, and XXIII	Interpretation of GATT 1947 articles	Developed countries and Brazil, Chile, India, Korea and Yugoslavia*
1979	Agreement on Implementation of Article VII	To harmonise customs valuation practices.	Developed countries and Brazil, India, Korea and Yugoslavia*
1979	Agreement on Import Licensing Procedures	To regulate use of import licensing procedures	Developed countries and Chile, India, Pakistan, the Philippines and Yugoslavia*
1979	Agreement on implementation of Article VI of GATT 1947	To interpret Article VI of GATT 1947	Developed countries and Brazil, India, Pakistan and Yugoslavia*

*The position on adherence of developing countries shown here is as of 1983.

Declaration giving effect to the provisions of Article XVI:4 prohibiting the use of export subsidy on non-primary products, 1960

On non-tariff measures, the readiness of only a subset of contracting parties to accept higher levels of obligations led to the adoption of plurilateral agreements in some areas. The first notable example was the Declaration Giving Effect to the Provisions of Article XVI:4 of the GATT, which was approved on November 19, 1960. Article XVI:4 of GATT 1947 provided for contracting parties to stop granting export subsidies on non-primary products from January 1, 1958, or the earliest practicable date thereafter and the Contracting Parties (contracting parties acting jointly) chose to implement this provision through a declaration in November 1960. Paragraph 2 of the declaration made its acceptance by 14 industrialised countries of West Europe and North America a condition for its entry into force. The Declaration constituted clearly a plurilateral agreement as it was to enter into force upon the

acceptance of a subset of GATT contracting parties who were all developed countries.³

About two years later, the Federal Republic of Germany was the last of the listed countries to confirm its acceptance and the Director General notified the membership of the entry into force of the Declaration.⁴

In the Declaration Giving Effect to the Provisions of Article XVI:4, the idea of a critical mass had already taken shape. The Agreement (Declaration) entered into force with the acceptance of a core of important trading nations and it was made possible for other countries to join it at a later date, whenever they were ready. It is obvious that developing countries were not in a position to sign up while developed countries were eager to go ahead with the Declaration. A plurilateral agreement was undoubtedly the suitable vehicle for the contracting parties to move forward in such a situation.

3 GATT Document L/1381 dated 1.11.1960, BISD, Ninth Supplement

4 GATT Document L/1864

For the sake of giving the reader complete information on the subject, it may be added that paragraph 4 of Article XVI also provided for a standstill on subsidisation of exports of non-primary products until December 31, 1957, it being understood that the prohibition on these subsidies would enter into force on January 1, 1958. Since the declaration on giving effect to the provision on prohibition of export subsidies did not enter into force until later, 15 industrialised countries agreed on an annual basis to extend the standstill agreement through declarations. The last Declaration on Extension of Standstill Provisions of Article XVI:4 of the GATT was approved on November 19, 1960, along with the Declaration Giving Effect to the Provisions of Article XVI:4 of the GATT. The standstill agreements were also plurilateral agreements as only a subset of contracting parties was required to accept them before they entered into force.⁵

It needs to be noted that both the Declaration giving effect to the provisions of Article XVI:4 prohibiting the use of export subsidy on non-primary products, 1960, and the Standstill agreements were multilaterally approved, even though they were plurilateral in character.

Anti-Dumping Code, 1967

The Resolution adopted by Ministers on May 21, 1963, for what came to be known later as the Kennedy Round of trade negotiations mandated the scope of the negotiations to include not only tariffs but also non-tariff barriers. The Group on Anti-Dumping that was established to undertake negotiations on anti-dumping was a representative body with 18 contracting parties, including six developing countries, namely, Argentina, Chile, India, Jamaica, Korea and Peru.⁶ After negotiations in the group, the text of the Agreement on Implementation of Article VI of the GATT, also known as the Anti-dumping Code, 1967, was finalised and included as one of the instruments in the annexes to the Final Act of the Kennedy Round.

There was no agreement in the group on the suggestions made by developing countries and the disagreement was reflected in the Report of the Group.⁷

Although the Preamble describes the aim of the Code 'to interpret the provisions of Article VI of the GATT', it was not made binding on all contracting parties to the GATT and merely gave them the option to accept it. Article 13 provided for the agreement to enter into force on July 1, 1968, and there was no requirement of acceptance by all or a minimum number of contracting parties. The Code entered into force on July 1, 1968, for all parties that had accepted it at an earlier date and for other parties on the date of acceptance. On account of their dissatisfaction with the text, developing countries, with the exception of Yugoslavia, did not become parties to the Code. Although the initial intention of the GATT membership was to negotiate a multilateral agreement, they allowed it to evolve into a plurilateral agreement by deliberately choosing to go ahead even though only a subset of contracting parties, mainly developed countries, were willing to accept it. As of January 13, 1969, the following countries had become Parties to the Code:

Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Greece, Germany, Italy, Japan, Luxemburg, Norway, Sweden, Switzerland, the UK, the US, Yugoslavia and the EEC⁸

Other developed countries accepted the Code later but developing countries largely remained out until the end in 1980, when the Anti-Dumping Code, 1967, was superseded by the Tokyo Round Agreement on Anti-Dumping. The Tokyo Round agreement remained a plurilateral agreement with the difference that a larger number of developing countries became parties to it after its revision in the Tokyo Round.

In 1968, the question arose whether the parties to the Anti-Dumping Code had an obligation to extend the benefits of the Code to contracting parties that had not accepted the Code. As was the practice in those days, the Director General was asked to give a ruling on the issue. In a Note circulated on November 29, 1968, the Director General pointed out that Article 8 (b) of the Code expressly required non-discriminatory treatment of imports from different sources for imposing anti-dumping duties. 'Furthermore', he argued, 'for a contracting party to apply an improved set of rules for the interpretation and application of an Article of the GATT only to its trade with contracting

⁵ One difference between the two Declarations was that, in the case of the Declaration on Standstill, acceptance by Japan was also needed for entry into force in addition to acceptance by the 14 industrialised countries of West Europe and North America required for the Declaration for Giving Effect to the Provisions of Article XVI:4.

⁶ GATT Document TN/64/NTB/41/Rev.1

⁷ GATT Document TN.64/96

⁸ GATT Document L/3167

parties which undertake to apply the same rules would introduce a conditional element into the most-favoured-nation obligations which, under Article I of GATT, are clearly unconditional⁹.

The contracting parties to the GATT 1947, including the parties to the Code, accepted the above advice and recognised that by virtue of the requirement of unconditional MFN treatment of Article I of the GATT 1947, the benefits had to be extended to all contracting parties to the GATT, including those that did not adhere to the Code. Thus, although the Anti-Dumping Code, 1967, was negotiated as a multilateral agreement, it effectively evolved into an open plurilateral agreement when a large majority of developing countries did not join it and yet were extended its benefits by parties to the Code.

The Tokyo Round Codes on Non-Tariff Measures

One of the most important results of the Tokyo Round (1973-79) was agreements on non-tariff measures. Five of these agreements (the Agreement on Technical Barriers to Trade; the Agreement on Interpretation and Application of Articles VI, XVI and XXIII; the Agreement on Implementation of Article VII; the Agreement on Import Licensing Procedures; and the Agreement on Implementation of Article VI) were all open plurilateral agreements. It was not mandatory for the government contracting parties to the GATT 1947 to accept any or all of these agreements but, at the same time, these agreements were open for acceptance by any of them. As in the case of the Anti-Dumping Code, 1967, Article I of the GATT 1947 made it obligatory for parties to each of these agreements to extend benefits to non-signatory contracting parties on an MFN basis. Each of these agreements was accepted by the signatories on a stand-alone basis and there was no requirement of approval of the text by the full membership. The outcome of the Tokyo Round included also three sectoral agreements (on bovine meat, dairy and civil aircraft) and an important agreement on government procurement, but these four agreements were exclusive plurilateral agreements and are excluded from analysis in this paper, as stated in Paragraph 2.1.1 above. Developing countries were dissatisfied with the general lack of transparency in the process leading to the conclusion of the above-mentioned

agreements that had resulted in the majority among them not being involved in the discussions and negotiations.¹⁰ In the meetings of the groups and sub-groups on non-tariff barriers and in the Trade Negotiations Committee, at its final meeting on 11 and 12 April, 1979, they made strong attempts to alter the plurilateral nature of the emerging agreements and make them multilateral.¹¹ One proposal was that before the text of any agreement was opened for acceptance by signature or otherwise, it must be adopted by the Trade Negotiations Committee. Another suggestion that had the support of a number of developing countries was that for any agreement to enter into force, there should be a basic requirement of acceptance by two-thirds of the participants in the Multilateral Trade Negotiations. However, neither of these proposals was accepted. The main line of argument that prevailed in support of plurilateral agreements was that 'governments wishing to enter into agreements were not imposing anything on other governments but simply moving to higher levels of discipline.'¹² The point was also emphasised that the existing rights under the GATT of non-signatories would not be affected.

Despite the divergence of views on plurilateral agreements that were reiterated at the session of the Trade Negotiations Committee held on April 11-12, 1979, towards the end of the session, the Chairman obtained the consent of the Committee to attach the texts of various agreements to the Procès Verbal embodying the results of negotiations. In the Procès Verbal, the participants agreed to submit the texts to the governments for their approval. Thus, if a government contracting party to the GATT was dissatisfied with any agreement because its views had not been taken into account, or because of the plurilateral character of the agreement the only recourse available to it was not to accept the particular agreement. The main reason for developed countries not to involve developing countries (other than Brazil and India) in the negotiations of plurilateral agreements seems to have been their assessment that these countries were not yet ready to undertake a higher level of obligation on the non-tariff measures in question. It would be noted that the texts of the plurilateral agreements were at no stage considered for multilateral approval. In fact, this was the essence of the debate in the final stages of the Tokyo Round.

⁹ GATT Document L/ 3149.

¹⁰ Even the smaller developed countries, Austria and Switzerland, complained that they had received the text of the Civil Aircraft Agreement very late. In other words, they too were not involved in the early stages of the negotiations.

¹¹ GATT Document MTN/P/5, see paragraphs 18-22 in particular.

¹² Ibid, paragraph 19

As mentioned earlier, a proposal made that before any agreement was opened for acceptance, it should be adopted by the Trade Negotiations Committee was not approved. The Contracting Parties (the full GATT membership) not only allowed a subset of members to negotiate and adopt plurilateral agreements but gave them full autonomy in determining the disciplines to be included in these agreements. An important change from the practice of plurilateral agreements reflected in the 1960 Declaration Giving Effect to the Provisions of Article XVI:4 was that the Contracting Parties did not place any constraint on the entry into force by specifying the minimum number or identity of adherents.

Another feature of the Tokyo Round plurilateral agreements was that they were not integrated into the GATT 1947 and remained free-standing agreements. The texts of these agreements were not subject to any multilateral scrutiny but were approved by the signatories themselves. Four of the five agreements provided for their own dispute settlement procedures, broadly similar to the general procedures in GATT 1947 but there were some differences as well, with respect to the right to a panel and time-limits to be observed in various stages of the dispute-settlement procedures¹³. Only the Agreement on Import Licensing Procedures adopted the general dispute settlement procedures of Article XXII and Article XXIII of the GATT 1947.

At the concluding meeting of the Trade Negotiations Committee of the Tokyo Round, the statements made by a number of developing countries showed that they were dissatisfied more with the fact that they had not been associated fully in the negotiating process and less with the plurilateral character of the eventual agreements on non-tariff measures. However, since there was no compulsion to become parties to the new agreements and no obligations were imposed on them at all and at the same time, they got the benefits by virtue of the MFN clause of GATT 1947, their discontent petered out and they got reconciled to plurilateral agreements over a short period of time. A little over seven months after the April 1979 meeting of the Trade Negotiations Committee, when the Contracting Parties (contracting parties acting jointly) reviewed the results of the MTNs at its Thirty-Fifth Session (November 26-29, 1979), the

main concern of developing countries was to ensure that their interest as contracting parties to GATT were protected. They emphasised the following four points:

1. Since the evolution of individual agreements would take place under separate committees of parties, there would be a challenge to the unity and consistency of the GATT system.
2. It was necessary to ensure that the existing rights and benefits of contracting parties, including those flowing from Article I of GATT (which provided for unconditional most-favoured-nation treatment of contracting parties) were not affected.
3. In the context of the above concerns, it was necessary to provide for regular reports to be submitted by the Committees to the Contracting Parties; and
4. Non-signatory contracting parties should be able to follow the proceedings of the committees in an observer capacity.

In response to the above concerns, the Contracting Parties adopted their Decision¹⁴, titled Action by the Contracting Parties on the Multilateral Trade Negotiations, which takes care of the above concerns and protects the interest of non-adherents of the plurilateral agreements to the fullest extent possible.

Acceptance by developing countries of the plurilateral agreements on non-tariff barriers that emerged from the Tokyo Round remained limited to a handful of the more advanced developing countries for a long time. By the middle of 1983, more than three and a half years after the conclusion of the Round, while virtually all developed countries had accepted these agreements, only a small number of developing countries had done so, as noted below¹⁵:

- Agreement on Technical Barriers to Trade: Brazil, Chile, Colombia, India, Korea, Pakistan, the Philippines, Singapore and Yugoslavia.
- Agreement on Interpretation and Application of Articles VI, XVI and XXIII: Brazil, Chile, India, Korea, and Yugoslavia.

¹³ It is relevant to mention here that the Agreement on Government Procurement also provided for an independent dispute machinery. However, the Agreement on Government Procurement is an exclusive plurilateral agreement, outside the scope of this paper.

¹⁴ GATT Document L/4905 of 28 November 1979.

¹⁵ GATT Document L/4914/Rev.6/Add.5, Status of Acceptance of Protocols, Agreements and Arrangements.

- Agreement on Implementation of Article VII: Brazil, India, Korea and Yugoslavia.
- Agreement on Import Licensing Procedures: Chile, India, Pakistan, the Philippines and Yugoslavia.
- Agreement on Implementation of Article VI: Brazil, India, Pakistan, and Yugoslavia.

Despite the limited adherence of developing countries to the plurilateral agreements on non-tariff barriers emerging from the Tokyo Round, it is observed that the Round considerably enlarged recourse to open plurilateral agreements in GATT 1947. Variable geometry in international agreements on trade policy, first introduced in the Declaration on Giving Effect to the Provisions of Article XVI:4 in 1960 and continued in the Anti-Dumping Code, 1967, matured as a full-fledged doctrine in the Tokyo Round Codes on non-tariff barriers. A way had been found to deal with situations in which some governments are eager to accept higher levels of obligations in trade policy in a multilateral setting while others are not ready. Not only could governments stay out of plurilateral

negotiations and the resulting agreements altogether, but they could participate in the negotiations and still decide to stay out if not satisfied with the outcome.

In the Uruguay Round, the plurilateral agreements agreed in the Tokyo Round evolved further and 15 years later they became full-fledged multilateral agreements. Looking back from the vantage point of 1994, it is possible to argue that open plurilateral agreements agreed over the previous decades (1960 Declaration Giving Effect to Article XVI:4, the Anti-Dumping Code, 1967, and the Non-Tariff Barrier Codes developed in the Tokyo Round) paved the way for multilateral agreements on non-tariff barriers that were eventually embodied in the WTO Agreement. Open plurilateral agreements facilitated rather than impeded multilateral agreements reached later.

3 Open plurilateral agreements: experience under the WTO Agreement

The practice has continued in the WTO era and Table 2 gives the list of 4 OPAs that have entered into force.

Table 2: Open Plurilateral Agreements in the WTO era

Year	Name of agreement	Objective of agreement	Parties to the agreement
1997	Information Technology Agreement	Elimination of duty on six categories of products	39 WTO members at the time it entered into effect on April 1, 1997. The number rose to 54 by 2015
2015	Expansion of Trade in Information Technology Products	Expansion of the list of information technology products	30 of the 54 signatories to the Information Technology Agreement.
1998	Telecommunications Agreement	Original commitments broadened to include basic telecom services and regulatory guidelines for such services	69 WTO members were participants in the plurilateral negotiations
1999	Agreement on financial services	Improvement of Uruguay Round commitments	70 members annexed their schedules to the Fifth Protocol but only 52 of them could accept it by the date fixed

OPAs have entered into practice both for tariff liberalisation on goods and specific commitments on services. Negotiations have been held in large groups of willing participants but agreements have been concluded only if a critical mass is prepared to go ahead.

Information Technology Agreement (1997)

In December 1996, outside of the main Singapore Ministerial Meeting of the WTO, a group of 28 WTO members reached an agreement to eliminate import tariffs on six categories of products, viz., computers, telecommunication products, semi-conductors, semi-conductor manufacturing equipment, software

and scientific instruments. The distinguishing feature of the accord, which came to be known as the Information Technology Agreement (ITA), was that it was to enter into effect only after participants with a share of 90 per cent of world trade (critical mass) had notified their acceptance of the agreement. By March 26, 1997, as many as 39 participants with a share of 92.5 per cent of world trade had notified their acceptance, and the ITA entered into effect on April 1, 1997.

Two essential features of the ITA need to be taken note of. First, it was an open-ended agreement with no restriction on entry of WTO members, and second, the benefit of zero tariff was to be extended

on MFN basis to all WTO members, whether or not they adhered to the Agreement. The lack of reciprocity from non-adherents had the potential to create a political problem for members domestically, but the problem was minimised by setting the figure for critical mass at the relatively high level of 90 per cent. This enabled the participants to ensure that no major player in the information technology segment got a free ride. Important trading countries such as Brazil, Mexico and Argentina got a free ride no doubt, but the participants did not seem to care as these countries were relatively smaller players in the area. A great merit of the agreement was the speed at which it was accomplished, in less than four months. The participants had full control on the process and were not constrained by the need for consensus among the full membership of the WTO. The new tariff commitments undertaken by the participants in the ITA were inscribed by them in their respective GATT 1994 Schedules through the process of certification. The certification process involves circulation of draft changes and the draft becomes a certification if no objections are raised. Since tariff was being eliminated on MFN basis on certain products, there could really be no occasion for an objection being raised during the certification process.

Expansion of Trade in Information Technology Products (2015)

In 2012, a number of the ITA participants, but not all of them, took the initiative to expand the list of ITA products for tariff elimination. Since the objective of the expansion was not shared by all ITA participants, the negotiations moved out of the ITA Committee, the lead being taken by six ITA participants (Costa Rica, the European Union, Japan, the Republic of Korea, Chinese Taipei and the United States). Three years later, agreement was reached among twenty-two ITA participants to expand the list of products for elimination of tariff and, in 2015, the EU notified the General Council of the Declaration for Expansion of Trade in Information Technology Products.¹⁶ Here too, there was agreement that implementation would go ahead once the schedules of participants representing 90 per cent share of world trade had been approved. Eventually, the Agreement on the Expansion of Trade in Information Technology Products was adopted in December 2015 at the Nairobi Ministerial Conference by twenty-four

WTO members against fifty-four in the original ITA Agreement.

While the Agreement on Expansion of Trade on Information Technology Products was an offshoot of the ITA, the participants were not too much concerned that 30 of the 54 participants in the original agreement were not on board. What mattered was whether WTO Members that were willing to go ahead with the elimination of duty on newly identified IT products had a share of 90 per cent in world trade in those products.

Extended Uruguay Round negotiations on specific commitments under the General Agreement on Services (GATS)

At the end of the Uruguay Round, in an attempt to broaden the scope of commitments already agreed before the end of the Round, negotiations on specific commitments were extended in four areas (maritime transport, mode 4, basic telecommunication services and financial services). The negotiations on basic telecommunication services and financial services resulted in plurilateral agreements on specific commitments in the sub-sectors. A common feature of these agreements was that, like the Information Technology Agreement, they were critical mass agreements in which benefits were applied to all WTO members on the most-favoured-nation basis, and not limited to signatories.

Telecommunication services

In the extended negotiations held early in 1997, 69 participants negotiated specific commitments on telecommunication services. While the commitments of many participants in the Uruguay Round were narrow and limited to value-added services, in the extended negotiations, they were broadened to cover basic telecommunication services. The Fourth Protocol to which the respective schedules of commitments on telecommunication services were annexed stipulated that it would enter into force only if all 69 participants accepted it by a certain date, initially agreed for November 30, 1997, but extended later to July 31, 1998. Instead of setting the critical mass in terms of trade coverage, the participants stipulated that all 69 participants must accept the protocol for it to enter into force.

¹⁶ WTO Document WT/L/956 dated 26 July, 2015

A very important feature of the negotiations on specific commitments in this area was that the participants also drew up a set of regulatory guidelines on the basis of the best international practices in public telecommunications, and incorporated them in a Reference Paper (RP). The RP contained important guiding principles that relate, inter alia, to anti-competitive practices, cross-subsidisation, interconnection, dispute settlement in interconnection, universal service obligations, allocation of scarce resources and separation of regulatory and supply functions, which can all impinge on access to the market. What is relevant for the purposes of this paper is that in this area, a plurilateral agreement has covered not only market access and national treatment but also guidelines on regulatory policies. Since most of these guidelines do not fit in under either market access or national treatment, the related commitments were entered into the schedules of individual members as Additional Commitments under Article XVIII, sometimes with qualifications. The importance of the reference paper innovation and its relevance for future negotiations in services cannot be overestimated.

Financial Services

The negotiations on financial services were held in two phases during the period 1995-1999. They were first held in the period up to July 28, 1995, and concluded with an interim agreement for improvement of service schedules by 29 members. These improvements and changes were annexed to the Second Protocol, which entered into force for most of the members concerned on September 1, 1996. Negotiations were reopened in April 1997 and concluded on December 12, 1997. Although 70 members annexed their schedules to the Fifth Protocol, only 52 of them could accept the protocol by the due date of January 29, 1999, but this was considered adequate by other participants in the negotiations for putting the new commitments into effect on March 1, 1999.

A feature of the commitments in the schedules annexed to the Fifth Protocol is that a number of members (mainly developed countries) have scheduled their commitments in accordance with the Understanding on Commitments in Financial Services which provides for disciplines, inter alia, on standstill of the prevailing trading conditions, monopoly rights and procurement of financial services by public entities.

From the perspective of the theme of this paper, it is to be noted that open plurilateral agreements

in which only a subset of WTO members has participated while also extending the benefits of the agreements to non-participants on a most favoured nation basis, has become a common practice among members in the WTO era while undertaking specific commitments in both goods and services.

Joint Sector Initiatives (JSIs)

At the 11th Ministerial Conference held in December 2017 at Buenos Aires, large groups of members sponsored the Joint Statement Initiatives (JSIs) to begin plurilateral negotiations and discussions in four different areas, viz., domestic regulation of services, electronic commerce, investment facilitation for development and increasing opportunities in international trade for micro, small and medium enterprises (MSMEs). The talks that have ensued have made steady progress as described below and given a fillip to the move towards plurilateral agreements to sidestep the problem of reaching consensus in multilateral negotiations. The first three JSIs have generated interest as well as controversy among members and, in the following paragraphs, we focus on the debate on these three JSIs, leaving out the JSI on MSMEs.

The work done on domestic regulation of services has been the most impressive and negotiations have been concluded already. By way of background on this subject, it may be mentioned that Article VI.4 of the GATS mandates the Council on Trade in Services to undertake work with a view to ensuring that, where authorisation is required for the supply of a service, licensing requirements, qualification requirements and procedures and technical standards do not constitute unnecessary barriers to trade in services. Although considerable work was done in the Working Party on Domestic Regulations established by the Council in 1999, deliberations in the Working Party had dragged on for 18 years and yet the conclusion was not in sight at the time of the 11th Ministerial. In four years since then, the JSI group has completed the work and finalised a text, which has been agreed to by 67 members.

On electronic commerce, discussions in the WTO have been ongoing since May 1998 when the second Ministerial Conference adopted the Declaration on Global Electronic Commerce. In these discussions, there has been no movement towards a concrete outcome, as a number of members have maintained the view that the subject was not ripe for negotiations. Discussions have not been easy in the JSI group as well because of divergence of opinion among key players

on such issues as data privacy and trans-border data flows. There has, however, been a meeting of minds on less sensitive issues such as online consumer protection, electronic signature, transparency, paperless trading and open internet access.

Investment has been a difficult area for negotiations in the WTO, and the Cancun Ministerial Conference had collapsed in 2003 on account of the unwillingness of developing countries to include the subject (as well as competition policy and government procurement) on the agenda for negotiations. However, the JSI group on investment facilitation for development has made considerable progress on text-based negotiations. What has helped the process is that the participants in the group have agreed to steer clear of the contentious aspects of market access, investment protection and investor-state dispute settlement. Details of negotiations have not been made public but from the WTO website, it is learnt that such aspects as improving the transparency and predictability of investment measures and simplifying and expediting investment-related administrative procedures are being discussed.

The number of WTO members sponsoring the JSIs was already large at the outset and as talks have gone ahead, support has grown further. By the end of 2021, as many as 67 were participating in the talks on domestic regulation of services, 86 on e-commerce, and 112 (more than two-thirds of the WTO membership of 164) on investment facilitation. The EU, Japan and Canada were among the sponsors of all four. The US was selective and initially backed the initiative only on electronic commerce, but later joined the negotiations on domestic regulation of services as well. Among other countries in G20, China, Brazil, Korea, Mexico, the Russian Federation, Saudi Arabia and Turkey are participating in most of the groups. It is manifest that there has been a strong upturn in support for plurilateral negotiations among key WTO members.

4. Objections raised against plurilateral negotiations

While support has been growing among members for negotiations pursuant to the JSIs, there has been dissent as well. A group of developing countries have not only stood aside from the JSIs but have strongly

opposed them. A joint paper submitted by India, South Africa and Namibia¹⁷ raises issues on three main points.

- The first point relates to the procedure for integration of the outcome of plurilateral negotiations into the WTO framework, where the negotiated outcome includes rules and disciplines. The issue is whether, in such cases, the negotiated outcome can be introduced into the WTO Agreement through procedures for certification of Schedules, or whether there is a requirement instead that the procedure of amendment laid down in Article X of the Marrakesh Agreement be followed.
- The second point is about whether the JSI groups need a multilateral mandate before they can engage in negotiations, particularly on domestic regulation of services and electronic commerce. The issue is that in the former, the Working Party on Domestic Regulation (WPDR) has already been entrusted with the task of developing necessary disciplines and, in the latter, the WTO members have agreed only on an exploratory and non-negotiating mandate.
- The third point is about the need for authorisation by the Ministerial Conference in terms of Article III.2 of the Marrakesh Agreement. The issue is whether such an authorisation is needed since the negotiations are on new disciplines not dealt with under the WTO Agreement. On investment facilitation, India-South Africa-Namibia make the additional point that the General Council has barred negotiations on certain issues including investment within the WTO during the Doha Round, as agreed in the July Framework of 2004.¹⁸ We take up these issues in turn.

The issues raised by the JSIs concern principally the area of services and the GATS. While dealing with the question of integration of the results of plurilateral negotiations with the WTO framework, we have found it appropriate to add some information, for the benefit of the reader, on the future possibilities of plurilateral negotiation in the area of goods.

¹⁷ WTO Document WT/GC/W/819/Rev.1

¹⁸ WTO Doc WT/L/579

Integration of outcome of the plurilateral negotiations in the WTO framework

In order to enable the reader to understand fully the issues that have been raised on the integration into the WTO framework of the results of plurilateral negotiations, it is necessary to explain briefly the structure of important obligations in the GATS. Part II of the GATS contains general obligations and disciplines, including Article II on Most Favoured Nation Treatment and Article III on transparency. Part III of the GATS provides for the negotiation among members of specific commitments on services and service suppliers in terms of limitations on and conditions of market access (Article XVI) and of qualifications and conditions of national treatment (Article XVII). Members may also undertake additional commitments (Article XVIII) with respect to measures not falling under Articles XVI and XVII. The specific commitments, whether as restrictions on market access, qualifications on national treatment or undertakings on additional commitments are inscribed in the Services Schedules of members, which are an integral part of the GATS and are annexed to it. Changes in the Services Schedule resulting from the addition of new commitments, improvements of existing ones and rectifications or changes of a formal character take effect through the process of certification that has been approved by the Services Council.¹⁹ On the other hand, if such negotiations were to result in changes in the rules under Part II of the GATS, such as those on the MFN and transparency obligations, it would require to be approved through the process of amendment stipulated in Article X of the Marrakesh Agreement.

Article XVIII of GATS on additional commitments is of particular importance in the context of issues that have arisen on integration into the WTO framework of the outcome of plurilateral negotiations. It needs to be noted that Article XVIII gives wide latitude to WTO members to expand the ambit of specific commitments that are inscribed in the Schedules. The Article does not restrict the scope of 'additional commitments' beyond stipulating that the commitments on market access and national treatment would not be covered. They may contain commitments on any aspect of services trade including rules and disciplines for any service sector or subsector. In fact, the distinction between Parts II

and III of GATS becomes somewhat hazy as Article XVIII mentions that additional commitments would include commitments on 'qualifications, standards or licensing matters', which are also covered by Article VI on Domestic Regulations under Part II of GATS. At the same time, on the integration question, rules are clear in respect of additional commitments: Article XVIII clearly stipulates that these commitments 'shall be inscribed in a Member's Schedule'. This mandate of Article XVIII to inscribe the commitment in a member's schedule does not depend on whether the commitment is related to rules and disciplines or some other aspect. This provision clearly overrides the assertion in the India-South Africa-Namibia paper that any new rules and disciplines can be integrated into the WTO only by putting them into Part II through the process of amendment.

Apart from the language of the text, we need to look also at the practice of the membership in the negotiations held under the GATS since the WTO was established. The Reference Paper on Telecommunication, on the basis of which members inscribed their additional commitments in their schedules in the extended negotiations after the Uruguay Round, was an innovative mechanism that opened the way for rules on the regulatory aspects to be negotiated on various sectors and sub-sectors in future. As mentioned already, the Telecom Reference Paper has a wide coverage and provides precedence for regulatory matters and any aspect of services, other than market access and national treatment, to be similarly brought within the purview of commitments under the GATS. In the language of Article XVIII of GATS as well as while implementing the provision of the GATS, members have given themselves wide discretion for adopting additional commitments under Article XVIII. They may make any commitments or adopt undertakings on measures affecting trade in services other than those relating to market access and national treatment.

In the light of the above analysis, it is possible to argue that the outcome of plurilateral negotiations in the area of services, such as those being aimed at in the JSIs on domestic regulation can be smoothly integrated into the WTO framework through the additional commitments route. The same route is also available for agreements on electronic commerce

¹⁹ Procedures for the Certification of Rectifications or Improvements to the Schedules of Specific Commitments, adopted by the Council for Trade in Services on 14 April 2000 (S/L/84).

and investment facilitation to be integrated into the WTO framework, not through the process of amendment envisaged in Article X of the Marrakesh Agreement but by additions in the Services Schedule. But first agreements have to be reached in these areas among WTO members with a significant share in world trade. On investment facilitation, since the JSI group has decided to leave out controversial subjects such as market access, investment protection and investor-state dispute settlement from the purview of discussions, it may be easier to reach an agreement. But in electronic commerce, the issues of data localisation and trans-border data flows and of privacy are highly sensitive and it may take a long time to seal a deal. The option is open to participants to enter into a less ambitious plurilateral agreement initially, with obligations only in respect of the less sensitive issues such as online consumer protection, electronic signature, transparency, paperless trading and open internet access and leave out for later the more difficult areas relating to cross-border data flows and data localisation. On both electronic commerce and investment facilitation, the question has also arisen whether the requirement of a decision by the Ministerial Conference in the second sentence of Article III.2 of the Marrakesh Agreement comes in the way of plurilateral negotiations. We deal with this question in paragraph 4.15 below.

What can be said about plurilateral agreements in the area of goods? Does the legal structure of GATT 1994 provide space for the outcome of plurilateral agreements to be similarly inscribed therein? The practice is well settled in respect of plurilateral negotiations on tariffs and the results can be inserted in GATT 1994 Schedules in accordance with the 1980 Certification Procedures.²⁰ Although the approved decision mentions only changes in the Schedules arising from actions under Articles II, XVIII, XXIV, XXVII and XXVIII of GATT 1994, in practice these procedures have also been used to inscribe changes in Schedules arising from unilateral commitments or resulting from bilateral or plurilateral negotiations. Thus, they were used to incorporate changes in bound tariffs made unilaterally by Hong Kong China in 2000 and those that resulted from bilateral or plurilateral negotiations for the expansion in 1984 of products covered by the Agreement on Civil Aircraft, the Information Technology Agreement 1997,

Expansion of Trade in Information Technology Products 2015 and EC-US agreement for the elimination of duty on white distilled spirits in 1997. In future, plurilateral tariff negotiations can be held in any sector, including those proposed but not taken up during the Doha Round and listed in Annex 6 of the Chair's text²¹ on Draft Modalities for Non-Agricultural Market Access and the outcome lodged in the Goods Schedules of members after following the prescribed procedures.

Can plurilateral agreements be similarly negotiated on non-tariff measures and incorporated in the Goods Schedule of members by following the 1980 Certification Procedures? In the original GATT 1947, there was no mention of NTMs in the context of Schedules. Article II (1) (b) referred to Part I of the Schedule as containing the MFN tariffs and Article II (1) (c) stated that Part II showed the preferential tariffs. Article 3 of the WTO Agreement on Agriculture added Part IV to the Goods Schedule with two sections, Section I containing commitments on domestic support and Section II reflecting those on export subsidy. The Marrakesh Protocol to the GATT 1994 only refers to Part III while stipulating how modification of concessions on NTMs shall be dealt with. It is anomalous that no WTO Agreement makes any mention about the insertion of specific commitments on non-tariff measures in the Schedules. However, in practice, members have added Part III to their Schedules on non-tariff measures, pursuant to a WTO secretariat recommendation²² on the format of Goods Schedules.

Since concessions on NTMs that have been negotiated multilaterally are inscribed in the Goods Schedule of members, like the tariff concessions, it follows that it will also be legitimate to seek to add to the Goods Schedules any commitments on NTMs flowing from plurilateral negotiations. Thus, space is available for assimilating the results of plurilateral NTM negotiations into the WTO framework. Looking at Part III of the format of the Goods Schedule proposed in the Secretariat document referred to above and accepted in practice by the WTO members, it may seem that the idea initially was that only product specific NTMs would be scheduled. But starting with a specific product or group of products, proposals can be built into elaborate texts of mutual understandings

20 Procedures for Modification and Rectification of Schedules of Tariff Concessions, Decision of GATT Contracting Parties of 26 March 1980 (BISD 16S/16, 1/4962)

21 WTO Document TN/MA/W/103/Rev.3/Add.1

22 MTN.GNG/MA/W/25

covering both simple and complex issues on NTMs. During the Doha Round, there were as many as 13 textual proposals on NTMs that included detailed understandings covering groups of products such as fireworks; textiles, clothing, footwear and travel goods; electronic products; forestry products and automotive products; they also contained suggestions on measures such as technical regulations, standards and conformity assessment procedures; labelling requirements; export licensing; export taxes; and remanufactured goods. These are all listed in Annex 5 of the Chair's text on Modalities.²³ There does not appear to be a bar against adding the full text of a new agreement to the Schedule of members which are parties to an agreement, except that they have to be consistent with existing multilateral NTM agreements and with the general obligations of the GATT 1994. In respect of NTMs covered by multilateral agreements, it is possible to envisage additional specific commitments being undertaken by members and inscribed in the Schedules. If negotiations on the NTM proposals of the Doha Round are successfully taken up in future, members would have two options for dealing with the outcome. They may either embody the agreements on NTMs in one or more Protocols of Amendment for insertion into Annex 1A of the WTO Agreement or they may inscribe each agreement into their Schedules. The first is the difficult multilateral option, which will be available only if there is consensus among WTO members and which can become operational only after two-thirds of members have indicated acceptance. The second is the seemingly easier plurilateral option in which there is no requirement for consensus for adoption, but the course of action may not prove to be very easy, as co-ordinated action will still be needed by members with a significant share (critical mass) in world trade.

We conclude our discussion on this question, therefore, with the finding that there is no difficulty in accommodating the outcome of plurilateral negotiations in the legal architecture of either GATT 1994 or GATS. We agree entirely with Hoekman and Mavroidis, who argue that there is no legal constraint in inscribing the results of plurilateral negotiations in the WTO Schedules.²⁴ Their finding embraces both goods and services.

Do the JSI's need a multilateral mandate for plurilateral negotiations?

There is no provision in the WTO Agreement on OPAs in either goods or services. OPAs have evolved as a WTO practice because they can be accommodated within the legal structure of the GATT 1994 and of the GATS and have proven useful for making progress in both market access and rulemaking. Plurilateral tariff negotiations are totally autonomous, with the participating countries themselves deciding to begin or conclude the process.

The initiatives for the negotiations on the Information Technology Agreement, 1997, and the Expansion of Trade in Information Technology Products, 2015, came from within groups of members consulting among themselves outside the WTO, and almost the entire negotiations were conducted outside the WTO. The WTO practice of group-initiated plurilateral talks is further illustrated by the case of the EC-US agreement on white distilled spirit in April 1997 in which the two parties merely notified to the WTO their decision to eliminate tariffs on white distilled spirits on completion of negotiations. As long as it is ensured that the WTO rights of other members are protected, there is no reason for any member contemplating undertaking new commitments to seek or obtain multilateral authorisation.

As regards plurilateral agreements on NTMs negotiated during the GATT 1947 era, it needs to be mentioned that in most cases the negotiations began on the basis that they would result in multilateral agreements. It was only on completion of negotiations that it was realised that the end results would be plurilateral agreements, as a number of developing countries did not accept the negotiated texts and the remaining countries decided to go ahead without all countries being on board. The question of prior authorisation never arose in these plurilateral negotiation. The same comment applies by and large to negotiations that resulted in the plurilateral agreements on telecommunication services 1997 and financial services 1999.

But do the parties need to obtain multilateral approval of the outcome? A distinctive feature of

²³ WTO Document TN/MA/W/103/Rev.3/Add.1

²⁴ Hoekman and Mavroidis observe as follows: 'There is no formal constraint in the WTO that prevent WTO members from exploring the MFN club option—agreeing to WTO + rules and incorporating them into their schedules in a concerted manner. Consensus is not required as long as deals are applied on a non-discriminatory basis and do not undercut existing rights of non-signatories including provisions incorporated in existing WTO agreements.' Bernard Hoekman and Petros C. Mavroidis, MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from the GATS. EJIL28(2017)

the practice with regard to plurilateral agreements of the WTO era has been that the outcomes have been agreed among subsets of participating WTO members themselves, and have not needed the stamp of multilateral approval. However, as mentioned earlier, before the plurilateral agreements enter into effect, the consequential changes in the Schedules of Goods or Services need to undergo a process of certification under procedures approved by the respective WTO Councils. This process is necessary to confirm that the commitments undertaken in plurilateral negotiations are not inconsistent with the obligations of members under GATT 1994 or the GATS, and should not be confused with multilateral approval.

Thus, we come to the conclusion that plurilateral negotiations or agreements do not need either prior authorisation or post facto approval by a multilateral body.

Do the JSI's need authorisation by the Ministerial Conference in terms of Article III.2 of the Marrakesh Agreement for negotiations on investment facilitation and electronic commerce?

Article III.2 of the Marrakesh Agreement expressly provides that '[T]he WTO shall provide the forum for negotiations among its members concerning their multilateral trade relations in matters dealt with in the Annexes to this Agreement'. If the matter is not covered by the agreements in the Annex, the second sentence of the same provision requires a decision by the Ministerial Conference for negotiations to be undertaken. Such a decision can only be by consensus and is sure to be a difficult proposition to secure. Of the three substantive subjects covered by the JSIs, domestic regulation is non-controversial in the context of Article III.2 of the Marrakesh Agreement. However, with respect to electronic commerce, the point is made that the GATS does not cover non-trade issues like privacy and consumer protection, which are being taken up in the JSI discussions.²⁵ Further, it is argued that non-service investments beyond the GATS definition of a service is not covered by the GATS or any other agreement in the Annexes to the Marrakesh Agreement. The implication of these contentions is that since the scope of the plurilateral

negotiations undertaken on electronic commerce and investment facilitation goes beyond 'matters dealt with under the agreements in the Annexes' to the Marrakesh Agreement in terms of Article III.2, the outcomes of plurilateral negotiations on these subjects will not have legitimacy for the purpose of integration into the WTO framework without prior decision of the Ministerial Conference authorising such negotiations.

In order to take a view on the issue, we need to look closely at the language of Article III.2 to see how it might be interpreted. It would be seen that the mandate of the first sentence of the Article is formulated rather broadly: the reference is to 'matters dealt with under the agreements in the Annexes' and not to the rights and obligations embodied in these agreements. This would appear to give to WTO members some latitude in undertaking negotiations on closely connected subjects that might still be considered to be within the ambit of 'matters dealt with under the agreements in the Annexes'. There is no indication in Article III.2 that the intention was to strictly limit future negotiations only to the dimensions of rights and obligations already included in the annexed agreements.

There is no issue on whether electronic commerce, which covers buying and selling of goods and services on the internet, is a matter dealt with in the GATS. Article I of that agreement on scope and definition provides that the Agreement applies to 'measures by Members affecting trade in services.' The objections that privacy or consumer protection are not matters dealt with in the GATS ignores the relevance of these aspects to electronic commerce. Furthermore, it is manifest that measures taken by WTO members on privacy or consumer protection would have the potential to affect trade in services and, therefore, would be covered by the scope and definition of services spelled out in Article I of the GATS.

As regards non-service investments, we need to bear in mind that Article I of the TRIMs Agreement provides that the agreement 'applies to investment measures related to trade in goods.' Clearly, investment measures related to trade in goods is a matter dealt with in the TRIMs Agreement and

²⁵ Kelsey writes: "The current JSIs on services domestic regulation, and aspects of electronic commerce and investment facilitation, come within the first sentence, although the latter two also involve new non-trade matters, such as non-services foreign direct investment (FDI), and privacy and consumer protection obligations. If these negotiations did not need a mandate, it would be easier to initiate plurilateral than multilateral trade negotiations. That would be perverse." Jane Kelsey in "The Illegitimacy of Joint Statement Initiatives and their Systemic Implications for the WTO," *Journal of International Economic Law*, 2022, 25, 2-24

negotiations may be undertaken by WTO members on any aspect of investment related to trade in goods, and this could include investment facilitation. There is no requirement in Article III.2 of the Marrakesh Agreement that might be interpreted as limiting any future negotiations on investment to the specific obligations relating to national treatment and quantitative restrictions that the TRIMs Agreement deals with.

The only point in the objections raised against the JSIs that remains unanswered is that negotiations on investment facilitations go against the mandate in the July Framework of 2004, whereby the General Council has barred any negotiations within the WTO during the Doha Round on investment (and competition policy and government procurement). The decision on the July Framework was taken after a stalemate developed in the Doha Round in 2003 on the inclusion of these very issues on the agenda and the July Framework decision was adopted to resolve the deadlock.

The India-South Africa- Namibia paper on JSIs raises a valid criticism that plurilateral negotiations on investment facilitations falls foul of the July Framework decision of the General Council in 2004, but the general onslaught in the joint paper against open plurilateral negotiations and agreements resulting from such negotiations in which benefits are made available to both participant and non-participant WTO members does not carry conviction. It ignores the contribution that OPAs can make towards resolving the current crisis in multilateral dialogue on trade in the WTO. It overlooks the push that plurilateral negotiations and agreements gave in the GATT 1947 days to create momentum for rule-making on a non-discriminatory basis. It does not recognise the reality that OPAs do no harm to the interests of WTO members that do not participate in plurilateral negotiations or do not accept plurilateral agreements. Further it disregards the opportunity that OPAs provide for special and differential treatment of developing countries by allowing them autonomy in deciding when to come on board and accept the higher trade policy obligations included in the proposed agreement. Instead of opposing OPAs, the WTO members need to recognise plurilateral initiatives as a legitimate exercise so that the plurilateral groups are able to use the WTO infrastructure for their meetings and are not pushed away to the missions of individual delegations or to Davos. Of course, it will be in order to ask these groups to be asked to pay for the use of infrastructure and services.

In all likelihood, there is fear among developing countries that plurilateral initiatives will serve as a

vehicle to drive forward WTO negotiations in new areas such as investment, competition policy and climate change while leaving behind traditional trade issues such as those related to agriculture, anti-dumping, etc. Developed countries need to realise that progress on old issues such as agriculture and anti-dumping is imperative to elicit cooperation from developing countries in plurilateral and multilateral negotiations in the WTO. They must move forward on both market access and domestic support in agriculture. The extent to which developed countries have held back on liberalisation of agriculture is truly extraordinary. Not only have they maintained domestic support to agriculture at unconscionable levels but in market access, they have not even agreed to proposals to simplify their agricultural tariffs. Developing countries need also to recognise that discussions are inevitable on at least some new issues such as trade-related aspects of climate change including issues like the carbon border adjustment mechanism.

5. Conclusions and recommendations

The complex agenda and diversity in the economic situations and levels of development of participating countries make slow progress inevitable in multilateral trade negotiations. The procedure of decision-making by consensus inherited from GATT 1947 days compounds the problem.

Developing countries are strongly committed to the practice of decision-making by consensus as it protects them from new obligations being imposed on them without their support and consent.

The alternative of open plurilateral agreements (OPAs) has emerged in order to enable negotiations to be undertaken by sidestepping the problem of consensus in multilateral negotiations. In these negotiations, a subset of members accounting for a substantial proportion of world trade (critical mass) decides to go ahead with negotiations in selected areas, without waiting for all members to come on board. Doors, however, are kept open for the remaining members to join in at a later stage, whenever they are ready. An important feature of OPAs is that benefits are applicable on a non-discriminatory basis to all WTO members, whether or not they are participants in the negotiations, or signatories to the plurilateral agreement. There can be no adverse fall-out of OPAs for members who do not join in at the outset.

Negotiations for OPAs can deliver faster results as they need neither multilateral authorisation to launch nor multilateral approval to conclude them.

Both decisions are taken only by the participants themselves. OPAs have the potential to make a significant contribution towards resolving the crisis of near stasis in multilateral trade negotiations that the WTO has confronted since 2008 when the last serious attempt to make progress ended in an impasse in the DDA negotiations. A limiting factor, no doubt, is that a decision needs to be taken on the level of adherence to the agreement that would constitute a critical mass for it to enter into effect. Such a decision may prove to be difficult at times but it is inescapable for the approach to be workable. It needs to be noted that in all the 4 plurilateral negotiations taken up under the WTO, there was no problem either on deciding on or reaching the critical mass.

No provision in the WTO Agreement specifically authorises or permits OPAs in either goods or services. OPAs have evolved as a WTO practice, because they have proved useful to foster non-discriminatory liberalisation and rulemaking and can be accommodated within the legal structure of the GATT 1994 and of the GATS. The approved procedures for certification in the WTO allow the addition of new commitments flowing from plurilateral negotiations to the Goods and Services Schedules.

Plurilateral negotiations have already yielded results in sectoral liberalisation in both goods (information technology products and certain alcoholic products) and services (telecommunication and financial services). There is scope for plurilateral negotiations in the goods area on NTMs as well, both on a product-specific basis and for the adoption of full-blown textual agreements. In addition, Article XVIII of the GATS on Additional Commitments provides opportunities for plurilateral negotiations to be undertaken on regulatory aspects in the area of services.

The WTO rules (Article III.2 of the Marrakesh Agreement) distinguish between negotiations among members 'concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes' to the Marrakesh Agreements and negotiations that go beyond these agreements. Negotiations in matters not dealt with under the agreements can take place only after a decision by the Ministerial Conference. The language used in Article III.2 provides considerable room for treating a range of subjects to be falling within the purview of 'matters dealt with under the agreements in the Annexes'. It is possible to make a plausible case that the negotiations on aspects of investment facilitation and various aspects of electronic commerce taken up in the JSIs do not need a decision by the Ministerial Conference.

A review of past practices shows that there was significant use of plurilateral negotiations for promoting trade disciplines in the GATT 1947 era. Reference needs to be made in particular to the plurilateral agreements on non-tariff measures in five areas adopted following negotiations in the Tokyo Round (1973-79) in which only developed countries and a handful of developing countries became parties initially.

After further negotiations in the Uruguay Round (1986-94), all OPAs negotiated in the Tokyo Round evolved into full-fledged multilateral accords that were assimilated into the WTO Agreement. Thus, during the GATT 1947 era, open plurilateral agreements proved to be stepping stones for multilateral agreements. At a time when a large number of GATT contracting parties were not ready to accept higher levels of obligations variable geometry facilitated rather than hindered the progress towards multilateral agreements in the area of non-tariff measures.

Past experience has demonstrated that when plurilateral negotiations are undertaken, it is important for the participants in plurilateral negotiations to ensure full transparency in the negotiations. In the Tokyo Round, in some instances, the participants in plurilateral negotiations on non-tariff measures ignored the need for full transparency and circulated the completed text shortly before consideration by the Trade Negotiations Committee. This had the adverse impact of alienating many non-participants who rejected the outcome of plurilateral negotiations for the sole reason that they had not been involved sufficiently in the negotiations.

There is a deeper problem underlying the confrontation on OPAs that relates to substance of negotiations rather than procedures. Developing countries fear that plurilateral initiatives would help to push forward WTO negotiations in new areas, such as investment, competition policy and climate change, which they see as being of interest to developed countries only. The apprehension among developing countries is that traditional trade issues such as those related to agriculture and anti-dumping will remain on the back burner. This is a strategic problem that WTO members must address in order to make the environment conducive for world trade talks to make progress on issues in new areas. The realisation must dawn on developed countries that they need to make progress on issues such as agriculture and anti-dumping. On their part, developing countries also need to recognise that they cannot avoid discussions on all new issues for ever.

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