Plurilateral Trade Agreements: An Escape Route for the WTO?

Rudolf Adlung* & Hamid Mamdouh*

Due to the persistent stalemate in the WTO's Doha Round negotiations, various smaller-scale options have drawn attention in recent years, including the negotiation of plurilateral agreements (PAs) among interested governments. There are essentially two types of such agreements, an exclusive and an open variant. While the former apply among the signatories only, the latter are implemented on a Most-favoured-Nation (MFN) basis. To preclude 'free riding', the entry into force of such open PAs is usually conditioned on the participation of a 'critical mass' of countries, representing market shares of some 80% or more – quite a challenging benchmark. To promote more frequent use of PAs, given the plethora of pressing policy concerns, whether investment-, competition- or labour-related, the negotiation of exclusive agreements is being (re-)considered in current discussions. However, the entry into force of any non-MFN-based agreement would need to be accepted by consensus among all 160-odd WTO Members, and this may prove virtually impossible to achieve. This article thus proposes, based on past experience, to further explore the potential for open PAs among interested Members in the form of co-ordinated improvements of current commitments or, if not covered by the existing WTO framework, by way of 'WTO-extra' understandings.

'That's the funny thing about trying to escape. You never really can. Maybe temporarily, but not completely.'

Jennifer L. Armentrout, *Onyx*

1 BACKGROUND

This article is inspired by, and seeks to add to, some recent publications on the future role of plurilateral trade agreements (PAs) in the WTO. Such agreements among sub-groups of Members are increasingly viewed, potentially at least, as an escape route from the stalemate in the Doha Round which is likely to persist for quite some time. While the Tenth Ministerial Conference in Nairobi (December

* Both authors formerly worked in the WTO Secretariat's Trade in Services and Investment Division, Hamid Mamdouh as the Director and Rudolf Adlung as the senior economist. Emails: rudolf.adlung@gmail.com and hamid-mamdouh@outlook.com. The authors would like to thank Stuart Harbinson, Juan Marchetti and Weiwei Zhang for very inspiring comments on earlier drafts. Nevertheless, as usual, they remain fully responsible for the views expressed as well as any remaining errors and omissions. The article was completed in mid-Nov. 2017.

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2015) delivered some significant results,[1] it did not help to advance the Doha Development Agenda (DDA) or open the door for quite a number of 'new issues' that have arisen since the Agenda's launch over fifteen years ago.

The DDA's extended paralysis appears particularly frustrating from a trade-in-services perspective. This is for at least two reasons. First, current commitments under the General Agreement on Services (GATS), mostly scheduled during the Uruguay Round (UR), are generally very shallow. While many Members had remained hesitant at the time of the Round (1986–1993/4), possibly due to lack of experience with the new concepts and ensuing government-internal coordination problems, technical and regulatory innovations (e-commerce!) have created since many new trading opportunities. In other words, a lot of additional water has been impounded.[2] Second, the particularly wide scope of the GATS, extending inter alia to investment, labour and competition issues, opened a broad range of negotiating areas beyond the comparatively narrow reach of the General Agreement on Tariffs and Trade (GATT), its counterpart covering merchandise trade since 1947.[3] The GATS thus offers more space for issue-specific negotiations across the membership than possibly exists in any other area.[4] In turn, this has

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1 World Trade Organization, *Ministerial Conference – Tenth Session*, Ministerial Declaration, Document WT/MIN(15)/DEC, 21 Dec. 2015. The most impressive achievements are a decision to completely eliminate agricultural export subsidies and, on a plurilateral basis, to significantly expand the product coverage of the 1996 Information Technology Agreement (ITA, s. 3.2[a]).

2 Batshur Gootiiz & Aaditya Mattoo, *Services in Doha – What's on the Table?*, 45 J. World Trade 1013 (2009); Sébastien Miroudot & Kätlin Pertel, *Water in the GATS: Methodology and Results*, OECD: Working Paper of the Trade Committee, TAD/TC/WP(2014)19/FINAL (2014).

3 There is no basis in our view for sweeping claims that 'in areas such as investment, competition and environmental protection … no multilateral disciplines exist at all' (Bernard M. Hoekman & Petros C. Mavroidis, *WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements*, 26 Euro. J. Int'l L. 319, 325 (2015)) or that investment measures are covered only, tangentially at least, by the Agreement on Trade-Related Investment Measures (Gary Hufbauer & Cathleen Cimino-Isaacs, *How will TPP and TTIP Change the WTO System?*, 18 J. Int'l Econ. L. 679, 682 (2015)). Concerning the applicability of GATS to investment *see* for instance, Rudolf Adlung, *International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS*, 17 J. World Inv. & Trade 41 (2016); Eric H. Leroux, *Twenty Years of GATS Case Law: Does It Taste like a Good Wine?*, in *Research Handbook on Trade in Services* 213 (Pierre Sauvé & Martin Roy eds, Cheltenham UK: Edward Elger Publishing 2016); and Mitsuo Matsushita, Thomas Schoenbaum, Petros C. Mavroidis & Michael Hahn, *The World Trade Organization – Law, Practice, and Policy* 563 (Oxford: Oxford University Press 2015). Regarding the role of competition-related provisions under the Agreement, *see* Mark A. A. Warner, *Competition Policy and GATS*, in *GATS 2000. New Directions in Services Trade Liberalization*, 364 (Pierre Sauvé & Robert M. Stern eds, Washington D.C.: The Brookings Institution 2000). Concerning the impact of pro-competitive disciplines in the telecom sector in particular, *see* Eleanor M. Fox, *The WTO's First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. Int'l Econ. L. 271 (2006) as well as s. 3.2[b] below.

4 As noted by Collier, 'trade in services has enormous potential for expansion. This is probably the main case in which there is scope for mutual gains that are *intra*-sectoral and so the bargaining should in principle be considerably easier than the "grand bargain" needed for the rest of the trade round'. Paul Collier, *Why the WTO is Deadlocked*, 29 World Economy 1423, 1444 (2006).

created ample opportunities for agreements, provisional or definitive, to be concluded independently of the fate of the DDA.

It is true that paragraph 47 of the Doha Ministerial Declaration of 2001 requires that the conduct, conclusion and outcome of the negotiations shall form part of a single undertaking. However, the Declaration also provides that 'agreements reached at an early stage may be implemented on a provisional or a definitive basis'.[5] Ten years later, the Chairman's summary of the Eighth Ministerial Conference confirms that Ministers are committed 'to advance negotiations, where progress can be achieved, including focusing on the elements of the Doha Declaration that allow Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking'.[6] Yet, the number of such early agreements has remained quite limited to date. Apart from the Trade Facilitation Agreement (TFA), adopted at the Bali Ministerial Conference in 2013, and the commitment, at the Nairobi Ministerial Conference in late 2015, to abolish export subsidies in agriculture, the so-called services waiver may be mentioned in this context.[7] After a multi-year logjam, these results have been viewed as an indication that 'at the WTO, life has been stirring anew'.[8] However, the general policy environment has certainly not improved since, and the expectations surrounding the Eleventh Ministerial in Buenos Aires, in December 2017, are quite modest.

The lack of progress across broad areas of the DDA has drawn attention to the possibility of smaller-scale negotiations, on a plurilateral basis, intended to promote a commonly shared agenda among like-minded countries. The negotiating

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5 World Trade Organization, *Ministerial Conference – Fourth Session*, Ministerial Declaration, Document WT/MIN(01)/DEC/1, 20 Nov. 2001, at para. 47.

6 World Trade Organization, *Ministerial Conference – Eighth Session*, Chairman's Concluding Statement, Document WT/MIN(11)/11, 17 Dec. 2011, at 3.

7 For further information on the history and content of the TFA, *see* Nora Neufeld, *Implementing the Trade Facilitation Agreement: From Vision to Reality*, WTO Working Paper ERSD-2016-14 (2016); and Ben Czapnik, *The Unique Features of the Trade Facilitation Agreement: A Revolutionary New Approach to Multilateral Negotiations or the Exception Which Proves the Rule?*, 18 J. Int'l Econ. L. 773 (2015). In order to enter into force, pursuant to Art. X of the WTO Agreement, the TFA needed to be ratified by two thirds of the WTO membership which was achieved on 22 Feb. 2017. *See also infra* n. 68.
The *services waiver* allows non-LDC Members, notwithstanding the Most-favoured-Nation (MFN) clause, to extend preferences to services and service suppliers from least-developed countries. (World Trade Organization, *Preferential Treatments to Services and Service Suppliers of Least-Developed Countries*, Document WT/L/847, 17 Dec. 2011, at 3.) By the time of the Nairobi Ministerial Conference, in Dec. 2015, twenty-one Members had submitted notifications indicating the preferences they extend under this Waiver.
For an overview of the Nairobi Decisions on *export competition in agriculture*, consisting of the abolition of all forms of export subsidies as well as the introduction of disciplines on other export policies (export finance, food aid and the operations of agricultural state trading enterprises), *see* the WTO Secretariat's briefing note at www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_agriculture_e.htm#exportcompetition (accessed 24 Nov. 2017).

8 Stuart Harbinson, *Trade Negotiations: Is the Bicycle Tipping Over?*, Asia Global Institute 5 (2016), http://www.asiaglobalinstitute.hku.hk/en/trade-negotiations-bicycle-tipping/ (accessed 24 Nov. 2017).

mandate concerning future trade rounds, in GATS Article XIX, already calls for the process of 'progressive liberalization' to be advanced through 'bilateral, plurilateral and multilateral negotiations' and, correspondingly, Annex C of the 2005 Hong Ministerial Declaration institutionalizes the plurilateral option for the DDA market access negotiations in services.[9] Ten years later, the Nairobi Declaration acknowledges that 'WTO Members have also worked successfully and reached agreements in plurilateral formats'.[10]

The respective negotiations had taken place mostly within autonomously constituted groups of interested Members, with the results being implemented on a Most-favoured-Nation (MFN) basis. The entry into force of such open agreements has generally been conditioned on the contribution of economically significant commitments from a 'critical mass' of countries. These are normally expected to involve all major participants in the sector to the point of eliminating or at least substantially reducing the risk of 'free riding', which usually implies that some 80% or 90% of the global market concerned is to be covered. The bar to cross is thus quite high. While recognizing the desirability of this approach, in principle, an apparently increasing number of observers therefore advocates the negotiation of exclusive plurilaterals the benefits of which remain confined to the signatories only.[11] The risks surrounding such agreements – use for protectionist purposes, scope for power-based strategies, and avoidance of reciprocal liberalization moves – are deemed acceptable if compared to the risks associated with the status quo: disengagement from the multilateral system and further proliferation of Regional Trade Agreements.[12]

While Regional Trade Agreements (RTAs) have traditionally been geared towards the abolition or reduction of formal trade barriers between participants, they are now increasingly being used as fora to address wider policy concerns that have emerged over time. With the gradual lowering of formal trade restrictions, in particular in the form of GATT-bound industrial tariffs, and the emergence of international production chains, other barriers of a regulatory nature have gained in economic importance. In addition, RTAs provide a basis to extend trade

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9 Pursuant to Art. XIX:4, '[t]he process of progressive liberalization shall be advanced in each … round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement'. In turn, para. 7 of Annex C of the Hong Kong Ministerial Declaration stipulates that '[i]n addition to bilateral negotiations, … the request-offer negotiations should also be pursued on a plurilateral basis in accordance with the principles of the GATS and the Guidelines and Procedures for the Negotiations on Trade in Services'.

10 *Supra* n. 1.

11 Hoekman & Mavroidis, *supra* n. 3; Michael J. Trebilcock, *Between Theories of Trade and Development: The Future of the World Trading System*, 16 J. World Inv. & Trade 122 (2015); and Robert Z. Lawrence, *Rule-Making Amidst Growing Diversity: A Club-of-Club Approach to WTO Reform and New Issue Selection*, 9 J. Int'l Econ. L. 823 (2006).

12 Trebilcock, *ibid.*, at 132.

disciplines to factor flows – investment and labour – that are covered by the GATS, but essentially remain beyond the scope of GATT.[13] RTAs might thus help to ensure the consistent application of rules across all types of production processes and stages, enabling participants to commit on, and lock in, measures beyond the current reach of the WTO regime.

However, RTAs are certainly no panacea. In particular, they might not only be used to establish more open and harmonious trading conditions among the signatories, but to exclude other Members, for whatever reasons, from participation.[14] There are no access rights for countries interested in joining at a later stage as their economies and their ability to respond to more demanding regulatory challenges develop. Moreover, the dispute settlement procedures provided under most RTAs, if any, do not generally match WTO standards in terms of ease of access, predictability and enforceability.[15] And, finally, there is ample evidence that RTAs have been used not only as instruments to add to, but also to modify and/or detract from, existing WTO disciplines, thus introducing additional elements of fragmentation into the trading system.[16]

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[13] The Agreement on Trade-Related Investment Measures (TRIMS), which was negotiated during the Uruguay Round, certainly deals with investment measures concerning trade in goods. In substance, however, it is mostly concerned with clarifying the application of key GATT Articles to certain investment measures and reaffirming WTO Member's commitment to better compliance. Its Art. II:1 requires WTO Members not to apply any TRIM that is inconsistent with Art. III (National Treatment) and Art. XI (General Elimination of Quantitative Restrictions) of the GATT. Inconsistent measures, which were to be notified to the Council for Trade in Goods after the WTO Agreement's entry into force, were exempt during specified transition periods. *See* Martha Lara de Sterlini, *The Agreement on Trade-Related Investment Measures*, in *The World Trade Organization: Legal, Economic and Political Analysis* 437, at 480f (Patrick F. J. Macrory, Arthur E. Appleton & Michael G. Plummer eds, New York: Springer US 2005).

[14] E.g. Heribert Dieter, *The Return to Geopolitics – Trade Policy in the Era of TTIP and TPP* (Berlin: Friedrich Ebert Stiftung 2014).

[15] In turn, this may explain why the respective provisions have rarely been invoked to date. A recent study, based on 226 WTO-notified RTAs, found indeed that, where applicable, RTA partners continued to resort to the WTO dispute settlement mechanism to resolve disputes between them. Claude Chase, Alan Yanovich, Jo-Ann Crawford & Pamela Ugaz, *Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements – Innovative or Variations on a Theme?*, in *Regional Trade Agreements and the Multilateral Trading System* 608, 610 (Rohini Acharya ed., Cambridge: Cambridge University Press 2016).

[16] Rudolf Adlung & Sébastien Miroudot, *Poison in the Wine? Tracing GATS-Minus Commitments in Regional Trade Agreements*, 46 J. World Trade 1045 (2012). A comparison of GATS-neutral, GATS-plus and GATS-minus commitments across fifty-six RTAs is contained in Sébastien Miroudot, Jehan Sauvage & Marie Sudreau, *Multilateralising Regionalism: How Preferential are Services Commitments in Regional Trade Agreements?*, OECD Trade Policy Working Paper No. 106, TAD/TC/WP(2010)18/FINAL (2010). A similar comparison focusing on provisions in the North American Free Trade Agreement (NAFTA) and the EU's Economic Partnership Agreements (EPAs) is provided by Mario Marconini, *Revisiting Regional Trade Agreements and Their Impact on Services Trade*, ICTSD Issue Paper No. 4 (Geneva 2009). Similar inconsistencies reportedly exist in other contexts as well. A case in point are quantitative restrictions on exports of goods. A recent study found that 44% of the reviewed 240-odd RTAs exempt certain sectors or products from the GATT's general ban on such restrictions. Weiwei Zhang, *Tracing GATT-Minus Provisions on Export Restrictions in Regional Trade Agreements*, 11 Global Trade & Cust. J. 122 (2016).

The challenge thus arises, in services and beyond, to further explore other options to promote co-operation and liberalization among interested Members in a manner consistent with the WTO's legal framework and relevant Ministerial Decisions and Declarations. As indicated before, the focus of this article is on plurilateral agreements (PAs).

Starting point of the following discussion are the WTO provisions dealing with trade negotiations among Members and their relevance for different scenarios. This is followed in the third section by an overview of PAs as achieved in the wake of the Tokyo Round (1973–1979) and, later on, the launch of the WTO in 1995. While the early agreements, reflecting the limited scope of the GATT system, remained confined to merchandise trade, various agreements concluded under the WTO's auspices cover services. If there is a common facet, it is an increasing trend over time to focus on MFN-based (open) rather than on exclusive PAs. The fourth section then reflects on the implications of a return to exclusive PAs, as recently proposed to overcome (or bypass) the stalemate in the Doha Round. Yet there appear to be strong reservations among some Members, and the legal barrier – consensus requirement – is high. The fifth section thus refocuses on the potential use of open PAs as a possible way forward. One issue deserves particular attention: While a broad range of policies affecting services trade under the GATS' four modes of supply, whether related to investment, labour or competition, can be addressed within the Agreement's existing framework, the scope of the GATT has remained confined essentially to cross-border trade in goods. It would be possible, however, to negotiate open PAs not only based on current treaty provisions, but to address wider ('WTO-extra') policy concerns in the form of MFN-based understandings among interested Members. The final section summarizes and concludes.

2 NEGOTIATING APPROACHES IN THE WTO

The conduct of trade negotiations is one of the main functions of the WTO. Article III:2 of the WTO Agreement states:

> The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.

For good reasons, Article III:2 does not specify the legal forms that negotiated outcomes might take or the exact procedures that should be followed. Indeed, the legal approach and the related procedures can be determined for each negotiating

process in the light of its peculiarities such as the nature of the subject matter (e.g. new substantive obligations in the form of liberalization commitments or new rules); relationship of the outcome to pre-existing provisions; scope of the participants concerned; further institutional matters; etc.

In contrast to Article III:2, other provisions of the WTO Agreement provide for specific procedures to be followed in particular circumstances. They can be found in Article IX:2 (interpretation), Article IX: 3 and 4 (waivers), and Article X (amendments). The latter Article distinguishes between various WTO provisions which are then subjected to different procedures and benchmarks.[17] However, while providing guidance in particular situations, these provisions do not exhaust all possible scenarios concerning the results of 'negotiations' within the meaning of Article III:2 in all their forms.

To implement the results of past WTO negotiations, various approaches have been used that are not codified in the WTO Agreement. In the negotiations on basic telecommunications and financial services, for example, the results were annexed to protocols specifying the procedural requirements on the basis of which they would enter into force.[18] Relevant elements include the time-frame for acceptance; approval conditions (e.g. acceptance by all Members concerned, a certain number of Members or any other formula); the ensuing legal effect (replacing, supplementing or modifying pre-existing commitments); consequences if not all Members concerned have accepted within the given time-frame (normally those who have accepted would decide upon entry into force); and institutional provisions such as depositary, registration, date and venue. Such protocols may thus serve as legal instruments to give effect to a negotiated outcome by making it an integral part of a pre-existing treaty, in this case the GATS.

The content of the protocols, including the approval conditions and expected effects, depend on the circumstances of a particular negotiation. A consensus decision by all Members to adopt the protocol would not be legally required, though this was the course taken, for political reasons, in previous cases under the GATS. Yet, there would have been no legal impediments that could have

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[17] E.g. while changes to the MFN obligations of GATT (Art. I), GATS (Article II:1) and TRIPS (Art. 4) would need to be accepted by all Members, there is a possibility for other amendments to be decided upon, shall consensus not be reached, by a two-thirds majority. The amendments would be binding only on those Members that have accepted them.

[18] For basic telecommunications, *see* Fourth Protocol to the General Agreement on Trade in Services (Document S/L/20, 30 Apr. 1996), for financial services, *see* Fifth Protocol to the General Agreement on Trade in Services (Document S/L/45, 3 Dec. 1997). Contrary to what was erroneously mentioned in a recent publication, the provisions of GATS Art. XVIII, governing Additional Commitments, played no role in this context.

prevented interested Members from negotiating and implementing the respective protocols among each other without adoption by the entire membership.

Negotiations in the WTO are open in principle to all Members, and consensus must be the main decision-making practice, as provided for in Article IX:1 of the WTO Agreement. Nevertheless, with the increasing diversity of issues and their complexity, reaching consensus has become more challenging. In many instances, negotiations have thus been conducted among a subset of the WTO membership, with the results being implemented on an MFN basis. In other words, plurilateral negotiating processes have been used to produce outcomes that potentially benefit all Members. By their very nature, such negotiations do not need to be approved by the entire membership to start or conclude. Request/offer negotiations on market access are typical examples. While relieving non-contributing Members from the expectation of joining a consensus, this also facilitates the bargaining process among participants and helps achieve a satisfactory outcome.

Critical mass-based approaches have been employed not only in market-access negotiations, but also, albeit to a lesser extent, in rule-making. The creation and implementation of a template of regulatory principles for basic telecommunications, the so-called 'Reference Paper' (RP), is a case in point (section 3.2[b]). The template was developed by a group of negotiating participants and has been inscribed, sometimes with variations, by over ninety WTO Members in their schedules of commitments of (counting EU Member States individually).

Though protocols have normally served as instruments to implement negotiating outcomes, there are other options as well. For example, the results of the Information Technology Agreement (ITA) (section 3.2[a]) have been enacted simply through individual certification of the tariff schedules of the Members participating in the negotiations, adding new tariff concessions on the products concerned. This approach obviously required a clear understanding among the governments concerned on the procedural steps to be taken.

Since the negotiating function of the WTO has been floundering for quite some time, the question arises, whether and to what extent the methods used in conducting and concluding previous negotiations could provide guidance for the future. In particular, should Members seek to rely more often on open plurilateral negotiations, among a critical mass of participants, with MFN-based outcomes? Or would exclusive plurilaterals, as recently proposed, constitute a realistically feasible option? Whatever approach might finally be chosen, however, there is at least one precondition: the existence of a core group of Members that would mobilize the expertise and political energy needed for such a project, and their readiness to reach mutually acceptable outcomes.

3 'PLURILATERAL TRADE AGREEMENTS' (PAS): PAST AND PRESENT

3.1 Looking into the rear-view mirror

The history of PAs within the GATT/WTO system goes back at least to the 1970s. Nine such agreements or codes, then called MTN Agreements and Arrangements, were negotiated in the Tokyo Round. They either were sector-specific – International Dairy Agreement, International Bovine Meet Agreement and the Agreement on Trade in Civil Aircraft – or they dealt with particular policy issues on a cross-sectoral basis: the Agreement on Government Procurement (GPA) as well as further five Codes concerning Technical Barriers to Trade, Subsidies and Countervailing Duties, Anti-Dumping, Customs Valuation, and Import Licensing. The latter five Codes, plus the Agreements on Dairy Products and Bovine Meat, were subject to a Contracting Party (CP) Decision of 28 November 1979 confirming that the existing rights and benefits of non-participants under the GATT, including those derived from the MFN obligation, are not affected.[19] Reportedly, this decision was taken in order to overcome the resistance of a number of developing countries to concluding the Tokyo Round and allowing the GATT Secretariat to service agreements to which they were not parties.[20]

Nevertheless, many CPs and academic observers expressed concern that, given the limited coverage of these arrangements, generally relevant policy challenges were addressed only by relatively small groups of countries. And not all Codes were consistently applied on an MFN basis.[21] Eventually, the need to restore greater coherence was widely shared. It ultimately led to the concept of a single undertaking, which was adopted as a guiding principle for the Uruguay-Round negotiations (1986–1993/4) at least as far as goods trade was concerned. The services negotiations were subject to a separate mandate.[22]

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[19] Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations, Decision of 28 Nov. 1979, Document L/4905, BISD 26S (1980), at 201, para. 3.

[20] Stuart Harbinson & Bart De Meester, *Analysis of WTO-Consistent Approaches to Plurilateral and Non-MFN Trade Agreements* 26f (Washington: National Foreign Trade Council 2012), http://www.nftc.org/default/trade/WTO/NFTC21stCenturyTradeAgenda2012.pdf (accessed 24 Nov. 2017).

[21] For more details *see* Harbinson & De Meester, *ibid*.; John Croome, *Reshaping the World Trading System – A History of the Uruguay Round* 63f (2d ed., Alphen aan den Rijn: Kluwer Law International 1999); and Miguel Rodríguez Mendoza & Marie Wilke, *Revisiting the Single Undertaking: Towards a more Balanced Approach to WTO Negotiations*, in *Making Global Trade Governance Work for Development* 486, 499 (Carolyn Deere-Birkbeck ed., Cambridge: Cambridge University Press 2011).

[22] The Punta del Este Declaration launching the Uruguay Round introduced a two-track approach. The negotiations on trade in goods were covered by one part of the Declaration, which was adopted by ministers in their capacity as contracting parties to the GATT. In contrast, the negotiating mandate for services was contained in a second, far smaller part which ministers adopted as representatives of their

With the entry into force of the WTO, almost all elements of the new regime are universally applicable across the full membership, save one exception provided for under Article II:3 of the WTO Agreement. It stipulates that 'Plurilateral Trade Agreements' as included in Annex 4 to the Agreement are binding only on those Members that have accepted them and do not create rights or obligations for others.

The only exclusive agreements that are covered by this Annex today are those on Trade in Civil Aircraft and on Government Procurement.[23] Both agreements may be considered special cases, for different reasons: a very limited product focus, civil aircraft, that is of little commercial interest to many Members; and particular sensitivities in an area, government procurement, where industrial policy-related motivations may coexist with notions of national sovereignty. All other Tokyo Round Codes were transformed during the UR into commonly binding multilateral agreements or have been relinquished since.[24]

The *Agreement on Government Procurement (GPA)* has been thoroughly overhauled since its inception in the early 1980s and currently comprises forty-seven WTO Members, including twenty-eight EU Member States.[25] A further nine Members are seeking accession. They would then gain non-discriminatory access to the other signatories' procurement markets, consisting of government purchases of goods, services and construction services. Coverage is confined to transactions in those products and entities, including at sub-federal level, that are listed in the parties' schedules and exceed specified threshold levels. Pursuant to Article XXII of the GPA, any affected party may invoke the WTO's dispute settlement provisions to solve conflicts arising under the Agreement.[26] However, any suspension of concessions by a prevailing claimant must remain confined to obligations under the GPA and cannot be extended to those assumed under any of the multilateral trade agreements, and *vice versa* (Article XXII:7).

The *Agreement on Trade in Civil Aircraft* provided from its very beginning, in January 1980, that the customs duties on the covered range of products be eliminated on an MFN basis and no pressure or incentives be used by governments

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governments. This distinction was maintained throughout the Round. For more details *see* Croome, *ibid*., at 25f.

[23] Tellingly, the section on the WTO Website dealing with these Agreements is entitled 'Plurilaterals: of minority interest' (https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm (accessed 24 Nov. 2017)).

[24] The Agreements on Dairy Products and Bovine Meet were terminated in 1997.

[25] For a detailed account of the GPA's negotiating history *see* Robert D. Anderson & Anna Caroline Müller, *The Revised WTO Agreement on Government Procurement (GPA): Key Design Features and Significance for Global Trade and Development*, WTO Working Paper ERSD-2017-4 (2017).

[26] Since 1995, three disputes under the GPA have been brought to the WTO; an overview is provided at www.wto.org/english/tratop_e/gproc_e/disput_e.htm (accessed 24 Nov. 2017).

to affect purchases of civil aircraft (Article 2).[27] There is an exclusive element in the extension of some procedural benefits, however. In particular, only signatories may participate in the Committee on Trade in Civil Aircraft, which is mandated to oversee and review the Agreement's implementation and operation and to conduct further negotiations on its expansion and improvement. In the event of disputes, should consultations within the Committee not lead to a satisfactory outcome, the Member concerned would be free to invoke the WTO's dispute settlement mechanism even on issues not covered by a multilateral agreement.[28] However, there have been no such cases to date.

3.2 More recent (post-uruguay round) cases

In the years following the entry into force of the WTO Agreement, in 1995, a few initiatives continued or were newly launched by sub-groups of WTO Members with a view to co-ordinating liberalization or regulatory harmonization/facilitation initiatives in selected sectors. The outcomes were put into effect once a critical mass of Members had agreed to participate.

There is one common denominator in all cases: the results were to be extended on an MFN basis and more Members might join and/or assume similar obligations at a later stage. The rationale underlying such open plurilaterals was eloquently summarized by the Warwick Commission some ten years ago:

> In the name of justice and fairness, the principle of non-discrimination should apply to all Members, regardless of whether they participate in critical-mass agreements. To the extent that benefits do not only accrue as a direct result of obligations, the idea is that non-signatories benefit from a non-discriminatory application by signatories of the provisions of an agreement as well as access to benefits arising from the agreement. Thus, when it comes to variable geometry and rules negotiations, we have a clear precedent from the Tokyo Round Codes on standards, import licensing, anti-dumping, subsidies and countervailing measures and customs valuation.[29]

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[27] The Agreement has thrity-two signatories, including the EU and nineteen EU Member States, (https://www.wto.org/english/tratop_e/civair_e/civair_e.htm (accessed 24 Nov. 2017)).

[28] In any event, signatories retain their pre-existing rights to refer to WTO dispute settlement in case of disputes arising under the GATT or other multilateral agreements. (Richard O. Cunningham & Peter Lichtenbaum, *The Agreement on Trade in Civil Aircraft and Other Issues Relating to Civil Aircraft in the GATT/WTO System*, in Macrory et al. eds, *supra* n. 13, at 1165, 1168.)

[29] University of Warwick, *The Multilateral Trade Regime: Which Way Forward?*, 30f, (2007), www2.warwick.ac.uk/research/warwickcommission/worldtrade/report/uw_warcomm_tradereport_07.pdf (accessed 24 Nov. 2017). The Commission consisted mostly of academics, but also included some public and private sector representatives. Similar views are held, inter alia, by Rodríguez Mendoza & Wilke, *supra* n. 21. In turn, Gallagher and Stoler recommend exploring the potential of an MFN-based critical-mass approach, similar to the Fourth and Fifth Protocols under GATS, to overcome the DDA deadlock over agricultural liberalization. *See* Peter Gallagher & Andrew Stoler, *Critical Mass as an Alternative Framework for Multilateral Trade Negotiations*, 15 Global Governance 375 (2009).

3.2[a] *Merchandise Trade*

In the area of trade in goods, the *Information Technology Agreement* constitutes a significant milestone in the WTO's history to date. It was initiated on the fringes of the WTO's first Ministerial Conference in Singapore, in 1996, by twenty-nine participants which accounted for well over 80% of world trade in the information-technology (IT) products covered.[30] The Agreement provided for tariff eliminations, to be incorporated in the respective Members' tariff schedules and staged in equal rates between 1997 and 2000. The underlying Ministerial Declaration of 1996 expressly invited other WTO Members to join in the finalizing technical discussions and the tariff elimination programme.[31] Implementation was to start no later than April 1997, provided that the participants, estimated to represent approximately 90% of world trade in the products covered, had notified their acceptance and the phase-in programme been agreed.[32] The number of participants has more than doubled since, increasing the ITA's coverage to some 97% of world trade in the respective products. Though sector-specific, it appears that the positive outcome of the initial negotiations is not attributable only to a balance of negotiating interests across the products concerned; reportedly, some concessions were also made in non-related areas.[33]

Fifteen years later, in 2012, talks commenced among interested Members on the expansion of the ITA. After various delays and stand-offs, participants ultimately agreed, in July 2015, on tariff reductions on some 200 additional IT products. They are estimated by the WTO Secretariat to account for some 10% of world merchandise trade.[34] The accord was approved, as noted before, at the Nairobi Ministerial Conference. It is to be implemented in stages from July 2016.

The successful conclusion of this negotiation seemed to augur well for another recent initiative, among eighteen participants (representing forty-six WTO Members), to conclude an *Environmental Goods Agreement* (EGA). The idea was to agree on tariff exemptions on a broad range of environmentally friendly goods

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30 Counting the then fifteen EC Member States individually. More details are available at World Trade Organization, *Sector Specific Discussions and Negotiations on Goods in the GATT and WTO*, Note by the Secretariat, Document TN/MA/S/13, 24 Jan. 2005, at 10.

31 World Trade Organization, *Ministerial Declaration on Trade in Information Technology Products*, WT/MIN (96)/16, 13 Dec. 1996.

32 *Ibid*., at para. 4. According to an assessment in Mar. 1997, the coverage of the Agreement, following the participation of ten more countries, had reached 92.5% of world trade in the products concerned. *See* Document TN/MA/S/13, *supra* n. 30.

33 Reportedly, final agreement on the ITA was reached only after the United States had conceded, at the EU's insistence, to liberalize its liquor imports. (Philip I. Levy, *Do We Need an Undertaker for the Single Undertaking? Considering the Angles of Variable Geometry*, in *Economic Development and Multilateral Trade Cooperation* 417, 426 (Simon J. Evenett & Bernard M. Hoekman eds, New York: Palgrave MacMillan 2006).

34 www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm (accessed 24 Nov. 2017).

by end 2016.[35] However, in early December 2016, it turned out that the remaining gaps between the negotiators could not be bridged at this point and the negotiations needed to continue.[36]

Further attempts to address specific trade and environmental concerns include recent attempts to discipline *fisheries subsidies*. One of the options considered, initially on the initiative of the United States, is a PA among interested governments as a complement or alternative to a multilateral approach.[37]

3.2[b] *Services Trade*

Not all elements of the Uruguay-Round services negotiations were concluded in time to be incorporated into the GATS and the annexed schedules of specific commitments. The Agreement itself contains negotiating mandates on four rule-making issues (domestic regulation, emergency safeguards, government procurement, and subsidies), and Members agreed towards the end of the Round to extend negotiations on specific commitments in four areas: maritime transport, mode 4, basic telecommunications, and financial services. The rule-making negotiations are still ongoing, formally at least, with no concrete outcomes currently in sight.[38] Tellingly, the chairperson of the Working Party on Domestic Regulation concluded, in early November 2017, that there was no scope for her to prepare a negotiating text which could gather consensus at the forthcoming Ministerial Meeting in Buenos Aires.[39] And the situation in the other rule-making areas does not appear more promising by any means.

Among the negotiations on specific commitments, those on maritime transport were suspended in mid-1996 to be taken up again, on the basis of existing or improved offers, in the DDA.[40] In contrast, the negotiations on mode 4, extended until end-July 1995, achieved at least some modest results: under the Third Protocol to the GATS, six Members (including the then EC 15) agreed to upgrade their existing commitments on this mode. Far more commercially relevant, however, are the results of the extended negotiations on basic telecommunication services and financial services, which were implemented by way of the Fourth

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35 www.wto.org/english/tratop e/inftec e/itaintro e.htm (accessed 24 Nov. 2017).

36 www.wto.org/english/news_e/news16_e/ega_04dec16_e.htm (accessed 24 Nov. 2017).

37 For background information *see* www.wto.org/english/news e/archive e/fish arc e.htm (accessed 24 Nov. 2017).

38 The annual reports of the Working Parties on Domestic Regulation and on GATS Rules are available at www.wto.org/english/tratop_e/serv_e/s_coun_e.htm (accessed 24 Nov. 2017).

39 www.wto.org/english/news17 e/serv 08nov17 e.htm (accessed 24 Nov. 2017).

40 By the same token, the application of the MFN clause was suspended for those Members that had not undertaken commitments in the sector. (World Trade Organization, *Decision on Maritime Transport Services*, Document S/L/24, 3 July 1996.)

and Fifth Protocols, respectively, in early 1998.[41] These protocols must not be confused, as has been done in some publications, with the GATS Annexes on Financial Services and on Telecommunications. The latter have formed an integral part of the text of the Agreement since day one, and are equally binding on all Members. Concerning the protocols, as noted before, the respective procedural frameworks were developed by the Members concerned, case-specific, with the outcomes being implemented on a critical-mass basis (section 2).

3.2[b][i] Fourth Protocol (Telecommunication Services)

At the time of the UR, the telecom sector underwent fundamental institutional reforms in a significant number of countries, implying the termination of traditional monopoly arrangements and the emergence of competitive markets. The early liberalizers, including in particular the United States, were hesitant, however, to undertake bindings in the sector as long as these were not reciprocated, at least in the form of GATS-bound liberalizing programmes, by a sufficiently large group of trading partners.[42] In turn, however, it proved difficult for various governments to clearly anticipate the future course of the reform programmes they envisaged, and to undertake relevant bindings. Though a number of participants were prepared to schedule commitments during the Round, their proposed scope remained mostly limited to so-called value-added services and did not extend to basic services, including voice telephony. The negotiations were thus extended beyond the timeframe of the Round in order to be concluded, despite a temporary breakdown, in early 1997. The resulting commitments are among the most ambitious undertaken by Uruguay-Round participants to date, putting an end to many monopoly regimes.[43]

To ensure that everybody remained on board, the respective schedules and lists of MFN exemptions were annexed to a protocol which was to enter into force only if accepted by all participants, sixty-nine in total (counting the EU members

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41 As noted in the following Section, the Fifth Protocol was preceded by the Second Protocol on financial services which, however, was shunned by some main players for its perceived lack of substance.

42 According to a statement by the US Trade Representative, over 40% of world telecom revenue and over 34% of global international traffic were not covered by acceptable offers at the time. *See* Marco Bronckers & Pierre Larouche, *A Review of the WTO Regime for Telecommunications Services*, in *The World Trade Organization and Trade in Services* 319, 322 (Kern Alexander & Mads Andenas eds, Leiden: Martinus Nijhoff 2008).

43 Laura B. Sherman, *'Wildly enthusiastic' About the First Multilateral Agreement on Trade in Telecommunications Services*, 51 Fed. Comm. L. J. 61, 63 (1998). As in other sectors, reflecting the particular situation of the countries concerned, the commitments undertaken in many WTO accession cases are in a class of their own.

individually), by a specified date.[44] The protocol was thus nothing but a legal device to make sure that everybody remained on board; it entered into force on 5 February 1998.

In the course of these negotiations, a growing number of participants had realized that in order to provide effective market access, the respective commitments needed to be accompanied by a range of 'competitive safeguards'. This resulted in an informal group of interested Members developing a template of regulatory disciplines, intended to promote transparency, efficiency and competition, for incorporation in the respective schedules. In the end, the so-called telecom 'Reference Paper' was inscribed, sometimes with a few modifications, by fifty-seven of the sixty-nine participating Members as Additional Commitments under Article XVIII of the GATS.[45] The telecom sector accounts for the vast majority of the commitments undertaken under this Article. The respective bindings are considered to constitute 'a breakthrough at international level', reflecting participants' recognition that long monopolized sectors cannot be liberalized without appropriate regulatory supervision and enforcement of competition law principles.[46] According to the RP, measures must be taken to prevent 'major suppliers' from engaging in anti-competitive cross-subsidization, using information obtained from competitors, and withholding necessary technical and commercial information. Also, interconnection with major suppliers must be ensured at any technically feasible point in the network, in a timely fashion, and at cost-oriented rates. The telecom regulator must be separate from, and not accountable to, any supplier of basic telecom services.[47]

3.2[b][ii] Fifth Protocol (Financial Services)

Towards the end of the UR, the negotiating scenario in financial services was comparable to that in telecommunications: reluctance of some major players, in particular the United States, to contribute to an exercise which, in their view, had remained highly disappointing in substance. They thus insisted on maintaining

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[44] The initial deadline for acceptance, 30 Nov. 1997, was extended later by the Council for Trade in Services to 31 July 1998 to allow some remaining signatories to complete the domestic ratification process.

[45] Art. XX:1 of the GATS requires each Member to submit a schedule of specific commitments under the Agreement without further specifying the nature or number of the sectors to be covered or the levels of liberalization to be conceded. For every scheduled sector, the Member concerned must inscribe the levels of Market Access and National Treatment, pursuant to Arts XVI and XVII, respectively, it is prepared to accept for each of the Agreement's four modes of supply. In addition, there exists the possibility to undertake Additional Commitments on measures affecting trade in services, but not covered by Arts XVI and XVII. *See also* s. 5.

[46] Bronckers & Larouche, *supra* n. 42, at 330 and 344.

[47] Detailed assessments are provided by Sherman, *supra* n. 43, at 71–87 as well as Lee Tuthill, *The GATS and New Rules for Regulators*, 21 Telecomm. Pol'y 783 (1997). *See also* Fox, *supra* n. 3.

broad exemptions from MFN treatment, based on reciprocity. While an initial extension of the negotiations, leading to the conclusion of the Second Protocol to the GATS in July 1995, brought no major advances, significant improvements were achieved on their resumption in 1997. The United States, among others, decided to drop, or at least scale down, their previously listed MFN exemptions. Unlike telecommunication services, however, there is only little evidence of commitments that actually improved on already existing access conditions.[48] Nevertheless, a number of participants, almost exclusively developed countries, assumed obligations under the Understanding on Commitments in Financial Services, which in various respects exceed the generally applicable obligations and disciplines as contained in the GATS itself.[49]

Although not all participants had accepted the Fifth Protocol by the agreed date, end-January 1999, the fifty-odd Members that had done so, out of a total of seventy signatories, decided to put it into effect on 1 March 1999. The door was left open, however, for latecomers.

The *Understanding on Commitments in Financial Services* is a unique instrument insofar as it was included in the UR Final Act, but does not form an integral part of the GATS. It was developed during the negotiations when it became clear that not all obligations envisaged by some participants for inclusion in the horizontally applicable Annex on Financial Services were acceptable to all Members. The Understanding's rules and disciplines are normally integrated into respective schedules by way of a headnote in the financial services section of the respective schedules.[50] The content of the Understanding must not be replicated *tel quel* but, comparable to the telecom RP, can be qualified through Member-specific reservations or limitations. And such qualifications are quite numerous. In their absence, the Understanding provides, inter alia, for the following disciplines beyond the standard coverage of schedules:[51] a standstill provision ensuring that the prevailing trading conditions at the time of scheduling are bound without 'water'; an obligation to list any existing monopoly rights in the respective sectors and to endeavour eliminating or reducing them in scope; and a commitment not to discriminate domestically established foreign suppliers of financial services in the purchase of such services by

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48 An analysis of the results from the vantage point of developing and transition economies is provided by Aaditya Mattoo, *Financial Services and the WTO: Liberalization Commitments of the Developing and Transition Economies*, 23 World Economy 351 (2000).

49 Among the initial participants, Nigeria and Sri Lanka (excluding insurance services) were the only developing countries to incorporate the Understanding in their schedules. For more details *see* World Trade Organization, Council for Trade in Services, *Financial Services*, Background Note by the Secretariat, S/C/W/312, 3 Feb. 2010, at 9–13.

50 Forty-five Members, counting the participating EU Member States individually, have hitherto scheduled their financial services commitments in accordance with the Understanding.

51 A detailed assessment is provided by Bart De Meester, *Liberalization of Trade in Banking Services – An International and European Perspective* 64–68 (Cambridge: Cambridge University Press 2014).

public entities. Moreover, the established foreign suppliers must be permitted to offer any new financial services in the respective Member's territory.[52]

3.2[c] *Summary Observations*

As mentioned before, all post-UR PAs were developed and adopted by freely accessible 'clubs' of WTO Members for application on an MFN-basis. Even if the respective club members had wanted to exclude certain countries from the negotiations, for whatever reasons, they would not have been able to exempt them from the agreed benefits and/or from the assumption of equally binding obligations on an autonomous basis. By the same token, since there is no need to obtain other Members' approval, the process cannot be taken hostage and saddled with requests in unrelated areas.

A particularly interesting feature of the GATS is its extension to areas beyond conventional concepts of cross-border trade. This includes not only investment and labour issues as covered by modes 3 and 4, but any government measures 'affecting trade in services' within the modal structure of the Agreement.[53] Indeed, the Fourth and Fifth Protocols thus combined trade liberalizing with rule-making elements which, in turn, are specified at a level of detail not previously experienced in the multilateral system. In particular, the two Protocols provided a basis for participants to incorporate, in full or in part, the telecom RP (Fourth Protocol) and the Financial Services Understanding (Fifth Protocol) into their schedules, thus redefining the borderline between what were traditionally considered to be international (trade-related) concerns and issues falling within the domestic regulatory domain.[54]

The history of the Fourth Protocol also suggests that such initiatives can develop their own momentum. After the Protocol had entered into force, two Members, which had not participated in the negotiations (Egypt and Honduras), scheduled telecom commitments on their own initiative, and one participant (Morocco) upgraded its existing commitments to include the RP.[55] Traditional reciprocity-related concerns were apparently overcome by the perceived need to keep pace with what was going on elsewhere in a sector of key infrastructural

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[52] A new financial service is defined in the Understanding (Art. D.3) as 'a service of a financial nature, including services related to existing and new products or the manner in which a product is delivered, that is not supplied by any financial service supplier in the territory of a particular Member but which is supplied in the territory of another Member'.

[53] Competition-related aspects are discussed, for example, by Warner, *supra* n. 3.

[54] There is a historical difference insofar as the Financial Services Understanding had already been developed during the UR, while the telecom RP was negotiated in the context of the Fourth Protocol after the conclusion of the Round. Nevertheless, they share the same legal character of providing 'templates' for scheduling commitments.

[55] In addition, late submissions came from Barbados, Kenya and Uganda.

importance, with potentially significant productivity effects on a wide range downstream user industries.

Doubts have been expressed, however, whether past critical-mass negotiations, MFN-based, could serve as a model for the future. A sceptical view suggests that the respective cases – ITA, Fourth and Fifth Protocols – are misleading insofar as they dealt with left-overs from the UR and, thus, did not affect the overall balance of obligations.[56] Nevertheless, there should still be scope for negotiations that would be to everybody's benefit or, at least, leave no losers behind. The recently agreed expansion of the ITA and proposed options to discipline fisheries subsidies are examples in the field of merchandise trade. The potential for similar deals may be even larger in services trade, given the generally modest levels of current commitments and a wide range of regulatory issues that, in the view of many, but certainly not all Members, remain to be addressed.

Among the four modes of supply, the main focus of services commitments tends to be on mode 3 (commercial presence), which accounts for the lion's share of the trade flows falling under the Agreement.[57] To a certain degree, the expectations surrounding these commitments are similar to those associated with bilateral investment treaties (BITs): stimulating inward foreign direct investment (FDI) in order to promote growth and development, including via an economy's better integration into international supply chains. What other factors could explain the explosive growth of BITs over the past two decades to over 2,900 at present? However, if these treaties have proliferated, despite what might appear to be an imbalance of obligations between many of the signatories, typically either sources or destinations of FDI, why not more liberal GATS commitments? The gradual substitution of hub-centred obligations under BITs or RTAs with broadly agreed rules and disciplines could be expected to reduce the recipients' exposure to the trade and negotiating power of a few source countries.

Nevertheless, 'trade and investment' was among the three Singapore issues that needed to be dropped, in 2004, in order to secure the continuation of the DDA.[58] The respective Decision by the WTO's General Council provides that

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[56] Robert Wolfe, *The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor*, 12 J Int'l Econ. L. 835, 850 (2009). In addition, the telecom negotiations certainly benefitted from the fact that the prevailing regulatory regimes had been rendered obsolete by profound technical changes.

[57] Mode 3 alone is estimated to represent some 55%–60% of world services trade. *See* Joscelyn Magdeleine & Andreas Maurer, *Measuring GATS Mode 4 Trade Flows*, WTO Staff Working Paper ERSD-2008-05, 18 (2008). In turn, service sectors were found to account for 63% of the world's inward FDI stock in 2012, followed by manufacturing with 23% and primary production with 7%. *See* UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* 13 (New York and Geneva: United Nations 2015).

[58] The Singapore Ministerial Conference in 1996 had set up three working groups to deal, respectively, with trade and investment, competition policy, and transparency in government procurement. In addition, the WTO Goods Council was mandated to explore possibilities of simplifying trade

there be 'no work towards negotiations' during the Doha Round.[59] This was an early indication, followed by others, of how difficult it is to overcome deeply entrenched negotiating patterns and achieve consensus in the DDA environment.

4 RECENT PROPOSALS

In view of the prolonged stalemate in the DDA, a number of recent publications discuss the conclusion of exclusive PAs ('conditional MFN PAs') as a potential option to address trade-related concerns among like-minded countries.[60] Such plurilaterals could focus on individual sectors and/or policy matters without being subjected to the disciplines governing RTAs, including the need to eliminate 'duties and other restrictive regulations' on 'substantially all the trade' (GATT Article XXIV:8) or achieving 'substantial sectoral coverage' in the elimination of 'substantially all discrimination' (GATS Article V:1) among participants.

As noted by Hoekman and Mavroidis, it is obviously far easier to conclude RTAs than to achieve Members' approval of new exclusive PAs. Compliance with the RTA-related obligations could be ensured only *ex post* via a WTO Member questioning an RTA's content/impact under the respective treaty provisions. However, experience shows that the likelihood of such challenges is quite remote.[61] In contrast, given the consensus requirement under Article X:9 of the WTO Agreement, the conditions for accepting exclusive PAs are far more restrictive. The Article provides that '[t]he Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4'.[62] In the end, however, both routes would permit

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procedures. These four issues were initially included in the DDA. Negotiations should have started after the 2003 Cancún Ministerial Conference, 'on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations'. However, there was no consensus, and Members agreed in 1 Aug. 2004 to drop the former three issues. Work on the fourth issue ultimately led to the Trade Facilitation Agreement, which was adopted at the Bali Ministerial Conference in Dec. 2013. As noted before, it entered into force in Feb. 2017 after two-thirds of the membership had ratified (www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm, accessed 24 Nov. 2017).

59 WTO, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004* (2 Aug. 2004) WT/L/579. For preceding discussions in the WTO's Working Group on the Relationship between Trade and Investment (WGTI) *see* Philip De Man & Jan Wouters, *Improving the Framework of Negotiations on International Investment Agreements*, in *Foreign Direct Investment and Human Development – The Law and Economics of International Investment Agreements* 233 (Olivier De Schutter, Jo Swinnen & Jan Wouters eds, Abingdon: Routledge 2013).

60 *See* e.g. the publications listed in *supra* n. 11 and David A. Gantz, *Liberalizing International Trade After Doha – Multilateral, Plurilateral, Regional, and Unilateral Initiatives* (Cambridge: Cambridge University Press 2013).

61 Cases in point are *Turkey – Textiles* and *Peru – Agricultural Products*. (WTO Appellate Body Reports, *Turkey – Restrictions on Imports of Textile and Clothing Product*, adopted 19 Nov. 1999, and *Peru – Additional Duty on Imports of certain Agricultural Products*, WT/DS457/AB/R, adopted 31 July 2015.)

62 As noted elsewhere, a range of other exemptions from the MFN obligation exists. Apart from RTAs as covered by GATT Art. XXIV and GATS Art. V, there is the possibility for Members to request a waiver pursuant to Arts X:3 and 4 of the WTO Agreement or, specifically in the area of services, to list

sub-sets of the Members to agree on a mutually binding liberalizing programme and prevent others from 'free-riding' on the concessions made.

Proponents of PAs tend to emphasize the agreements' potential for 'greater transparency, a much closer "connection" with day-to-day WTO activities and processes, and greater coherence when it comes to case law/dispute settlement'.[63] PAs are expected to prove a more suitable forum than RTAs whenever the participants' focus is not on reducing formal trade barriers, i.e. import duties on goods or restrictions on market access and national treatment in services trade, but advancing a common rule-making agenda. The scope of relevant agreements would not need to be confined to WTO-covered matters, but could extend to new ground, comparable to the GPA. Access to the WTO dispute settlement could be guaranteed on similar terms as under the GPA, i.e. without the possibility for a prevailing party to suspend concessions under other WTO Agreements.[64] (Yet one might wonder whether a lot of substance would be left should such agreements focus on narrowly defined policy areas only.)

Of course, governments remain free to conclude whatever type of stand-alone agreement on issues *not* subject to WTO disciplines. The MFN requirement under the respective GATT or GATS provisions would not apply. However, given the particularly wide scope of the GATS, the range of potentially relevant issues that would overlap with existing multilateral obligations and commitments is far larger in services than in merchandise trade (*see* following section). And whenever such overlaps exist, the respective MFN obligations kick in.

What could be done to make non-benefitting Members tolerate the formation of new exclusive PAs? The proponents tend to agree on some possibly facilitating strides.[65] In particular, negotiations should be open to all WTO Members or, at least, all Members should be entitled to accede at a later stage. And participants could be free, if they wish, to extend the benefits on an MFN basis; least-developed countries (LDCs) might automatically qualify in any event. In addition, adding an Aid-for-Trade dimension might help improve an agreement's relevance (and chance of acceptance) among low-income Members.[66] Nevertheless, there is also widespread recognition that little might be achieved if the consensus

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MFN exemptions or seek cover for recognition measures under GATS Art. VII. However, these exemptions are available only in closely defined circumstances. *See* Rudolf Adlung & Antonia Carzaniga (2009), *MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?*, 12 J. Int'l Econ. L. 357, 362 (2009).

63 Hoekman & Mavroidis, *supra* n. 3, at 331. In a similar vein: Trebilcock, *supra* n. 11, at 132. Nevertheless, the authors also recognize the ensuing risks for the multilateral system, including the limited possibilities in fact for countries acceding at later stage to influence the initially agreed rules and a long-term fragmentation of the WTO membership.

64 *See also* Lawrence, *supra* n. 11, at 830.

65 *See* the articles quoted in *supra* n. 11.

66 Hoekman & Mavroidis, *supra* n. 3, at 343.

requirement in Article X:9 of the WTO Agreement was not relaxed. The possibility of negotiating a code of conduct with certain minimum requirements that a PA would need to meet in order to be adopted by the membership, for example by qualified majority, was raised in this context.[67]

5 WHICH WAY FORWARD?

Are the expectations surrounding the negotiation of exclusive PAs realistic? A good dose of scepticism appears warranted. The approval process of the TFA suggests that the consensus requirement might even be used to prevent changes that would ultimately be implemented on an MFN basis and, thus, not disadvantage any particular Member.[68] And, apparently, the scope for blockage (or 'hostage taking') has not narrowed since.

As noted before, the concluding sentence of the Nairobi Ministerial Declaration explicitly provides that any decision to launch multilateral negotiations on non-DDA issues would need to be agreed by all Members. Against this background, who would want to take the initiative, identify focal areas for exclusive PAs, map out the respective structure, propose the procedural framework for adoption, and build support across the membership? In the end, the respective approval processes might turn into 'renewed versions of Doha Round squabbles'.[69]

The focus of the following discussion is therefore on 'open PAs' among a critical mass of interested Members. As noted before, such agreements could cover far more ground, in terms of measures and types of transactions, in services than would be possible in merchandise trade. In the latter area, reflecting the GATT's definitional scope, they would essentially be *one-dimensional* with tariffs and other measures impinging on cross-border trade being the key parameters. In contrast, the GATS provides *a multi-dimensional* framework that covers a wide variety of measures affecting trade in services which, in turn, is defined to encompass four modes of supply. In addition to conventional cross-border trade, the consumption of services

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[67] *Ibid.*, at 341. *See also* Peter Draper & Memory Dube, *Plurilaterals and the Multilateral Trading System*, in *E 15 Initiative – Strengthening the Multilateral Trading System*, *Regional Agreements Group Proposals and Analysis* (2013), http://e15initiative.org/wp-content/uploads/2015/02/E15_RTAs_Proposals-Analysis_Final.pdf (accessed 24 Nov. 2017).

[68] After its adoption at the Bali Ministerial Conference in Dec. 2013, it took almost one more year for Members to agree on a Protocol of Amendment to insert the TFA into the WTO Agreement. The process came close to the brink of collapse because, in the words of an observer, it was used by some parties as leverage for pushing other agendas, which may well have been equally desirable but proved more controversial (Alan Deardorff, *The Conversation* (5 Sept. 2016) https://theconversation.com/decision-from-g20-leaders-could-prove-the-tipping-point-for-free-trade-64863 (accessed 24 Nov. 2017)).

[69] Kent Jones, *Reconstructing the World Trade Organization for the 21st Century* 111 (Oxford: Oxford University Press 2015).

abroad, under mode 2, as well as factor flows, i.e. investment and labour as covered by modes 3 and 4, thus come into play. Furthermore, the concept of 'supply' covers the entire value chain of services, from production to distribution, marketing and sale up to the delivery of the service. This means that government measures at any or all of those stages might fall within the scope of the Agreement. The measures that participating Members may want to address and discipline could include quantitative restrictions and foreign equity ceilings, denials of national treatment under discriminatory tax or subsidy regimes, the deterrent effects of excessively restrictive licensing and authorization procedures as well as access or cost problems encountered by (potential) users of government-controlled public services.

A particularly interesting option is the negotiation of Additional Commitments under GATS Article XVIII. The Article allows for the adoption of commitments 'with respect to measures affecting trade in services' that are not subject to scheduling under the market-access and national-treatment provisions of Articles XVI and XVII, 'including those regarding qualifications, standards and licensing matters'. Any government measure that affects trade in services within the definitional structure of the Agreement could thus be addressed.[70]

It would thus be technically possible to inscribe quite a number of the disciplines negotiated under recent mega-regionals, such as the Trans-Pacific Partnership (TPP) Agreement, virtually unchanged into the parties' GATS schedules. Cases in point are the TPP Chapters on Electronic Commerce (Chapter 14), state-owned Enterprises and Designated Monopolies (Chapter 17), and Transparency and Anti-Corruption (Chapter 26) insofar as they reach beyond already existing GATS provisions. By the same token, virtually all issues raised in connection with a recent proposal to create a TFA in Services, inspired by the current TFA in merchandise trade, could be covered by Additional Commitments under Article XVIII. The concept note submitted by India in the Working Party on Domestic Regulation lists a very broad range of issues, from disciplines on services-related taxes, fees and charges, to the streamlined ('single-window')

[70] The Appellate Body has expressly recognized the broad reach of the language used: 'In our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing".[fn] We also note that Article I:3(b) of the GATS provides that "'services' includes any service in any sector except services supplied in the exercise of governmental authority" (emphasis added), and that Article XXVIII(b) of the GATS provides that the "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service". There is nothing at all in these provisions to suggest a limited scope of application for the GATS'. (WTO Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas)*, WT/DS27/AB/R, adopted 25 Sept. 1997, at para. 220.)

clearance of applications for commercial establishment, and to simplified work permit and visa procedures for access-seekers under mode 4.[71]

Given the participation of broad groups of WTO Members, the process leading to the Fourth Protocol and the telecommunications RP may prove inspiring in the current context (section 3.2[b][i]). The respective negotiations have certainly been facilitated by the fact that the lifting of long-entrenched monopoly regimes might not be viewed from the same (mercantilist) vantage point as predominantly access-based liberalization initiatives and that several reform-minded economies had already experienced positive growth and employment effects in a wide range of commercially significant downstream industries. The absence of any similar strides in services after 1997 is not necessarily indicative of lack of interest, but may rather be blamed on the deterrent effects of the DDA's extended paralysis, combined with what might be viewed as a lower status of the services track compared to the negotiations on agriculture and non-agricultural market access (NAMA).[72]

Governments' scope to undertake WTO-enforceable obligations under the GATS is not unlimited, however. There are various white spots beyond the reach of the Agreement ('WTO-extra provisions'),[73] including obligations concerning foreign investments that do not lead to majority ownership or control of the respective companies or undertakings relating to the foreign employees of domestically owned companies.[74] In this regard, RTAs would offer more scope for obligations. And the same may be true for certain labour- or environment-related obligations that are contained, e.g. in RTAs concluded by the United States or the European Union.[75]

Nevertheless, it is obvious that the GATS provides a basis to address a far wider range of policy issues, from the regulation of investment and labour flows to competition disciplines, than the GATT. And nothing would prevent interested

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71 World Trade Organization, Document S/WPDR/W/55, 27 Sept. 2016.

72 Under para. 24 of the Hong Kong Ministerial Declaration of 2005 ('Balance between Agriculture and NAMA') participants undertook to instruct their negotiators 'to ensure that there is a comparable high level on ambition in market access for Agriculture and NAMA'. In contrast, the following para. ('Services Negotiations') simply provides, recalling relevant treaty provisions, declarations and guidelines, that 'the negotiations on trade in services shall proceed to their conclusion with a view to promoting the economic growth of trading partners and the development of developing and least-developed countries'. (World Trade Organization, *Ministerial Conference – Sixth Session*, Ministerial Declaration, Document WT/MIN(05)/DEC, 22 Dec. 2005.)

73 Unlike WTO-plus provisions, which are about the deepening of already existing obligations and commitments, such WTO-extra provisions venture into areas not currently covered by multilateral disciplines.

74 The scope of modes 3 (commercial presence) and 4 (presence of natural persons) is discussed in two background notes by the WTO Secretariat, World Trade Organization, Documents S/C/W/314, 7 Apr. 2010 and S/C/W/301, 15 Sept. 2009.

75 The relevant provisions are not always legally enforceable, however. For an overview *see* Henrik Horn, Petros C. Mavroidis & André Sapir, *Beyond the WTO? An anatomy of EU and US Preferential Trade Agreements*, 33 World Economy 1565 (2010). More detailed information specifically on labour standards is contained in Roman Grynberg & Veniana Qalo, *Labour Standards in US and EU Preferential Arrangements*, 40 J. World Trade 619 (2006).

Members to fill any perceived gaps in existing GATS and/or GATT disciplines by a common understanding that reaches beyond the existing framework(s). For example, a BIT-type understanding on investment issues, while adding completely novel elements to existing multilateral disciplines in merchandise trade, might also contain additional facets, including stronger protection from 'takings of property' (expropriation), compared to mode 3-related obligations under the GATS.[76] In areas of overlap, the GATS' MFN clause would ensure in any event that the more ambitious set of disciplines prevails. However, compared to co-ordinated upgrades of existing GATS commitments, the conclusion of WTO-extra obligations, in whatever area, would require a particular dose of negotiating stamina since, in the absence of suitable templates, any related attempts would need to start from scratch. One key issue that inevitably arises in this context is the question of legal enforceability: Could the scope of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) be extended to WTO-extra obligations?

In principle, Members would be free to make any necessary additions to Appendix 1 of the DSU which lists the Agreements covered (at present: WTO Agreement, GATT, GATS, TRIPS, DSU, GPA and the Agreement on Trade in Civil Aircraft).[77] The Appendix provides that the DSU's applicability to each PA be subject to a decision by the parties setting out the terms for the application of the Understanding. However, this presupposes, first, that a consensus decision be reached to include the respective PAs in the Appendix. Sceptics may wonder whether such an initiative would prove politically feasible in the current environment as it might be seen as an opportunity by frustrated Members to extract concessions elsewhere. On the other hand, pursuant to a mandate in the Doha Ministerial Declaration, negotiations on 'improvements and clarifications of the Dispute Settlement Understanding' are to be conducted in any event. And, interestingly, these negotiations are explicitly exempt from the single-undertaking proviso of the DDA.[78] Therefore, there would not only be a suitable forum, but also an exemption from a potentially suffocating requirement.

6 TENTATIVE CONCLUSIONS

The DDA has by now continued for some fifteen years, during which numerous changes have taken place in international trade. Geopolitical forces and trading interests have shifted, the number of WTO Members has been consistently on the rise, and many new substantive issues have come to the fore (competition-related concerns

[76] Adlung, *supra* n. 3, at 62.
[77] The Appendix further lists two plurilateral trade agreements, the International Dairy Agreement and the International Bovine Meat Agreement which, as noted before (s. 3.1), have been rescinded since.
[78] World Trade Organization, *supra* n. 5, at paras 30 and 47.

surrounding, for example, state-owned enterprises; restrictions on cross-border data flows; localization requirements; privacy policies; environmental and labour standards as well as other regulatory challenges). And unlike in the UR, large swathes of the membership are taking active interest, either out of 'positive' engagement in the areas concerned or in order to express their frustration about non-events and/or to extract concessions elsewhere. In turn, this has made it ever more difficult to reach consensus.

Various commentators have pointed at 'decision-making' in the WTO as being at the root of the problem, suggesting that departing from the consensus principle might be the solution. This claim is not fully convincing, however. It is not decision-making in general, but one particular type of decisions that have proven difficult to take: those relating to the continuation and conclusion of DDA-related negotiations as well as all other decisions resulting in commonly binding treaty obligations. Of course, any such outcome will have to be arrived at with the consent of all parties involved.[79] In other words, voting could not take place in any case.

The 'practice of decision-making by consensus' will thus continue to be the guiding principle in the WTO, not just because it is stipulated in the treaty (Article IX:1), but because it is the only realistic basis for moving forward among sovereign states. At the same time, waiting for each of the 160-odd Members, or at least for those taking active interest in the respective negotiations, to approve of each and every element involved cannot work either.

A potential way out of this dilemma, which deserves to be carefully explored, is resorting more frequently to plurilateral, critical-mass based negotiations in producing results that apply on an MFN basis. Such kinds of plurilaterals have traditionally been the main approach in market-access negotiations in the GATT/WTO system.

A further step in the negotiating agenda would be the use of open PAs not only for the market-access track, but also for rules-related negotiations. The negotiation of regulatory disciplines has worked well in individual cases, with the prime example of the RP in telecommunications. The respective process might provide inspiration and guidance of how technically and politically difficult issues can be addressed among interested Members while at the same time ensuring an MFN-based outcome. As indicated before (section 2), it would be possible to avoid any procedural requirements in this context that might provide room for non-participants to intervene with a view to promoting their agenda in substantially unrelated areas.

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[79] More specifically, as observed by Jones, 'the institutional framework of the GATT/WTO system creates "pooled" sovereignty among its participants, based on trade-off by each member to sacrifice absolute sovereign control over access to its domestic market in exchange for an extension of its sovereignty, through the negotiated agreement, over market access abroad'. In turn, however, the terms at which such trade-offs are deemed acceptable, are a matter of sovereign decision by each and every participant. (Jones, *supra* n. 69, at 34.)

Given the broad scope of the GATS, a wide range of pressing issues, including the quest for investment-, competition- and labour-related disciplines, could be tackled within the Agreement's existing framework. In the same vein, virtually all intentions recently voiced in connection with a TFA for Services could be accomplished, on a critical-mass basis, building on current GATS schedules. As noted before, successful models already exist in a sectoral context.

However, there is no conceivable equivalent under the GATT that could allow for the extension of a similarly broad range of disciplines, governing, for instance, investment- or visa-approval procedures, to suppliers engaged in merchandise trade. The GATT has remained 'one dimensional', focusing on the application of tariffs and other measures impacting on cross-border supplies.[80] This is highly unfortunate, given that the distinction between services and merchandise trade has increasingly been rendered void. As they move along international supply chains, products and/or their components may criss-cross the borderlines between the two spheres which, in cases such as contract manufacturing, may well exist on paper, but defy any economically persuasive rationale.[81]

Attempts to overcome this artificial divide between services- and goods-related disciplines can be observed in some recent RTAs. The respective chapters governing investment-, labour-, and competition-related disciplines, inter alia, tend to apply on a cross-sectoral basis. Among other factors, including the stalemate in the DDA and geo-political motivations, this may help explain the attractiveness of RTAs and their recent proliferation. Unfortunately, past initiatives to contain the attendant risks for the multilateral system, including through common monitoring and surveillance procedures, have not apparently generated a lot of interest. At least, however, there have been attempts recently to promote more substantive exchanges on the RTAs' systemic implications and to put the existing (provisional) Transparency Mechanism on a permanent basis.[82]

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[80] According to its Preamble, the GATT's underlying objectives (raising standards of living, etc.) are to pursued via 'reciprocal and mutually advantage arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce'.

[81] Rudolf Adlung & Weiwei Zhang, *Trade Disciplines with a Trapdoor: Contract Manufacturing*, 16 J. Int'l Econ. L. 383 (2013).

[82] Para. 28 of the Nairobi Ministerial Declaration (*supra* n. 1) reads: 'We reaffirm the need to ensure that Regional Trade Agreements (RTAs) remain complementary to, not a substitute for, the multilateral trading system. In this regard, we instruct the Committee on Regional Trade Agreements (CRTA) to discuss the systemic implications of RTAs for the multilateral trading system and their relationship with WTO rules. With a view to enhancing transparency in, and understanding of, RTAs and their effects, we agree to work towards the transformation of the current provisional Transparency Mechanism into a permanent mechanism in accordance with the General Council Decision of 14 December 2006, without prejudice to questions related to notification requirements.' By end-2016, the respective deliberations were still at an early stage. (Report (2016) of the Committee on Regional Trade Agreements to the General Council, Document WT/REG/26, 18 Nov. 2016.)

What has not been tried so far is the creation of consistent cross-sectoral obligations in the form of open PAs that would be accessible to all WTO Members. The services-related aspects might be inspired by already existing attempts, including the Fourth Protocol on telecommunication services. These could be complemented by the extension of similar disciplines, of a GATS- or, in merchandise trade, GATT-extra nature. There are no legal constraints that could prevent interested governments from launching and participating in such a project. Even the gap in enforceability – WTO dispute settlement for the GATS-covered elements without an apparent equivalent for other components – might be closed. In principle, participants would be free to seek the project's inclusion in Annex 1 of the DSU, thus rendering it legally enforceable in the WTO. Non-participants would have no credible reason to object to such a move from which they would benefit at 'zero cost', i.e. without assuming own obligations.

While open plurilaterals could help subsets of interested Members to escape from DDA-related negotiating blockades, obviously this route is more easily accessible and less winding in services than in merchandise trade. Regardless of the area, it is important to bear in mind, however, that there is no procedural substitute for the input and energy which would need to be provided by dedicated initiators. The above analysis, based on actual cases, focused on how negotiating interests could be accommodated through technical and legal solutions, but it is certainly not meant to imply that agreed outcomes could ultimately be achieved without a proper dose of political determination and guidance.

Finally, it might be worth recalling that the WTO has a broad deliberative and exploratory function concerning all issues relating to the conduct of trade relations between Members. This function has been stifled on various occasions by linking it closely with negotiating intentions and proposals and, thus, the stalemate in the Round.[83] Deliberations among Members, if any, have become more rigid in scope and content due to creeping suspicion about the underlying motives. However, there are no suitable other settings; RTAs would never be able to fill in. Regardless of what happens in and around the DDA, it is therefore essential to resuscitate and promote the WTO's role as a forum for conceptual exploration and exchange, including, of course, on the issues raised in this article.

[83] In this context, the WTO's former Director General Pascal Lamy has coined the term of a 'missing middle'. *See also* Patrick Low, *Potential Future Functions of the World Trade Organization*, and Simon J. Evenett, *Aid for Trade and the 'Missing Middle' of the World Trade Organization*, 15 Global Governance, 327 and 359 (2009).