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Plurilateral Initiatives and Their Interaction with WTO Rules

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KEY POINTS

- This paper deals with questions pertaining to the legality of importing, through unilateral action, the outcomes from current plurilateral initiatives on services domestic regulation and investment facilitation into the WTO body of law. It also discusses the potential systemic implications such action could have on the WTO and the multilateral trade negotiations.

- The paper reviews the cases of the Government Procurement Agreement, the Information Technology Agreements (ITA I and II), the protocols on basic telecommunications and financial services under the General Agreement on Trade in Services (GATS), the Reference Paper on Telecommunications and the Understanding on Financial Services.

- None of these experiences provide precedent or basis to argue that results from currently ongoing plurilateral initiatives can legally be imported into the WTO through unilateral actions by Member States, such as through adding the outcomes to a Member's schedule of commitments. All the reviewed cases were multilaterally approved, except for the ITA. Thus, all were backed by collective multilateral will and vision, and their interaction with WTO rules and existing agreements and mandates was collectively agreed.

- The case of the ITA is not comparable to the current plurilateral initiatives, particularly because the ITA deals with straightforward additional liberalization commitments on specific products. It does not deal with new rules on regulatory disciplines nor does it deal with issues not currently covered under the WTO agreements, as the current plurilateral initiatives do.

- None of the cases reviewed in this paper overlap with an existing negotiation mandate built into the WTO multilateral agreements, as the current plurilateral initiatives on domestic regulation and investment

facilitation do with respect to the mandate under Article VI.4 of the GATS. Moreover, there is no precedent under the WTO that could help clarify the legal issues emerging from the fact that the investment facilitation plurilateral initiative covers issues that have been restricted from being addressed "during" the Doha Round discussions.

- Where an issue is already addressed under WTO law, the result of any negotiations that would amend this pre-existing law will have to fulfill the requirements under Article X of the Marrakesh Agreement. The rules pertaining to amendments cannot be discarded through an attempt to utilize alternative routes such as unilateral scheduling of commitments. Opening an amendment proposal for acceptance by the WTO membership involves a multilateral process that requires consensus, or two-thirds majority if consensus is not attained.

- Besides the legality issues specifically pertaining to each plurilateral initiative and its interaction with WTO rules and mandates, the proliferation of plurilateral initiatives could leave an eroding effect and systemically undermine the WTO as a multilateral institution. Such proliferation will be in tension with the collective interest of developing countries in preserving a multilateral space that allows them opportunities to benefit from the international trading system. It will also not serve the developing countries' stated objective of preserving and strengthening the multilateral character of the WTO.

1 Introduction

PLURILATERAL initiatives on electronic commerce, investment facilitation, services domestic regulation, disciplines for micro, small and medium enterprises, and trade and gender were announced at the World Trade Organization (WTO)'s 11th Ministerial Conference (MC11) in Buenos Aires in 2017. These announcements took the form of declarations by selected Member States, which they launched when their proposals failed to secure multilateral consensus.

Some have promoted the plurilateral approach to negotiations as potentially a "better fit" for future negotiations at the WTO and a more efficient one. Others considered that there were signs in Buenos Aires that WTO Members were ready to turn towards plurilateral solutions on trade that could, in time, become fully multilateralized.[1]

Some developed-country Members of the WTO have included the plurilateral form of negotiations as one element of their conceptualization of "WTO reform". For example, the European Union's concept note on WTO modernization proposed plurilateral negotiations "[i]n areas where multilateral consensus is unattainable", referring to "plurilateral negotiations which should remain open to all Members to join and whose results will be

[1] James Bacchus, "Was Buenos Aires the Beginning of the End or the End of the Beginning? The Future of the World Trade Organization", May 2018, available at: https://www.cato.org/publications/policy-analysis/was-buenos-aires-beginning-end-or-end-beginning-future-world-trade

applied on an MFN [most-favoured nation] basis".[2] The EU also called for "[e]xplor[ing] the feasibility of amending the WTO agreement so as to create a new Annex IV.b. which would contain a set of plurilateral agreements that are applied on an MFN-basis and which could be amended through a simplified process".[3]

Some developing countries have taken on a role as proponents of recent plurilateral initiatives referred to above. This has been a significant divergence from the historic position of developing countries.[4] Yet, in general, developing countries insist that preserving and strengthening the WTO includes "[s]trengthening the multilateral character of the WTO, especially through the preservation of the practice of decision-making by consensus and respecting Article X of the Marrakesh Agreement on Amendments".[5] This is a point of convergence for developing countries.

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2 European Union, "Concept Note: WTO modernisation; future EU proposals". The paper was "intended to serve as a basis for discussion with the European Parliament, the Council and with other Members of the WTO, in response to the conclusions of the European Council of 28 June 2018, which invited the European Commission to propose a comprehensive approach to improving together with like-minded partners, the functioning of the WTO in crucial areas, including the dispute settlement and the Appellate Body…".

3 Ibid. The International Chambers of Commerce have also pushed a recommendation in support of plurilateral negotiations, proposing that "[n]ew negotiations should be advanced using flexible, open, transparent, plurilateral approaches focused on the delivery of tangible outcomes … while ensuring that the centrality of the WTO is never compromised and honouring the principle of inclusivity". See: ICC, "Reforming the Multilateral Rules Based Trading System".

4 It has been documented that developing countries "such as Brazil, China, India, and South Africa have openly expressed their rejection of a plurilateral alternative to the Doha impasse, preferring instead a multilateral approach". Source: Peter Draper and Memory Dube, "Plurilaterals and the Multilateral System", International Centre for Trade and Sustainable Development and World Economic Forum, December 2013, page 3. See also, for example: Goh Chien Yen, "Many Developing Countries Reject Plurilateral Approach for Singapore Issues in the WTO Green Room Meeting", Third World Network, 13 November 2003, available at: https://www.twn.my/title/twninfo92.htm

5 See for example: "South rallies around proposals to advance developmental agenda", published in *SUNS* #8955, 26 July 2019, and available as TWN Info Service on WTO and Trade Issues (July19/31) at https://www.twn.my

Recent plurilateral initiatives have been acknowledged and facilitated by the official representation of the WTO, including its director-general and secretariat.[6] The WTO secretariat plays a facilitating role for these initiatives by arranging the hosting of meetings at the WTO premises, supporting the coordinators of the initiatives in preparing the reports of the meetings, and providing technical support for posting the materials on subpages of the WTO website. This is perceived as an encouragement from the institutional representation of the WTO to the sponsors of the plurilateral initiatives in order to advance with their campaigns.[7]

This in turn poses questions about the drive behind such institutional support and what it implies. For example, does it imply an assumption that these initiatives will eventually provide added value to the multilateral system by being incorporated in some way into the WTO acquis?[8] Or is the support rooted in a principled assumption that any additional rules in the area of trade and investment will eventually serve the broader objective of stimulating and enhancing international trade? Yet, could these initiatives, whether eventually added to the WTO acquis or not, lead to the emergence of challenging dynamics for the multilateral organization, including exposing the need, or lack thereof, to preserve this multilateral body?

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6 See for example: "DG inciting sponsors of plurilateral initiatives to intensify campaign", published in *SUNS* #8629, 26 February 2018, and available as TWN Info Service on WTO and Trade Issues (Feb18/20) at https://www.twn.my. This article notes that: "During a retreat meeting of the ACP (Africa, Caribbean, and Pacific) countries…, the Director-General said: 'I also want to acknowledge the declarations put forward by various groups of members in Buenos Aires – including some ACP members – covering e-commerce, investment facilitation, MSMEs and women's economic empowerment.'"

7 Ibid., where it is noted that: "The World Trade Organization Director-General Roberto Azevedo appears to be encouraging the sponsors of various plurilateral initiatives announced after the failed eleventh ministerial conference (MC11) at Buenos Aires last December to intensify their campaign, according to trade envoys familiar with the development … Knowing full well that these 'declarations' failed to get adopted at the open-ended heads of delegations meetings convened by different minister-facilitators on 12 December in Buenos Aires, the Director-General is subtly inciting the sponsors of those declarations to step up their campaign, said an ACP participant who asked not to be quoted…."

8 "WTO acquis" is used here to refer to the accumulation of WTO rules embodied in its agreements and other authoritative decisions by the membership sitting as the General Council or Dispute Settlement Body, including the jurisprudence produced under the WTO Dispute Settlement Understanding.

Clearly, these developments pose multiple questions pertaining to the understanding of existing WTO rules, the intent behind these rules, and consequently the issues of legality when considering adding the results of the plurilateral negotiations to the WTO acquis. Each of the recent plurilateral initiatives might pose different legal issues pertaining to its interaction with the WTO rules and mandates, given the differences in the nature and scope of issues covered under each initiative. Collectively, they also pose systemic implications pertaining to the role and added value of the WTO as a multilateral forum and to the dynamics of negotiations within the WTO.

This paper will explore the issues emerging from interactions between plurilateral initiatives and WTO rules, focusing particularly on the plurilateral initiatives on services domestic regulation and investment facilitation as case studies, and briefly commenting on the plurilateral e-commerce initiative. The paper focuses on questions pertaining to the legality of importing outcomes from plurilateral initiatives into the WTO acquis, and the potential systemic implications for the WTO and the multilateral trade negotiations. Examples from previous WTO negotiations and instruments labelled as plurilateral will be reviewed, including the negotiations on the Information Technology Agreements (ITA I and II), the protocols under the General Agreement on Trade in Services (GATS), the Reference Paper on Telecommunications and the Understanding on Financial Services. The paper is primarily concerned with whether promoting and pushing the proliferation of plurilateral initiatives can co-exist with working on preserving and strengthening the multilateral character of the WTO.

2 Overview of the Plurilateral Initiatives on Services Domestic Regulation and Investment Facilitation

THE recent plurilateral joint initiatives need to be looked at in terms of their coverage and their potential interface with the WTO rules, including existing WTO multilateral mandates and decisions that had acquired the membership's consensus. This chapter explores the particularities of the plurilateral initiatives on services domestic regulation and investment facilitation and highlights some questions arising from the potential interaction of these initiatives with the WTO acquis. These questions will be further explored in Chapter 3.

2.1 Brief overview of the plurilateral initiative on services domestic regulation disciplines

The plurilateral initiative on services domestic regulation disciplines deals with a negotiating issue covered under a multilateral mandate built into Article VI.4 of the GATS. The latter covers "measures relating to qualification requirements and procedures, technical standards and licensing requirements".[9] The Working Party on Domestic Regulation (WPDR) was

[9] Article VI.4 of the GATS provides that: "With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:
(a) based on objective and transparent criteria, such as competence and the ability to supply the service;
(b) not more burdensome than necessary to ensure the quality of the service;
(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service."

established by WTO Members in 1999 pursuant to Article VI.4, which provides that "the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines". The WPDR is the multilateral body entrusted with developing any necessary disciplines under the multilateral mandate.[10] Importantly, this has been acknowledged in the declaration launching the plurilateral process, where reference was made to "the valuable work that has been undertaken and good progress made … to revive negotiations in the WTO Working Party on Domestic Regulation (WPDR)". Multiple versions of a multilateral negotiating text were developed by the WPDR over the years of its work, including versions from 2009 and 2011.[11]

The plurilateral declaration on services domestic regulation launched at MC11 was conceptualized as a step towards "concluding the negotiation of disciplines on domestic regulation pursuant to the mandate contained in Article VI:4 of the General Agreement on Trade in Services…".[12] In later statements, the participants in the plurilateral initiative have positioned their work as carrying the objective of "elaborating upon" the provisions of the GATS, "pursuant to" paragraph 4 of Article VI of the GATS.[13] Beyond that, the potential implications of the interface with the multilateral mandate built into Article VI.4 of the GATS have not been addressed.

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10 See WTO document S/L/70. See also: Kinda Mohamadieh, "Disciplining Non-discriminatory Domestic Regulations in the Services Sectors – Another Plurilateral Track at the WTO", Third World Network Briefing Paper No. 103, October 2019, available at: https://twn.my/title2/briefing_papers/No103.pdf. Under the multilateral process, negotiations specific to accountancy services were held that concluded with the adoption in 1998 of a set of Disciplines on Domestic Regulation in the Accountancy Sector. These were endorsed by the Council for Trade in Services. Implementation was put on hold pending the formal adoption of the Disciplines by the Members at the conclusion of the Doha Round of negotiations.

11 As a result of the negotiations in the WPDR, a large number of developing-country and least-developed-country Members have been questioning the "necessity" of domestic regulation disciplines in light of the difficulties that might be faced in implementing horizontal disciplines on domestic regulations. See, for example, paragraph 1.6 of WTO document S/WPDR/M/74, "Working Party on Domestic Regulation – Report of the meeting held on 5 December 2018 – Note by the Secretariat", dated 13 February 2019.

12 See "Ministerial Conference – Eleventh Session – Buenos Aires, 10-13 December 2017 – Joint Ministerial statement on services domestic regulation", WT/MIN(17)/61, 13 December 2017.

13 See for example: WTO document INF/SDR/RD/6, 12 March 2020, restricted.

While the multilateral and plurilateral tracks seem to be in a close-to-complete overlap, the plurilateral discussions also cover issues that effectively extend beyond the scope of Article VI.4 of the GATS, such as "authorizations". The latter are generally understood to mean the permission to engage in the supply of a service. Article VI.3 of the GATS already addresses authorizations.[14] Members of the plurilateral process plan to incorporate the disciplines to be agreed among them in their schedules of commitments under the GATS as "additional commitments", using for those purposes GATS Article XVIII. The latter Article provides that "Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule."[15]

Issues of legality and systemic implications that ought to be unpacked

The interface between the plurilateral process and the multilateral mandate poses multiple particular legal issues that require investigation. For example, it is important to consider what legal grounds would justify that a subset of WTO Members could establish a parallel, and potentially competing, process to pursue the same objectives set under a multilateral mandate and consequently apply the outcomes to their relations with other WTO Members. Moreover, it is important to consider whether the resulting rules could be imported unilaterally into the WTO acquis. If so, what legal avenue could enable such a move and what would be the resulting implications on the potential of fulfilling the multilateral mandate established under Article VI.4 of the GATS?

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[14] Article VI.3 of the GATS provides that: "Where authorization is required for the supply of a service on which a specific commitment has been made, the competent authorities of a Member shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the Member shall provide, without undue delay, information concerning the status of the application."

[15] Article XVI of the GATS addresses market access commitments, while Article XVII addresses national treatment commitments.

Much will depend on the specific content of the results emerging from the plurilateral initiative. For example, will any rules agreed plurilaterally imply a change to Members' obligations and rights under the GATS, including vis-a-vis other Members not part of the plurilateral initiative? In such a situation, would the route of Article XVIII of the GATS be viable for unilaterally importing the results into the GATS schedules of commitments, or will that require the fulfilment of the rules pertaining to GATS amendment, which are laid down under Article X of the Marrakesh Agreement Establishing the WTO (hereafter referred to as the Marrakesh Agreement)?

2.2 Brief overview of the plurilateral initiative on investment facilitation for development

The plurilateral initiative on investment facilitation for development (IFD) launched at MC11 set up a process of "structured discussions" with the aim of developing a multilateral framework on investment facilitation (IF).[16]

At the multilateral level, WTO Members, sitting as the General Council of the WTO in July 2004, had taken a decision by consensus in which they declared that no work would take place towards negotiations on trade and investment within the WTO "during" the Doha Round.[17] This 2004 restriction on investment negotiations at the WTO was preceded by work done in a Working Group on Trade and Investment that was mandated at the First WTO Ministerial Conference in Singapore (1996) to examine the relationship

[16] See: "Ministerial Conference – Eleventh Session – Buenos Aires, 10-13 December 2017 – Joint Ministerial statement on investment facilitation for development", WT/MIN(17)/59, December 2017.

[17] Article 1(g) of the July 2004 Package provides that "the Council agrees that these issues [including investment], mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round". See: Text of the "July package" – the General Council's post-Cancun decision, at: https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm

between trade and investment.[18] The Working Group did not have a negotiating mandate. A declaration at the 4th WTO Ministerial Conference in Doha (2001) stated that "negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations".[19] However, this consensus decision was never taken.

Proponents of the plurilateral initiative on IF seek to distinguish the scope of this initiative from that mandate pertaining to investment that has been restricted under the July Package of 2004, which includes issues pertaining to market access, investment protection and investor-state dispute settlement. This differentiation aims to substantiate the argument that the IFD initiative does not violate the mandate of the 2004 July Package. Some WTO Member States opposing the IFD initiative had pointed out that the establishment of an investment facilitation discussion process could run against the 2004 decision.[20]

The IFD initiative deals with issues covered under the 2004 decision, such as transparency and other issues that will be discussed more thoroughly in Chapter 3. Moreover, the background note prepared by the proponents of the initiative and circulated at MC11, which was more detailed than the

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18 See: Ministerial Conference, Singapore – Singapore Ministerial Declaration, WT/MIN(96)/DEC, 18 December 1996. See: Martin Khor, "The 'Singapore Issues' in the WTO: Evolution and Implications for Developing Countries", Third World Network, 2007, available at: https://twn.my/title2/t&d/tnd33.pdf, for a detailed background and account of how the "Singapore issues", including investment, were introduced in the WTO and their evolution from the WTO's Singapore Ministerial Conference (1996) to the Seattle (1999) and Doha (2001) Ministerial Conferences.

19 See: paragraph 20 of the Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001. Also, paragraph 22 of the Doha Ministerial Declaration provides that "further work in the Working Group on the Relationship Between Trade and Investment will focus on the clarification of: scope and definition; transparency; non-discrimination; modalities for pre-establishment commitments based on a GATS-type, positive list approach; development provisions; exceptions and balance-of-payments safeguards; consultation and the settlement of disputes between members…". The 5th Ministerial Conference held in Cancun in 2003 ended with no ministerial declaration. See https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_e.htm

20 See for example: South Africa Statement during the 11th WTO Ministerial Conference, 10 December 2017.

Ministerial Declaration on IF, showed significant overlap with the approach to investment as proposed at the 1996 Singapore Ministerial Conference.[21] There is also a significant overlap between what is proposed under the IF plurilateral initiative and the proposed disciplines on services domestic regulation that were discussed under the WTO WPDR and are currently being discussed under the plurilateral initiative on services domestic regulation as reviewed above.[22]

Issues of legality and systemic implications that ought to be unpacked

The IF plurilateral initiative poses multiple questions pertaining to the legality of its interface with the WTO rules, besides its interaction with the General Council (GC) decision under the 2004 July Package. If proponents are considering potentially bringing a framework on IF under the WTO acquis, it is not clear what legal avenue would be possible for such action, if any. In one GC meeting, there has already been clear opposition to formally addressing the issues covered under the IFD initiative. On 10 May 2017, India objected to including an item entitled "Trade and Investment Facilitation" on the agenda of the GC meeting, arguing that consensus was required for each item listed and discussed on the GC agenda and that the proposed investment issues fell outside the ambit of the Marrakesh Agreement. Later, India only agreed to an item of "Informal dialogue on investment facilitation", while underlining its strong opposition to discussion and negotiation of "investment facilitation" within the formal structures of the WTO. India made it clear that Members with an interest in the subject

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21 See for example: Our World Is Not for Sale Network, "Investment Facilitation for Development: Opening the doors of the WTO for hard rules on investment", available at: https://ourworldisnotforsale.net/2017/Investment_rebuttal.pdf. Some pre-MC11 proposals from proponents indicate interest in eventually moving towards an extensive scope that includes market access and treatment for investments. For example, see: Communication from the Russian Federation, Investment Policy Discussion Group, WTO General Council, JOB/GC/120, 31 March 2017.

22 For more details, see: Kinda Mohamadieh, "Investment Facilitation – Another Plurilateral Initiative at the WTO and Its Potential Implications", Third World Network, October 2019, available at: https://twn.my/title2/briefing_papers/No102.pdf

could take up informal discussions "outside the formal structures of the WTO".[23]

The IFD initiative is broad in its scope of coverage. It is proposed to cover investments in both services and non-services sectors. Depending on the definition of "investments" to be adopted, the framework could potentially be addressing issues that overlap or interact with the General Agreement on Tariffs and Trade (GATT), the Agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS), and the GATS. Besides, some issues proposed under the IF initiative, such as corporate social responsibility and measures against corruption, are not already tackled under the WTO law. When it comes to services, the proposed IF framework would overlap with the GATS given it will cover all commitments undertaken by Members in respect of commercial presence in the services sector. It extends beyond the GATS to cover all other commercial presence in the services sector (where Members have not undertaken commitments) in addition to commercial presence in non-services sectors, such as mining, agriculture and manufacturing. The degree to which it extends beyond commercial presence (i.e., Mode 3) under the GATS would depend on the definition of "investments" to be adopted by the plurilateral initiative.

The extent of the potential overlap will eventually determine the legal issues that may arise when considering ways in which to bring the results of the initiative under the WTO acquis. For example, given the potential overlap with the GATS and services domestic regulation disciplines, how would two sets of disciplines, one pertaining to IF and the other pertaining to disciplines on domestic regulation of services, co-exist in a parallel and unharmonized manner under the WTO umbrella?[24] Will this require explicit regulation of

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[23] Statement by India during WTO General Council meeting held on 10 May 2017.

[24] Proponents of the IF plurilateral initiative recognize that the overlap with disciplines on domestic regulation in services is an issue that needs to be addressed, calling for "ensur[ing] that these two plurilateral efforts are coherent and not in contradiction with each other". See, for example, the presentation by Sherry Stephenson during a webinar entitled "Integrating an international framework on investment facilitation for development into the WTO", 28 May 2020, available at: https://drive.google.com/file/d/1HWp2h5XZlZ1_m4cDCWhDRs3uheZy2n6W/view

the relationship between the two, similar to how some trade agreements organize the relationship between the investment and services chapters?[25] Will the disciplines that could be agreed under the IF initiative imply an amendment to GATS disciplines in so far as they apply to GATS Mode 3 on commercial presence? Given that the IFD initiative covers issues that potentially stretch across at least two WTO agreements, including the GATT and the GATS, what will that mean in any attempts to integrate the IF outcomes into the WTO while lacking a coherent framework?[26] Where the IF plurilateral initiative covers issues that have not been part of the WTO agreements so far, would it be possible to bring such issues under the WTO acquis without consensus of the WTO membership?

These issues will be further discussed in Chapter 3.

[25] On this issue, see for example: OECD, "The Interaction Between Investment and Services Chapters in Selected Regional Trade Agreements", in *International Investment Law: Understanding Concepts and Tracking Innovations*, 2008.

[26] Proponents of the IF plurilateral initiative recognize these potential challenges. For example, see the presentation by Rudolph Adlung at a webinar entitled "Integrating an international framework on investment facilitation for development into the WTO", 28 May 2020, available at: https://drive.google.com/file/d/1HWp2h5XZlZ1_m4cDCWhDRs3uheZy2n6W/view

3 The WTO Rules Pertaining to Plurilateral Agreements and Initiatives

THERE have been multiple negotiation experiences associated with the WTO that have been branded as "plurilateral". These include the ITA (I and II), the Government Procurement Agreement (GPA), the Fourth and Fifth Protocols under the GATS on telecommunications and financial services, the Reference Paper on Telecommunications and the Understanding on Financial Services.

Each of these experiences is specific and different from the others, and has a particular negotiation history and interface with the WTO rules. Among the examples listed above, the GPA is the only plurilateral trade agreement as per the rules laid out in Article X.9 of the Marrakesh Agreement. The others are either outcomes of plurilateral initiatives, such as the ITA, or outcomes of multilateral mandates that were adopted by a subset of WTO Members.

This chapter will explore the different WTO rules pertaining to these plurilateral initiatives and agreements. Consequently, the chapter will discuss what these imply for current considerations pertaining to recent plurilateral initiatives, particularly the discussion on how the outcomes of plurilateral initiatives could be brought under the WTO acquis.

3.1 The mandate and function of the WTO: plurilaterals as an exception and not the norm

The Marrakesh Agreement provides under Article II.1 that "[t]he WTO shall provide the common institutional framework for the conduct of trade relations

among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement". It also provides under Article III.1 that the function of the WTO shall be to "facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements". Article III.2 states that 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".

The above provides for the core mandate of the WTO as a multilateral forum. Article II.1 read in conjunction with Article III.2 of the Marrakesh Agreement imply that any negotiations for any trade accord on any of the agreements in Annex 1 of the Marrakesh Agreement, which covers those WTO agreements pertaining to goods trade, services trade and trade-related intellectual property rights, are to be conducted with the WTO as "the forum for negotiations".[27] Yet, what would be categorized as negotiations with the WTO as "the forum for [such] negotiations"? For example, would the negotiations under the recent plurilateral initiatives fulfill this categorization given that they are being physically hosted at the WTO despite not being conducted under a multilaterally agreed mandate? Or would such a characterization require that the negotiations be undertaken based on a multilaterally agreed mandate, irrespective of whether all WTO Members take part in them or just a subset of WTO Members join the negotiations? When it comes to the reference to "plurilateral trade agreements", could the articles noted above be taken to embody a reflection that the WTO was designed to accommodate negotiations

[27] See: Chakravarthi Raghavan, "The Plurilateral Services Game at the WTO", published in *SUNS* #7464, 23 October 2012, and available as TWN Info Service on WTO and Trade Issues (Oct2012/08) at: https://www.twn.my/title2/wto.info/2012/twninfo121008.htm

on and implementation of any plurilateral agreements or outcomes of plurilateral trade negotiations? Or is the reference more specific to those plurilateral trade agreements or negotiations multilaterally approved by consensus?

For example, it has been argued that Article III.2 does not specify the legal form of the negotiated outcome, which opens the way for it to accommodate plurilateral negotiations.[28] Furthermore, a former member of the US House of Representatives argued that the WTO was designed to address emerging trade issues through agreements that – "at least at the outset – would be less than fully multilateral", consequently proposing that "the WTO agreements permit – indeed, they encourage – alternative, plurilateral approaches to liberalization".[29]

While the Marrakesh Agreement does indeed accommodate plurilaterals, there is no indication that these are intended as anything but exceptions to the multilateral norm, which the WTO was designed to serve and advance. In fact, there are ample safeguards against plurilateral agreements becoming the norm, including the consensus requirement established under Article X.9 of the Marrakesh Agreement. Article X.9 provides that "The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that [plurilateral] agreement to Annex 4...". If the original intent was not against proliferation of plurilateral agreements, one can imagine that Article X.9 would have incorporated a requirement less burdensome than consensus. Moreover, as per the Marrakesh Agreement, the rules pertaining to plurilateral trade agreements that would become part of the WTO acquis were kept rooted in multilateral action that allows all Members of the WTO to take part in designing the boundaries of

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28 Hamid Mamdouh and Rudolf Adlung, "Plurilateral Trade Agreements: An Escape Route for the WTO?", December 2016, page 7.

29 See Bacchus, footnote 1. Bacchus was drawing here on his personal recollections as one of the six original co-sponsors of the implementing legislation for the Uruguay Round trade agreements in 1994, in the US House of Representatives.

these agreements and how they interface with the existing WTO rules and disciplines. These issues will be explored further in the following sections.

3.2 The direct route of adding a new plurilateral agreement under the WTO

To take the direct route of adding a plurilateral agreement under the WTO acquis would require fulfilling the consensus requirement stipulated under Article X.9 of the Marrakesh Agreement. Any amendment of such a plurilateral agreement will be undertaken according to the rules of the plurilateral agreement itself. Unlike the agreements in the first three annexes to the Marrakesh Agreement, which are binding on all WTO Member States, the plurilateral agreements, which are included in the fourth annex, are binding only on those WTO Member States that have accepted them and their benefits apply only to those Members.[30] Thus, the plurilateral agreements do not create either obligations or rights for Members that have not accepted them. Article II.3 of the Marrakesh Agreement provides that "[t]he agreements and associated legal instruments included in Annex 4 … are also part of this Agreement [the Marrakesh Agreement] for those Members that have accepted them, and are binding on those Members".

The Marrakesh Agreement provides several particular rules that regulate the approach to and interface with plurilateral agreements, including under Article II.3, IV.8 on institutional structures, IX.5 on decision making, X.9 on adding the plurilateral agreement to the WTO acquis and X.10 on decision making, among other articles that refer back to the terms of the plurilateral agreement itself. For the WTO dispute settlement mechanism to apply to any such plurilateral agreement, the participants in the plurilateral agreement should

[30] See: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm10_e.htm. Nine such agreements or codes were negotiated in the Tokyo Round. They either were sector-specific, such as the International Dairy Agreement, International Bovine Meat Agreement and the Agreement on Trade in Civil Aircraft, or dealt with particular policy issues on a cross-sectoral basis, such as the GPA as well as five codes concerning Technical Barriers to Trade, Subsidies and Countervailing Duties, Anti-dumping, Customs Valuation, and Import Licensing.

secure consensus of all WTO Members over a decision to approve an amendment to Appendix 1(C) of the WTO Dispute Settlement Understanding (DSU) that lists the plurilateral trade agreements covered by the Understanding, thus rendering such amendment applicable to all WTO Members.[31]

Furthermore, the participating countries in the plurilateral agreement should fulfill the requirements under Appendix 1 of the DSU. This appendix stipulates that "[t]he applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB [Dispute Settlement Body]".

Case example 1: A brief overview of relevant aspects of the Government Procurement Agreement

Currently Annex 4 of the Marrakesh Agreement consists of two plurilateral agreements, the Agreement on Trade in Civil Aircraft and the Government Procurement Agreement.[32]

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[31] Currently, there are four plurilateral agreements listed under Appendix 1 of the DSU, including the GPA; see: https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm. See Article X.8 of the Marrakesh Agreement regarding amendments to the DSU, which require WTO membership consensus. Article X.8 provides that "[a]ny Member of the WTO may initiate a proposal to amend the provisions of the Multilateral Trade Agreements in Annexes 2 and 3 [i.e., the DSU and the Trade Policy Review Mechanism] by submitting such proposal to the Ministerial Conference. The decision to approve amendments to the Multilateral Trade Agreement in Annex 2 [i.e., the DSU] shall be made by consensus and these amendments shall take effect for all Members upon approval by the Ministerial Conference…".

[32] See more information on: https://www.wto.org/english/docs_e/legal_e/legal_e.htm. Along with these two agreements, there were two other plurilateral agreements – on bovine meat and dairy products – in Annex 4, but these were terminated by WTO Members in 1997.

The GPA is one of the agreements, or codes, resulting from the Tokyo Round of multilateral trade negotiations under the GATT,[33] which lasted from 1973 to 1979. The first GPA was signed in 1979 and entered into force in 1981. Negotiations on amending the first GPA concluded in 1987, and the amendment entered into force in 1988. At the time of the Uruguay Round, parties to the GPA held negotiations to broaden the coverage of the Agreement to purchases by sub-central government entities and other public enterprises and to the services and construction services sectors.[34]

While other codes carried forward from the Tokyo Round into the Uruguay Round were multilateralized and incorporated under the WTO multilateral agreements, the GPA was not.[35] It was agreed that it would be carried forward as a plurilateral trade agreement, as per the meaning of Article X.9 of the Marrakesh Agreement. Following the negotiations, the 1994 GPA was signed in Marrakesh on 15 April 1994, at the same time as the Marrakesh Agreement, and came into force in 1996.

Pursuant to Article XXII of the GPA, any affected party of the GPA may invoke the WTO's dispute settlement provisions in case of conflicts arising under the Agreement. In case a prevailing claimant needs to retaliate due to lack of implementation on behalf of the losing party, suspension of concessions by the prevailing claimant must remain confined to obligations under the GPA and cannot be extended to those assumed under any of the multilateral trade agreements.[36]

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33 See Agreement on Government Procurement 1988 revised text, available at: https://www.wto.org/english/tratop_e/gproc_e/gpa_rev_text_1988_e.pdf. Other codes resulting from the Tokyo Round, on anti-dumping measures, technical barriers to trade and other non-tariff measures, are available at: https://www.wto.org/english/docs_e/legal_e/prewto_legal_e.htm

34 See more details at: https://www.wto.org/English/tratop_e/gproc_e/overview_e.htm

35 See: Bernard M. Hoekman and Petros Mavroidis, "The World Trade Organization's agreement on government procurement: expanding disciplines, declining membership?", World Bank, 1995.

36 See Article XXII.7 of the GPA. For an overview of dispute cases pertaining to the GPA, see: https://www.wto.org/english/tratop_e/gproc_e/disput_e.htm

WTO rules on amendments

The amendment process varies for different WTO provisions which are subjected to different procedures and benchmarks. While changes to the MFN obligations of the GATT (Article I), the GATS (Article II.1) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, Article 4) would require acceptance by all WTO Members, amendments of other provisions could be decided upon by a two-thirds majority, after which they will be binding on those Members that have accepted them.[37]

Article X.3 of the Marrakesh Agreement deals with amendments to the Marrakesh Agreement itself, the multilateral agreements on trade in goods and the TRIPS Agreement, providing that amendments of a nature that would alter the rights and obligations of the Members shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members and thereafter for each other Member upon acceptance by it.[38]

In regard to the GATS, Article X.5 of the Marrakesh Agreement provides that "amendments to Parts I, II and III of GATS and the respective annexes shall take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it", while "amendments to Parts IV, V and VI of GATS and the respective annexes shall take effect for all Members upon acceptance by two thirds of the Members".[39]

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37 Amendments of Article II of the GATT and Articles IX and X of the Marrakesh Agreement also require acceptance by all WTO Members. See: Article X.2 of the Marrakesh Agreement.

38 The Article further provides that: "The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under this paragraph is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference."

39 Article X.5 of the Marrakesh Agreement also provides that: "The Ministerial Conference may decide by a three-fourths majority of the Members that any amendment made effective under the preceding provision [relating to Parts I, II and III of GATS and the respective annexes] is of such a nature that any Member which has not accepted it within a period specified by the Ministerial Conference in each case shall be free to withdraw from the WTO or to remain a Member with the consent of the Ministerial Conference."

The relation between an issue proposed for plurilateral negotiations and pre-existing provisions under the WTO agreements is a main determinant of what rules ought to apply when regulating the interface of the plurilateral outcome with the WTO acquis. If a new rule will amend another already existing under the WTO agreements, then it will require the fulfilment of the relevant rules under Article X of the Marrakesh Agreement, even when amending the original rule for part of the WTO membership, not the whole membership. It can be argued that this is why the Trade Facilitation Agreement, part of which amends existing Articles of the GATT, had to fulfill the requirement of acceptance by two-thirds of WTO Members before it entered into force for those Members who accepted it.

Moreover, the rules pertaining to amendments cannot be discarded through utilizing alternative routes, such as unilaterally incorporating the results of plurilateral initiatives into Members' schedules of commitments. Indeed, as will be discussed later, outcomes of plurilateral negotiations that could be added unilaterally to Members' schedules of commitments but which have the effect of amending existing WTO rules require fulfilment of the rules on amendments stipulated under Article X of the Marrakesh Agreement.

The analysis above is in line with the requirement that all applicable provisions of the WTO agreements be read and applied in a way that gives meaning to all of them harmoniously.[40] This principle of effectiveness in interpretation, which is one of the corollaries of the "general rule of interpretation" under Article 31 of the Vienna Convention on the Law of Treaties, and has been clarified through the WTO jurisprudence, has been central to forming a

[40] See: Repertory of the Appellate Body Reports on the subject of interpretation, available at: https://www.wto.org/english/tratop_e/dispu_e/repertory_e/i3_e.htm#I.3.7

perception of the WTO system as efficient and legitimate.[41] The above considerations will eventually define the boundaries of what could potentially be valid given WTO law and mandates established under the Marrakesh Agreement.

3.3 The indirect route for importing outcomes of plurilateral initiatives into the WTO

Another route that has been considered for bringing outcomes of plurilateral initiatives under the WTO acquis is to import them through schedules of commitments and implement the obligations on an MFN basis without discrimination against non-signatories. As noted above, the proponents of the plurilateral initiative on domestic regulation in services are moving in the direction of adding their commitments to their schedules of commitments based on Article XVIII of the GATS.[42]

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41 For example, in US – Gasoline (WT/DS2/AB/R, page 23, DSR 1996:I, page 3 at 2), the WTO Appellate Body (AB) stated that "… One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility…". In Japan – Alcoholic Beverages II (WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, page 12, DSR 1997:I, page 97 at 106), the AB noted that "… A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness". In Canada – Dairy (WT/DS103/AB/R, WT/DS113/AB/R, WT/DS103/AB/R/Corr.1, WT/DS113/AB/R/Corr.1, paragraph 133), the AB provided that "… the task of the treaty interpreter is to ascertain and give effect to a legally operative meaning for the terms of the treaty. The applicable fundamental principle of effet utile is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility". Other examples are available at: https://www.wto.org/english/tratop_e/dispu_e/repertory_e/i3_e.htm#I.3.7

42 Article XVIII of the GATS provides that "Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule".

Some commentators have argued that such a route is suitable for what they term as "open plurilateral agreements among a critical mass of interested Members" and could be an option for moving forward WTO negotiations.[43] It has also been suggested that the GATS is a good basis for it provides "a multi-dimensional framework that covers a wide variety of measures affecting trade in services".[44] These arguments suggest using this route to potentially import much of the outcome of currently negotiated plurilateral initiatives into the WTO. Yet, this route poses several technical and legal questions, emerging both from the nature and scope of the issues covered and from their interface with the WTO rules.

Both the GATT and the GATS have provisions that regulate the unilateral addition of commitments to Members' schedules. Generally, a Member is free to amend its own schedule of commitments to undertake autonomous and unilateral liberalization as long as no other country perceives these additions as, in fact, restrictive. But, if the new additions to the schedules have the effect of amending WTO disciplines, then the rules regulating amendments, as stipulated under Article X of the Marrakesh Agreement, will apply.

The sections below discuss the legal basis for such action under the GATT and the GATS and discuss case examples in this regard.

The GATT

Article II of the GATT on "Schedules of Concessions" is considered to allow contracting parties to incorporate into their schedules acts yielding rights under the General Agreement, but not acts diminishing obligations under the

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43 See Mamdouh and Adlung, footnote 28.

44 Ibid., page 19. In this line of argument, it was suggested that it would 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".

Agreement. It provides that "[e]ach contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement".

Article XXVIII of the GATT regulates the act of modifying GATT schedules. GATT schedules consist of four parts: Part I on MFN concessions and maximum tariffs on goods from other WTO Members; Part II on preferential concessions such as tariffs relating to trade arrangements listed in GATT Article I; Part III on concessions on non-tariff measures; and Part IV on specific commitments on domestic support and export subsidies on agricultural products. Governments have included in their schedules such non-tariff commitments as minimum import quotas, or commitments for elimination of import permit requirements, import licensing schemes or import prohibitions.[45] According to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994, agreed pursuant to the Ministerial Declaration on the Uruguay Round, the provisions of Article XXVIII of the GATT and the "Procedures for Negotiations under Article XXVIII" adopted on 10 November 1980 apply to cases of modification or withdrawal of concessions relating to non-tariff measures as contained in Part III of the

[45] See: https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm. Eight WTO Members – Belize, Cameroon, El Salvador, Egypt, Indonesia, Malta, Senegal and Trinidad & Tobago – included concessions in Part III of their Uruguay Round Schedules, listing tariff item numbers and describing the non-tariff concessions. Moreover, a 2010 Secretariat Technical Note on the Accession Process notes that the Schedules of China, Saudi Arabia, Chinese Taipei, Viet Nam and Ukraine include concessions in Part III (source: WT/ACC/10/Rev.4, page 17). For source, see: WTO Analytical Index: GATT 1994 – Article II (Practice), available at: https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art2_oth.pdf. Some of these Schedules have provided explicitly for negotiations in the event of withdrawal of these commitments; in a number of instances, such Schedules have specified initial negotiating rights with respect to these commitments. Various concessions relating to the operation of import monopolies have been modified or withdrawn pursuant to negotiations under Article XXVIII, in the context of Article XXIV.6. In 1956 Germany withdrew a concession relating to screen quotas for the exhibition of films of foreign origin, after renegotiations under Article XXVIII. Source: WTO document "Article XXVIII Modification of Schedules", available at: https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art28_gatt47.pdf

schedules.[46] This would be without prejudice to the rights and obligations of Members under GATT 1994.[47]

Procedures agreed in 1980[48] provide that a Member undertaking GATT Article XXVIII negotiations should submit to the secretariat a report and a joint letter upon completion of each bilateral negotiation and a final report upon completion of all its bilateral negotiations. The 1980 Procedures have been used for certifying changes to goods schedules resulting from adjustments of a technical nature linked to amendments to the Harmonized System that do not affect the scope of the concessions, and from tariff reductions stemming from unilateral or collective liberalization initiatives, such as the Information

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46 See: The Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994, paragraph 6, available at: https://www.wto.org/english/docs_e/legal_e/13-mprot_e.htm

47 Non-tariff measures are considered to mean "policy measures – other than ordinary customs tariffs – that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both", including sanitary and phytosanitary measures and technical barriers to trade. See for example: https://unctad.org/en/Pages/DITC/Trade-Analysis/Non-Tariff-Measures/What-are-NTMs.aspx#:~:text=Non%2DTariff%20Measures-,What%20are%20Non%2DTariff%20Measures%3F,traded%2C%20or%20prices%20or%20both. According to the Organization for Economic Cooperation and Development (OECD), non-tariff measures "comprise all policy measures other than tariffs and tariff-rate quotas that have a more or less direct impact on international trade. They can affect the price of traded products, the quantity traded, or both … [and] can be broadly divided into two groups. The first type, called 'technical' measures, includes regulations, standards, testing and certification, primarily sanitary and phytosanitary (SPS) and Technical Barriers to Trade (TBT) measures. The second type, called 'non-technical' measures, includes quantitative restrictions (quotas, non-automatic import licensing), price measures, forced logistics or distribution channels, and so on." See: https://www.oecd.org/trade/topics/non-tariff-measures/

48 Decision of 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions (BISD 27S/25).

Technology Agreement and its expansion, the Nairobi Ministerial Decision on Export Competition and other sectoral initiatives.[49]

Article XXVIII requires "negotiation and agreement with contracting parties with which such concession was initially negotiated … and that have a principal supplying interest…", which implies that original concessions have already been established.[50] The WTO Appellate Body clarified in EC – Bananas III (1997) that "the ordinary meaning of the term 'concessions' suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations". Assessing and quantifying the impacts on concessions resulting from non-tariff measures, such as regulatory measures, in order to allow negotiation and agreement with contracting parties whose interests will be impacted by the modification is a complex endeavour. The Organization for Economic Cooperation and Development (OECD) has pointed out that "the issues that arise in connection with determining the economic impact of NTBs [non-tariff barriers] [are] very different from those surrounding the use of tariffs. As far as trade and the economic impact of NTBs are concerned, much depends on the specific circumstances of their

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49 *Status of WTO Legal Instruments* (2019 edition), WTO, page 12. For certification of adjustments linked to amendments to the Harmonized System, see, e.g., WT/Let/340 and WT/Let/489. Examples of tariff reductions stemming from unilateral liberalization initiatives include autonomous improvements in concessions and modifications pursuant to Annex 5 of the Agreement on Agriculture. Examples of autonomous improvements in concessions are available in WT/Let/171 and WT/Let/502. For examples of modifications pursuant to Annex 5 of the Agreement on Agriculture, see WT/Let/562 and WT/Let/882. For the Ministerial Declaration on Trade in Information Technology Products, see WT/MIN(96)/16, and for the Ministerial Declaration on the Expansion of Trade in Information Technology Products, see WT/MIN(15)/25. For the Nairobi Ministerial Declaration, see WT/MIN(15)/DEC, and for the Nairobi Ministerial Decision on Export Competition, see WT/MIN(15)/45 / WT/L/980. Examples of tariff reductions stemming from sectoral initiatives include revisions and additions to the product coverage of the Pharmaceutical Understanding, and bilateral sectoral negotiations (e.g., distilled spirits). For revisions of the Pharmaceutical Understanding, see G/MA/W/10, G/MA/W/18, G/MA/W/85 and G/MA/W/102, as well as resulting certifications of modifications, e.g., WT/Let/270 and WT/Let/272. For distilled spirits, see WT/Let/178 and WT/Let/182. See also: G/MA/W/123/Rev.1, "Factual Report on the Status of Renegotiations under Article XXVIII of the GATT 1994", Report by the Secretariat, 13 April 2017.

50 See: Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994, available at: https://www.wto.org/english/docs_e/legal_e/12-28_e.htm

application. To understand the effect of a specific measure requires a case-by-case examination".[51] Examples listed above for non-tariff measures included in some WTO Members' schedules, such as minimum import quotas, or commitments for elimination of import permit requirements, import licensing schemes or import prohibitions, have a clearer impact on the level of concessions than measures of a regulatory nature. There is no precedent of using Article XXVIII of the GATT to add to Members' schedules of concessions commitments of the kind envisioned under the IF framework, including transparency and regulatory disciplines.

Case example 2: A brief overview of relevant aspects of the Information Technology Agreement

When it comes to adding commitments unilaterally through an act of modifying schedules of commitments, the Information Technology Agreement is referred to as a case in point and a precedent.

The ITA was initiated by 29 WTO Members through a Ministerial Declaration on Trade in Information Technology Products that was concluded at the Singapore Ministerial Conference in December 1996.[52] The mandate for negotiating the ITA, as per this declaration, was established by the ministers of the selected WTO Members, acting individually, who wanted to engage in the negotiations. It was not a multilateral decision taken at the Ministerial Conference level.[53] The concessions resulting from the ITA negotiations were enacted through individual certification of the tariff schedules of participating WTO Members, through which they added new tariff concessions on the

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51 OECD, "Looking Beyond Tariffs: The Role of Non-Tariff Barriers in World Trade", OECD Trade Policy Studies, 2005, page 13, referenced in Robert W. Staiger, "Non-tariff Measures and the WTO", Staff Working Paper ERSD-2012-01, January 2012, available at: https://www.wto.org/english/res_e/reser_e/ersd201201_e.pdf

52 See: ITA, WT/MIN(96)/16 and G/MA/W/23/Rev.11

53 South Centre, "The Legality of Creating Plurilateral Agreements within the WTO for Singapore Issues", November 2003.

products concerned.[54] The ITA was expanded in 2015 (what came to be known as ITA II), and participating countries adopted the new commitments as a modification to their schedules of concessions, in accordance with the 1980 Procedures for Modification and Rectification of Schedules of Tariff Concessions.[55]

The ITA and ITA II are confined to additional undertakings of tariff concessions, and do not cover regulatory disciplines. Resulting concessions were inserted in the participating Members' schedules of concessions and offered on an MFN basis. Thus, the ITA is not a plurilateral agreement as per the meaning of Article X.9 of the Marrakesh Agreement, which governs the incorporation of such agreements into the WTO framework. It also does not present a case comparable to the potential outcomes from the IFD initiative, as it was limited to product liberalization and did not include regulatory elements.

The GATS

Articles XIX and XXI

Article XIX on "Negotiation of Specific Commitments", which falls under Part IV of the GATS on "Progressive Liberalization", provides the grounds for advancing negotiations through successive negotiating rounds (see Article XIX.1 of the GATS) via "bilateral, plurilateral or multilateral negotiations

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54 GATT Article XXVIII bis on tariff negotiations provides that: "… Negotiations under this Article may be carried out on a selective product-by-product basis or by the application of such multilateral procedures as may be accepted by the contracting parties concerned. Such negotiations may be directed towards the reduction of duties … The contracting parties recognize that in general the success of multilateral negotiations would depend on the participation of all contracting parties which conduct a substantial proportion of their external trade with one another…."

55 See: WT/L/956, "Declaration on the Expansion of Trade in Information Technology Products", Communication from the European Union, July 2015.

directed towards increasing the general level of specific commitments undertaken by Members" (see Article XIX.4 of the GATS).[56]

Part III of the GATS entitled "Specific Commitments" covers market access commitments under Article XVI, national treatment under Article XVII, as well as "additional commitments", particularly commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII. Additional commitments, in the form of regulatory undertakings, will have to fulfill the requirement under Article XIX.4 that the negotiations be "directed towards increasing the general level of specific commitments"; thus, they cannot undermine or detract from the benefits of other Members from the prescribed commitment.

Article XIX.2 of the GATS provides that "[t]he process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors". Appropriate flexibility for individual developing-country Members, Article XIX.2 explains, shall be in the form of "opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV".

Importantly, Article XIX.3 provides that for each round of liberalization, negotiating guidelines and procedures shall be established, whereby "the Council for Trade in Services shall carry out an assessment of trade in services

[56] Article XIX.4 of the GATS provides the following: "The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement." For example, Annex C of the 2005 Hong Kong Ministerial Declaration deals with the plurilateral option for access negotiations in services under the Doha Development Agenda. Paragraph 7 of Annex C provides 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".

in overall terms and on a sectoral basis with reference to the objectives of this Agreement…". The WTO website provides that "[n]egotiations of specific commitments, under Article XIX of the GATS, take place in the Special Session of the Council for Trade in Services".[57] This clearly brings in a role for the WTO Council for Trade in Services in the process of initiating such negotiations, whether bilateral, plurilateral or multilateral negotiations. This therefore makes it complex to argue that negotiations undertaken in the context of plurilateral initiatives on investment facilitation or e-commerce could be recast as "specific commitments" as per the meaning of GATS Article XIX.

Article XXI of the GATS deals with modification or withdrawal of any commitment in a Member's schedule. It deals with commitments already undertaken and existing under the Members' schedules. It also assumes less liberalization, given it stipulates detailed procedures for addressing any impact resulting from the modification or withdrawal on another Member, through providing any necessary compensatory adjustment.[58] Modifications of schedules subject to negotiation under Article XXI follow a specific certification procedure adopted by the Council for Trade in Services,[59] while rectifications and the inclusion of new or improved commitments follow a distinct process.[60] Consequently, Article XXI does not provide grounds for importing into the GATS new commitments undertaken by certain WTO Members under the IF framework.

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57 https://www.wto.org/english/tratop_e/serv_e/s_negs_e.htm

58 See Article XXI.2-4. See also S/L/80, "Procedures for the Implementation of Article XXI of the General Agreement on Trade in Services (Modification of Schedules)", 29 October 1999.

59 Ibid., S/L/80.

60 S/L/84, "Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments", adopted by the Council for Trade in Services on 14 April 2000. These procedures deal with modifications "not resulting from action under the procedures for the implementation of Article XXI of the GATS … which consist of new commitments, improvements to existing ones, or rectifications or changes of a purely technical character..." (paragraph 1, WTO document S/L/84). The S/L/84 procedures "follow well-established GATT practice that allows any Member to submit improvements or rectifications to its schedule of concessions at any time" (referring to the 1980 Procedures for Modification and Rectification of Schedules of Tariff Concessions). Until November 2012, this S/L/84 certification procedure was invoked on 10 occasions by nine WTO Members between 2001 and 2006 (Brazil, Egypt, Chinese Taipei, China, Albania, Honduras, Colombia, Nepal and the EC). Schedules were modified in six of these cases. See: WTO Secretariat, JOB/SERV/123.

Article XVIII

Article XVIII on "Additional Commitments" belongs to Part III of the GATS, which, as noted above, deals with "Specific Commitments". Article XVIII provides that "Members may negotiate commitments *with respect to measures affecting trade in services* not subject to scheduling under Articles XVI or XVII, *including* those regarding qualifications, standards or licensing matters…" (emphasis added). It provides a legal framework for addressing and negotiating the reduction of trade-restricting measures not covered by market access (Article XVI) and national treatment (Article XVII) obligations.[61] Members' schedules include a specific fourth column dedicated to such "additional commitments", besides a column on limitations on market access and another on national treatment.[62]

"Measures affecting trade in services" under Article XVIII is a broad category.[63] Under the GATS, the definition of "measures" is non-exhaustive, covering any measure by a Member, in the form of law, regulation, rule, procedure, decision, administrative action or any other form.[64] Furthermore, Article XXVIII.c of the GATS provides that "measures by Members affecting

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61 Committee on Specific Commitments, "Additional Commitments under Article XVIII of the GATS", Note by the Secretariat, S/CSC/W/34, 16 July 2002, paragraph 5, referenced in Rüdiger Wolfrum and Peter-Tobias Stoll (eds.), *Max Planck Commentaries on World Trade Law*, 2008, page 421.

62 S/L/92, paragraph 5.

63 WTO jurisprudence on "measures affecting trade in services" provides that "[N]o measures are excluded a priori from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services." (See: Panel report in EC – Bananas III.) It has been argued that "… the concept of 'supply' covers the entire value chain of services, from production to distribution, marketing, 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 participants 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". Source: Mamdouh and Adlung, footnote 28, page 19.

64 See: GATS, Article XXVIII.a.

trade in services" include measures in respect of (i) the purchase, payment or use of a service, (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally, and (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

It has been held that the scope of Article XVIII is broader than that of Article VI of the GATS and thus extends beyond domestic regulations mentioned under Article VI.4, which establishes a negotiating mandate pertaining to "qualification requirements and procedures, technical standards and licensing requirements".[65] Thus, goes the argument, Article XVIII could potentially cover commitments on matters other than licences, qualifications and standards.[66] Additional commitments do not have to be restricted to domestic regulatory measures, but can also apply to the cross-border supply of services.[67] Building on this, it has also been argued that given the broad scope of measures covered under the GATS, "any government measure that affects trade in services within the definitional structure of the Agreement could thus be addressed [under Article XVIII]",[68] implying that the results from plurilateral initiatives could be imported into the WTO acquis through this route.

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65 Council for Trade in Services, "Guidelines for the Scheduling of Specific Commitments under the GATS", adopted by the Council for Trade in Services on 23 March 2001, S/L/92, 28 March 2001, paragraph 19, referenced in *Max Planck Commentaries on World Trade Law*, supra, footnote 61, page 423.

66 See: Patrick F.J. Macrory, Arthur E. Appleton and Michael G. Plummer (eds.), *The World Trade Organization: Legal, Economic and Political Analysis*, page 853, referencing Committee on Specific Commitments, "Additional Commitments under Article XVIII of the GATS", Note by the WTO Secretariat, S/CSC/W/34, 16 July 2002, paragraph 4.

67 This was argued by Mexico in Mexico – Telecoms, WT/DS204/R, paragraph 7.98, and reflected in the panel's decision. See Mexico – Telecoms, paragraphs 7.96-7.144.

68 See Mamdouh and Adlung, footnote 28, page 19. In this paper, the authors suggest that: "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."

While Article XVIII refers to the broad category of "commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII", it is not clear whether a Member could unilaterally decide that a measure falls under Article XVIII. Article XVIII commences with "*Members may negotiate* commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII…" (emphasis added). This implies a collective role of WTO Members in deciding on what would fall under Article XVIII. The Article does not seem to support the case of unilateral action by one Member in deciding what would fall under Article XVIII. The issue of whether the scope of Article XVIII ought to be determined and controlled by the entirety of the WTO membership is left open under the Article. When it comes to qualification requirements and procedures, technical standards and licensing requirements, as noted above, Article VI.4 already embodies a multilateral mandate to negotiate such disciplines. In addition, the GATS Scheduling Guidelines of 1993 and 2001 provide that "additional commitments are expressed in the form of undertakings, not limitations."[69] Whatever is proposed as "additional commitments" under Article XVIII ought to be assessed as per this requirement.

Another issue to determine is the interface between the proposed elements/ commitments and existing mandates, rules or rights and obligations under the GATS, and what that entails in terms of legal implications. Where there is an overlap with existing commitments or obligations, then the MFN requirement should be fulfilled and the commitments should be made available for the benefit of all WTO Members. If the new commitments change such existing mandates, rules or rights and obligations, then the requirements stipulated for amending the GATS should be fulfilled too.

It is unclear from the text and WTO Member States' practices thus far whether the Article XVIII route could be used to schedule commitments pertaining to

[69] See: WTO document S/L/92, 28 March 2001.

issues not covered under the scope of the GATS.[70] The IF plurilateral initiative covers issues not addressed under the WTO rules, such as corporate social responsibility and anti-corruption measures. In such cases, scheduling commitments not already covered within the scope of the WTO agreements could imply creating a mandate through unilateral action, which could amount to remaking the WTO rules without going through the formal avenues stipulated under the WTO.

3.4 A brief overview of relevant aspects from the experiences of the protocols on basic telecommunications and financial services, Reference Paper on Telecommunications and Understanding on Financial Services

The experience of negotiating two protocols pertaining to financial services and telecommunications, as well as the Reference Paper on Telecommunications and the Understanding on Financial Services is often referred to when discussing ways of utilizing Articles XIX and XVIII of the GATS for importing outcomes of plurilateral initiatives into the WTO acquis. This section gives an overview of these previous experiences and discusses their relevance as precedent vis-a-vis the recent plurilateral initiatives.

[70] Mamdouh and Adlung argue that "… It would be possible, however, to negotiate open PAs [plurilateral agreements] 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". See: Mamdouh and Adlung, footnote 28, page 7.

Case example 3: The protocols of the GATS

The protocols on basic telecommunications (Fourth Protocol to the GATS, 30 April 1996) and financial services (Fifth Protocol to the GATS, 3 December 1997)[71] were multilaterally mandated under the Uruguay Round. The negotiations of the Fourth Protocol were carried out under the terms of the Ministerial Decision on Negotiations on Basic Telecommunications adopted at Marrakesh on 15 April 1994.[72] The Fourth Protocol was adopted by the Council for Trade in Services on 30 April 1996.[73] The Protocol and its annexed documents entered into force on 5 February 1998. The negotiations of the Fifth Protocol were undertaken under the terms of the Second Decision on Financial Services adopted by the Council for Trade in Services on 21 July 1995.[74] The Fifth Protocol embodies the results of the financial services negotiations concluded in December 1997, and entered into force on 1 March 1999. It replaces the schedules of commitments and lists of exemptions relating to financial services set out in Article II of the GATS.

The protocols deal with specific commitments as per the meaning of Article XIX (i.e., commitments pertaining to market access and national treatment), and not those pertaining to rules on regulatory disciplines in the services sectors. It has been argued that "such protocols are not based on any particular provisions in the WTO Agreement" and that "a consensus decision by all

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71 On the Fifth Protocol, see: https://www.wto.org/english/tratop_e/serv_e/finance_e/finance_e.htm. See the status of acceptance of the protocol at: https://www.wto.org/english/tratop_e/serv_e/finance_e/finance_status_5prot_e.htm. The protocol includes improved or first-time commitments made by about 70 WTO Members. For foreign direct investment (Mode 3), most participants 'bound' levels of liberalization existing in late 1997. Cross-border commitments in Mode 1 (cross-border supply) were relatively limited. See: Sydney J. Key, "The post-Uruguay Round negotiations on financial services", presentation at workshop to mark the 10th anniversary of the Fifth Protocol to the GATS, World Trade Organization, Geneva, 31 March 2009, available at: https://www.wto.org/english/tratop_e/serv_e/finance_e/workshop_march09_e/key_e.pdf

72 S/L/20, 30 April 1996, Fourth Protocol to the General Agreement on Trade in Services. See more details about the history of this protocol at: https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_history_e.htm

73 See: S/C/M/9 (13 May 1996) and S/L/20 (30 April 1996).

74 See: S/L/9, "Second Decision on Financial Services", adopted by the Council for Trade in Services on 21 July 1995; S/L/45, "Fifth Protocol to the General Agreement on Trade in Services", 3 December 1997.

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".[75] Yet, the history of these protocols reveals a central role for the multilateral bodies in the negotiation and acceptance of the protocols.

Even if the claim that no consensus decision by all Members would be needed is accepted, the protocols do not provide an example of a precedent when considering ways in which to deal with outcomes from current plurilateral initiatives, particularly those related to domestic regulation disciplines in services, investment facilitation or e-commerce. Indeed, the scope of issues being addressed under the current initiatives extends beyond additional liberalization in areas already covered under the WTO agreements, as is the case with the discussed protocols.

Case example 4: The Reference Paper on Telecommunications

The Reference Paper on Telecommunications addresses regulatory matters such as competitive safeguards, interconnection guarantees, universal service, licensing processes and independence of regulators. Members of the WTO adopting the Reference Paper relied on Article XVIII of the GATS in order to inscribe it as "additional commitments" in their schedules of commitments, with some variations among countries.[76] This experience has been invoked in order to argue that plurilateral initiatives based on garnering a critical mass and consequently adopting the results on an MFN basis through

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[75] Mamdouh and Adlung, footnote 28, pages 7 and 8, where the authors contend that "… there would have been no legal impediments that could have prevented interested Members from negotiating and implementing the respective protocols among each other without adoption by the entire membership".

[76] By February 1997, 57 of the 69 governments submitting schedules committed to the Reference Paper in whole or with a few modifications. It is currently estimated that over 90 WTO Members (counting EU Member States individually) have inscribed the Reference Paper, although with variation. Where a Member has adopted the Reference Paper and inscribed it as an additional commitment under its schedule of commitments, that Member will be subject to the rules pertaining to telecommunications under both the GATS and the Reference Paper. The Reference Paper adds to the rules on telecommunications under the GATS and does not provide a parallel regulatory framework that overlaps with elements that are covered under the GATS.

amending schedules of commitments could be used not only in market-access negotiations but in rule-making too.[77] Yet, a look at the history of the Reference Paper provides specifics that are not consistent with this view.

The origin of the Reference Paper goes back to 1992 during the Uruguay Round. In 1993, the Group of Negotiations on Services (GNS) under the Uruguay Round mandated an informal group to conduct consultations among the trade and telecommunications officials of interested participants on the idea of the Reference Paper.[78] A Ministerial Decision on Negotiations on Basic Telecommunications, adopted in Marrakesh on 15 April 1994, allowed negotiations on basic telecommunications to continue beyond the conclusion of the Uruguay Round,[79] and these talks went on between 1994 and 1997. The Decision was among 24 decisions adopted by the Uruguay Round Trade Negotiations Committee and was annexed to the Marrakesh Final Act.[80]

The Reference Paper was negotiated under the auspices of the Negotiating Group on Basic Telecommunications (NGBT) set up pursuant to the Ministerial Decision.[81] The NGBT first met in May 1994 and used to report to the Council for Trade in Services.[82] The discussions were held under a recurring agenda item known as "outstanding technical and conceptual issues".

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77 Mamdouh and Adlung, footnote 28.

78 The GNS was the official body discussing services under the Uruguay Round. See: https://docs.wto.org/gtd/Default.aspx?pagename=URsymbols&langue=e. For more background on the Reference Paper, see: S/CSC/W/34, "Additional Commitments Under Article XVIII of the GATS", Note by the Secretariat, 2002.

79 See: https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_posturuguay_neg_e.htm

80 *Status of WTO Legal Instruments* (2019 edition), WTO, endnote 4, page 15, available at: https://www.wto.org/english/res_e/booksp_e/wto_legal_instruments_e.pdf

81 The Reference Paper was negotiated by the NGBT and circulated by the WTO secretariat. It has been reported that the Reference Paper was not formally issued as a WTO document. See: Laura B. Sherman,"World Trade Organization: Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade in Services)", *International Legal Materials*, Vol. 36, No. 2 (March 1997), pp. 354-374, footnote 21, available at: https://www.jstor.org/stable/20698662?read-now=1&seq=3#page_scan_tab_contents

82 Ibid.

Thus, the negotiations on the Reference Paper were rooted in a multilateral act. Moreover, if compared with the current plurilateral initiative on services domestic regulation disciplines, one stark difference is that the discussions on basic telecommunications were not parallel to or overlapping with an ongoing multilateral mandate to develop disciplines covering the same scope. The Reference Paper also covers services sectors where Members have undertaken liberalization commitments. This is unlike the investment facilitation or e-commerce initiatives.

Case example 5: The Understanding on Financial Services

The Understanding on Financial Services, an optional and alternative approach to making specific commitments on financial services, was appended to the Final Act of the Uruguay Round. It is, however, not an integral part of the GATS. According to the first paragraph of the Understanding, "participants in the Uruguay Round have been enabled to take on specific commitments with respect to financial services under the General Agreement on Trade in Services on the basis of an alternative approach to that covered by Part III of the Agreement".[83]

Thus, the Understanding arises from a multilateral process which was part and parcel of the negotiations under the Uruguay Round, and it was collectively agreed among Members to open it up for selective acceptance by those Members who wished to undertake such additional commitments. Consequently, its interface with the GATS was designed and accepted through a multilateral process. Members making commitments pursuant to the Understanding, subject to Member-specific reservations or limitations, have inscribed these under their respective schedules of specific commitments by inserting a headnote to that effect in the section on financial services.[84]

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83 See: https://www.wto.org/english/tratop_e/serv_e/21-fin_e.htm

84 See: S/C/W/312 / S/FIN/W/73, "Financial Services", Background Note by the WTO Secretariat, page 10.

3.5 Overview of implications for ongoing plurilateral initiatives

None of the experiences discussed above compares to the current plurilateral initiatives on domestic regulation, investment facilitation or e-commerce. All the previous initiatives, whether the plurilateral trade agreements, such as the GPA, or the commitments undertaken as a result of plurilateral processes, such as the protocols under the GATS, the Reference Paper on Telecommunications and the Understanding on Financial Services, had their roots in multilateral mandates. Thus, the decisions to initiate those processes and run them on a plurilateral level had been multilaterally approved.

Exceptionally, the ITA commitments were initiated under a Ministerial Declaration that was agreed among a subset of WTO Members. Yet, the ITA deals with straightforward additional liberalization commitments on products within its ambit. It does not deal with new rules on regulatory disciplines nor with issues not currently covered under the WTO agreements, as the current plurilateral initiatives on IF and e-commerce do.

None of the cases discussed above overlap with an existing negotiating mandate built into the multilateral agreements, as the current plurilateral initiatives on domestic regulation and IF do with the mandate of Article VI.4 of the GATS. The latter explicitly provides that "the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines", based on which the Working Party on Domestic Regulation was established and undertook its work.

If countries in a plurilateral initiative agree a set of disciplines and attempt to incorporate them under the WTO acquis through Article XVIII of the GATS, they might be altering the multilateral mandate of Article VI.4, which refers particularly to conducting the negotiations on these issues under a multilateral body. Moreover, if Members taking part in the plurilateral initiative insert the resulting disciplines into their WTO schedules of commitments, they may not join a potential consensus on disciplines that could be agreed under the multilateral process. If they did, and the content of each set of disciplines

differs from the other, then their regulatory conduct in the services sectors where they have undertaken commitments could potentially be subject to two sets of rules. To avoid such a scenario, they will need to regulate situations where the two sets of rules differ. Alternatively, if they refrain from engaging in the multilateral discussions, they could in effect block the possibility of adopting a multilateral outcome to fulfill the Article VI.4 mandate. This would leave the rest of the WTO membership with the options of either converging towards what have been agreed upon under the plurilateral initiative or agreeing a separate set of disciplines on a plurilateral basis too. The latter would lead to multiple sets of disciplines on domestic regulation in services co-existing under the umbrella of the WTO. The mandate of Article VI.4 will not be fulfilled in either case.

Furthermore, if any of the rules to be agreed under the plurilateral initiatives imply a change to Members' obligations and rights under the GATS, then the requirements of Article X.5 of the Marrakesh Agreement will have to be fulfilled. For example, the plurilateral initiative on services domestic regulation seeks to set new disciplines for dealing with authorizations, which, as noted earlier, are already regulated under Article VI.3 of the GATS. If these new disciplines indeed turn out to have the effect of amending GATS obligations for those Members accepting them, the amendment process will require two conditions to be met. The first will be securing consensus or two-thirds majority (in case consensus is not secured) in order to submit the amendment for acceptance by Members. Article X.1 of the Marrakesh Agreement provides that any Member may initiate an amendment proceeding by submitting a proposal to the Ministerial Conference of the WTO. If consensus is not reached on such a proposition, the "Ministerial Conference shall decide by a two-thirds majority of the Members whether to submit the proposed amendment to the Members for acceptance".[85] The second condition

[85] A two-thirds majority of the WTO membership amounts to 110 Members. While some plurilateral initiatives have attracted Members numbering near this threshold, that does not automatically translate into a positive vote under Article X.1 of the Marrakesh Agreement. A Member that has joined the plurilateral talks might decide not to vote for integrating the resulting rules under the WTO acquis, taking into consideration the final outcome and the implications for the multilateral system.

to be met will be securing acceptance of the amendment as per Article X.5 of the Marrakesh Agreement. This requires acceptance by two-thirds of the WTO Members before the amendment can take effect for those Members who have accepted it.

Previous experiences under the WTO show that an amendment procedure is usually initiated through a protocol or decision that is agreed multilaterally. There have been three amendments to treaty instruments under the WTO adopted pursuant to Article X.[86] These include the 2005 Protocol Amending the TRIPS Agreement that entered into force on 23 January 2017,[87] the 2014 Protocol Amending the WTO Agreement to insert the Agreement on Trade Facilitation into Annex 1A of the WTO Agreement,[88] which entered into force on 22 February 2017, and the General Council decision amending the review periods set forth in paragraph C(ii) of the Trade Policy Review Mechanism as of 1 January 2019.[89]

The considerations above apply as well to the plurilateral initiative on investment facilitation if its results are sought to be brought under the WTO through the GATS Article XVIII route. Indeed, given that the IF initiative overlaps with the GATS as previously noted, some of the disciplines that could be agreed under the initiative might imply an amendment to GATS disciplines in so far as they apply to GATS Mode 3 on commercial presence. As also noted earlier, the IF plurilateral initiative covers issues that have, under the 2004 July Package, been restricted from being addressed "during" the Doha Round discussions. There is no precedent under the WTO that could help clarify the legal issues emerging from this situation. There has to be multilateral agreement that the decision under the 2004 July Package is reversed or that the Doha Round has ended, before it can be argued that the disciplines discussed under the IF plurilateral initiative could potentially be

86 *Status of WTO Legal Instruments* (2019 edition), WTO, page 11.
87 See: WT/L/641 and WT/Let/1236.
88 See: WT/Let/1241 and WT/L/940.
89 Pursuant to the General Council decision of 26 July 2017, this amendment took effect for all WTO Members on 1 January 2019 (WT/L/1014).

added to the WTO acquis (whether through the direct route as a plurilateral agreement as per the meaning of Article X.9 of the Marrakesh Agreement or through the indirect route of GATS Article XVIII).

Furthermore, the IF plurilateral initiative also covers issues that fall beyond the scope of the GATS. Some might fall under the GATT and other WTO agreements, and others have not been part of the WTO agreements so far. For example, the latter issues include corporate social responsibility and anti-corruption. It is not clear whether Article XVIII of the GATS allows Members to incorporate in their schedules commitments on issues not covered under the WTO agreements. None of the cases reviewed above shed helpful light in this regard.

4 Systemic Implications of the Plurilateral Initiatives for the WTO

BESIDES the legality issues specific to each initiative when considering its interaction with WTO rules and mandates, the plurilateral initiatives pose broader systemic implications for the WTO.

Proponents of the plurilateral route argue that such an incremental path would help the WTO advance and acquire more relevance instead of being bogged down. Yet, starting with agreements among some WTO Members and then gradually transforming them into fully global agreements means that some will be rule-takers and others rule-makers. Mere participation in a plurilateral initiative does not automatically make a country a rule-maker. Indeed, if a country is not ready at the national level with a clear vision for the sectors and issues being negotiated, including what it wants out of advancing international trading relations related to the relevant sector, then just having representatives in the negotiation room will not actually make this country a rule-maker. In fact, countries in such situations might only be adding quantitatively to the number of participants, in a way that allows the initiative to formally secure a 'critical mass', without substantively shaping or bringing anything to the actual negotiations.

Related to the above are the implications for the negotiating dynamics within the WTO, particularly on limiting the bargaining capacity of developing countries in this multilateral setting. Such capacity, particularly for small and medium-sized economies, results from collective positioning rather than unilateral economic and political weight. In addition, there is an impact on the existing multilateral negotiating mandates established under the Doha

Ministerial Declaration, which has been designed based on the principle of "single undertaking".[90] For many countries, the latter is essential in order to allow an alignment between progress on issues of interest to less-endowed developing countries and movement on issues of interest to developed countries. It has been rightly observed that "plurilaterals could conceivably revolve around the export interests of the major trading powers. Once those interests are satisfied, they would effectively be removed from the equation of broader, cross-issue trade-offs. This could make it difficult, if not impossible, to launch major trade rounds in the future. In addition, it could leave untouched the key sectors that still enjoy substantial protection in the major trading powers, notably agriculture and labour-intensive manufacturing, such as clothing".[91] In a plurilateral setting, the negotiated outcome might not reflect the balance required to respond to the needs of the totality of WTO Members, both developed and developing, and will not represent a collective compromise among the WTO Members.

The plurilateral initiatives dealing with areas mostly new to the WTO, such as the digital economy and investment facilitation, would end up defining the trade-related rules in a specific area, thus establishing a baseline in that regard. If lodged in the WTO, these rules take on very powerful norm-setting functions. Countries might be pressured to accept – or sometimes even exceed – these 'norms' as being more liberalizing or 'progressive'. Such pressures could emerge, for example, when a country seeks to accede to the WTO. In comparison, it is harder, and less viable politically, to ask an acceding country to accept rules from an agreement or initiative not officially recognized under the WTO. Such pressures could be exerted as well in bilateral and other plurilateral trade negotiations, by big economic investors or on countries seeking official loans or aid.

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90 See paragraph 47 of the Doha Ministerial Declaration, available at: https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

91 Peter Draper and Memory Dube, "Plurilaterals and the Multilateral System", International Centre for Trade and Sustainable Development and World Economic Forum, December 2013, page 30, available at: http://e15initiative.org/wp-content/uploads/2015/02/E15_RTAs_Proposals-Analysis_Final.pdf

These dynamics pertaining to the proliferation of plurilateral initiatives under the WTO which are not initiated with a collective multilateral will and vision, could systemically undermine the WTO as a multilateral institution. In essence, they could alter the "collective bargaining" approach underpinning the current negotiating practice in the WTO and be tantamount to moving away from consensus as the practice for decision-making at the WTO. This could eventually erode trust in this multilateral forum and its ability to deliver for all Members, leading to a long-term fragmentation of the WTO membership.[92]

Proliferation of plurilateral initiatives would not cater well to the collective interest of developing countries in preserving a multilateral space that allows them opportunities to benefit from the international trading system. It will also not serve the developing countries' stated objective of preserving and strengthening the multilateral character of the WTO.

Concluding observations

There is ample doubt that the existing examples of plurilateral trade agreements, as well as plurilateral initiatives whose results have been integrated into the WTO through unilateral action by selected Member countries, provide precedent or basis to argue that results from currently ongoing plurilateral initiatives can legally be imported into the WTO. Nothing in the WTO rules indicates an intent among the founding contracting parties to allow a situation where the multilateral process takes a backseat to plurilateral processes. While some try to argue that forcing the outcomes of a plurilateral initiative into the WTO through manoeuvres around what is written and not written in the WTO rules is lawful, it is hard to contend that such manoeuvres fit with the original intent behind the WTO and the vision of its founding negotiators.

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92 Michael J. Trebilcock, "Between Theories of Trade and Development: The Future of the World Trading System", U. Toronto Law Working Paper Series No. 2014-10, 24 July 2014, available at: https://ssrn.com/abstract=2473158 or http://dx.doi.org/10.2139/ssrn.2473158

Indeed, pushing a proliferation of plurilateral initiatives would not advance the intent reflected in the preamble of the Marrakesh Agreement, which provides that the contracting parties resolve to "develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations", and are "*[d]etermined* to preserve the basic principles and to further the objectives underlying this multilateral trading system" (emphasis added). The WTO was designed and intended as a multilateral institution for both developed and developing countries. Its preamble recognizes the "need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". The multilateral platform was often preferred because it allows for developing countries to coalesce together and advance their collective and/or common interests.

Moving down the plurilateral route entails significant systemic implications for the added value of the WTO as a platform for compromise among countries of varying levels of development with the objective of achieving benefit for all. This will be costly for all Members and will subject the WTO to a high risk of losing its fundamental nature as a multilateral forum. In turn, this could eventually expose the whole organization to depletion of its added value on the multilateral scene, particularly for developing countries. WTO Members, particularly developing countries, ought to take a much deeper look into the potential implications of the proliferation of plurilateral initiatives for the future of the organization and its ability to serve their interests.

PLURILATERAL INITIATIVES AND THEIR INTERACTION WITH WTO RULES

Plurilateral initiatives – which involve a limited number of World Trade Organization (WTO) Member countries – on several issues such as domestic regulation of the services sector, investment facilitation and electronic commerce were announced at the 2017 Ministerial Conference of the WTO. Key players in these talks have indicated the intention to incorporate the eventual outcomes of the negotiations into the body of WTO law.

This paper looks into whether and how this can be done, examining the less-than-straightforward relation between, on the one side, the nature and scope of the issues covered under the plurilateral initiatives and, on the other, the relevant WTO rules. It also reviews plurilateral outcomes which were added to the WTO framework in the past, and finds that these are dissimilar to the current initiatives and cannot provide precedent for dealing with the latter.

Besides questions surrounding the legality of importing their outcomes into the WTO system, the proliferation of plurilateral initiatives may undermine the multilateral character of the WTO. At risk could be the collective, consensus-based approach to negotiations aimed at striking a balance among the interests of the entire WTO membership, including the developing and least developed among them.

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