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WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements

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Abstract

Plurilateral agreements in the context of the World Trade Organization (WTO) allow sub-sets of countries to agree to commitments in specific policy areas that only apply to signatories and thus allow for 'variable geometry' in the WTO. Plurilateral agreements share a number of features with preferential trade agreements (PTAs), which are increasingly used by governments to liberalize trade in goods and services. This article discusses the current institutional framework that governs these two alternatives and distinguishes them from the general, non-discriminatory agreements that are negotiated among – and apply to – all WTO members. Current WTO rules make it much more difficult to pursue the plurilateral route than to negotiate a PTA. We review the arguments for and against making it easier for 'issue-specific' clubs to form in the WTO and discuss how concerns raised by some WTO members regarding the potential negative impact of plurilateral agreements on the multilateral trading system might be addressed. We take the view that action to facilitate the negotiation of plurilateral agreements in the WTO should be considered and that the potential downsides for the multilateral trading system can be managed.

1 Introduction

The Doha Round deadlock illustrates how difficult rule making is in the World Trade Organization (WTO). At the same time, the proliferation of preferential trade agreements (PTAs) illustrates that there is a continuing appetite among WTO members to

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use trade agreements to liberalize international commerce 'if the price is right'. Recent examples that involve major trading nations include the agreements signed by Korea with the European Union (EU) and the USA, the ongoing trans-Pacific partnership negotiations, and the launch of talks on a transatlantic trade and investment partnership agreement between the USA and the EU. The many PTAs in force today suggest that the problems in the WTO are not a reflection of an unwillingness of governments to embed binding, trade policy-related commitments in treaty instruments but, *prima facie*, an unwillingness to make similar commitments on a WTO-wide basis.

It may be that one of the consequences of the Doha Round deadlock has been to give countries a greater incentive to engage in PTAs. However, there may also be a reverse causality effect in that the existence of the PTA option may reduce the incentive to agree on rules on a multilateral basis. The proliferation of PTAs also suggests that deals are easier across a sub-set of the WTO membership. What is clear is that, since the content of PTAs is idiosyncratic, they are resulting in increasing fragmentation of the rules of the game for businesses engaged in international trade and are generating substantial information costs for traders.

PTAs are not the only game in town when it comes to negotiating deals within 'clubs'. The WTO offers another mechanism for members to form 'clubs' that allows them to move forward on an agenda of common interest – the conclusion of a plurilateral agreement (PA) under Article II.3 of the WTO Agreement.[1] This provision permits sub-sets of the WTO membership to agree to certain disciplines applying to signatories only. In contrast to a PTA, which must cover substantially all trade in goods (Article XXIV of GATT) and/or have substantial sectoral coverage of services (Article V of GATS), PAs can be issue specific.[2] PAs were quite prevalent under the pre-WTO GATT regime, although different terminology was used to denote essentially the same function. In the Kennedy (1964–1967) and Tokyo (1973–1979) Rounds, a number of PAs (which were called 'codes of conduct' at that time or simply 'codes') were negotiated, and they bound only their signatories.[3] Examples include agreements on anti-dumping, technical barriers to trade (product standards), subsidies and countervailing measures, import licensing and customs valuation. Most of these agreements only attracted limited membership. During the Uruguay Round, as part of the move towards the creation of the WTO, virtually all of the GATT codes were transformed into multilateral agreements that applied to all WTO members.

At present, there are only two PAs still in force in the WTO: the Agreement on Government Procurement (GPA) and the Agreement on Civil Aircraft.[4] This very small number contrasts with the hundreds of extant PTAs, raising the question why

[1] Agreement Establishing the World Trade Agreement (WTO Agreement) 1994, 1867 UNTS 154.

[2] General Agreement on Tariffs and Trade (GATT) 1994, 1867 UNTS 187; General Agreement on Trade in Services (GATS) 1994, 1869 UNTS 183.

[3] Stern and Hoekman, 'The Codes Approach', in J.M. Finger and A. Olechowski (eds), *The Uruguay Round: A Handbook for the Multilateral Trade Negotiations* (1987) 181.

[4] There were initially four plurilateral agreement (PAs): the Agreement on Government Procurement (GPA) 1 January 1996; Agreement on Civil Aircraft, 1 January 1995. The beef and dairy agreements were terminated in 1997.

there currently is so little use of PAs.[5] In this article, we assess the arguments for and against a more concerted effort to use (and accept the use of) PAs. The extant literature on PAs largely ignores the PTA dimension and centres on PAs, in comparison to the single undertaking/most-favoured-nation (MFN) agreements, including so-called critical mass agreements, under which commitments are negotiated among a set of countries that have the greatest stake/interest in an issue, with the benefits of whatever is agreed extended to all WTO members, whether they join or not. The latter are often colloquially referred to as 'plurilateral agreements', but we shall reserve this term for WTO Annex 4 agreements, which may be applied on a discriminatory basis to signatories only.[6] We compare the statutory provisions regarding the quintessential elements of PTAs and PAs, viewed from the perspective of a multilateralist, including: the manner in which the multilateral regime prejudges (if at all) their substantive content; the conditions for membership and accession by new members and the institutional aspects such as transparency and dispute settlement procedures.

2 The Current Legal Context

As mentioned earlier, the Uruguay Round was premised on the approach of the so-called single undertaking – membership of the WTO was made contingent upon accepting all of the treaties as a package. This approach is in sharp contrast to the GATT à la carte approach, which followed the Tokyo Round (1973–1979). The WTO was designed to offer a 'menu du jour' – customers (WTO members) could not choose particular items but had to accept the whole offering. The shift away from à la carte was deliberate and an explicit objective of many of the negotiators, who sought to extend the disciplines negotiated in earlier rounds to all members of the WTO. Their argument was that the codes created unnecessary confusion concerning who had signed what and who was bound by which obligations and, more important, that it was necessary to address free-riding by non-signatories to the codes (given that most

[5] Accommodating diversity in interests through greater use of critical mass agreements that apply on a most-favoured-nation (MFN) basis was one of the recommendations of the Warwick Commission and has been advocated by a number of analysts, including Lawrence, 'Rulemaking amidst Growing Diversity: A 'Club of Clubs' Approach to WTO Reform and New Issue Selection', 9(4) *Journal of International Economic Law* (*JIEL*) (2006) 823, at 828ff. Warwick Commission, *The Multilateral Trade Regime: Which Way Forward?* (2007).

[6] Critical mass has been a feature of both the GATT era and World Trade Organization (WTO) negotiations with the aim of reducing free-riding to a minimum acceptable level. An example of a critical mass agreement that was negotiated after the Uruguay Round was concluded is the International Technology Agreement (ITA) December 1996. Other critical mass agreements include the Agreement on Basic Telecommunications and the Agreement on Financial Services, both concluded in the years immediately following the Uruguay Round. There have also been numerous sector-specific 'zero-for-zero' tariff agreements that were conditioned on the existence of a critical mass of participants. G. Hufbauer and J. Schott, Will the World Trade Organization Enjoy a Bright Future?, Petersen Institute for International Economics Policy Brief 12-11, 2012. See B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System* (3rd edn, 2009) and Elsig, 'WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?', in D. Steger (ed.), *Redesigning the WTO for the 21st Century* (2010) 112, for further discussion.

of the codes were applied on a MFN basis). There was also an additional argument that trading nations had had adequate time to learn about the codes, and the positive experience that signatories had enjoyed could now be shared by the rest of the WTO membership.

Despite the strong push towards multilateralization of the codes, four Tokyo Round codes were excluded from the single undertaking: the Agreement on Civil Aircraft, the International Dairy Agreement, the International Bovine Meat Agreement and the GPA. These became so-called Annex 4 agreements (that is, PAs), which only bind those WTO members that opt to sign them. The first three of these agreements were excluded from the single undertaking for pragmatic reasons: they were sector-specific agreements and of concern to only a small number of WTO members. The signatories saw the benefits of their continued existence, while others did not have an interest in the products concerned. The GPA did not become a multilateral agreement because procurement was excluded from the coverage of GATT Article III – all of the other Tokyo Round codes addressed matters that were covered by the GATT provisions. Moreover, there was reluctance by many to join the GPA, as they wanted to continue using government procurement for industrial policy purposes.

Article II.3 of the WTO Agreement defines the legal status of these PAs in the following way:

> The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as 'Plurilateral Trade Agreement') are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.

Article X.9 of the WTO Agreement states that the Ministerial Conference of the WTO may decide to add an agreement to the existing set of PAs listed in Annex 4 'exclusively by consensus'. Existing agreements may be terminated if signatory WTO members deem this appropriate, provided that they respect the statutory conditions to this effect. Termination did occur with respect to the dairy and bovine meat agreements – both were terminated by decisions of the General Council on 31 December 1997 and 17 December 1997 respectively. The Agreement on Civil Aircraft is still in force, but its disciplines on subsidies have been superseded by the WTO Agreement on Subsidies and Countervailing Measures and by the GPA, which includes rules on public purchases of civil aircraft.[7] As a result, its added value is limited to tariff treatment of aircraft.

There are four dimensions of PTAs and PAs that are particularly relevant in assessing their impact on the trading system: the coverage of an agreement; whether and

[7] WTO Agreement on Subsidies and Countervailing Measures 1994, 1867 UNTS 14. The genesis of this PA was an effort by the European Union (EU) and the USA to agree on more specific rules of the game in this area than prevailed in the pre-WTO years. The primary added value of the Agreement on Civil Aircraft is the commitment by the 31 signatories to eliminate import duties on a specific list of products, including all non-military aircraft, civil aircraft engines, parts and components, all components and subassemblies of civil aircraft and flight simulators and their parts and components. This applies on a MFN basis because the products involved are subject to GATT. In regard to its market access dimension, this PA is therefore an example of a critical mass agreement.

under what conditions new countries can join; reporting and related transparency mechanisms and dispute settlement procedures. The next sections discuss the applicable rules under the WTO that have a bearing on these dimensions.

A *Rules on the Content of an Agreement*

1 PTAs

Article XXIV of GATT allows for free trade areas (FTAs) and customs unions if:

i. trade barriers after formation of the PTA do not rise on average (Article XXIV:5);
ii. all tariffs and other regulations of commerce are removed on substantially all trade within a reasonable length of time (Article XXIV:8); and
iii. they have been notified to the WTO Council.[8]

The 'substantially all trade' condition is somewhat counter-intuitive in that maximum preferential liberalization is likely to be more detrimental to non-members than partial liberalization. A rationale for the rule is that it ensures that countries are limited in their ability to violate their MFN obligations by selectively picking and choosing sectors. Absent this requirement, WTO members would have had an incentive to provide preferred partners with tariff cuts in areas where maximum trade diversion could result and thus undo the cornerstone of GATT, non-discriminatory trade liberalization.

Article V of GATS imposes three conditions on economic integration agreements in the area of services. First, they must have substantial sectoral coverage in terms of the number of sectors, the volume of trade affected, and the modes of supply. Service PTAs may not provide for the *a priori* exclusion of any mode of supply. Second, service PTAs must provide for the absence or elimination of substantially all measures violating national treatment in sectors where specific commitments were made in GATS at the entry into force of the agreement or within a reasonable time frame. Third, PTAs may not result in higher trade barriers against third countries. The substantial sectoral coverage requirement is arguably weaker than the 'substantially all trade' criterion of Article XXIV.[9] The same is true regarding the criteria for the magnitude of liberalization required and the external policy stance of the PTA, as the benchmark is not free trade in services among PTA members but, rather, goes beyond the specific commitments made under the GATS by the PTA members.

The determination of whether PTAs satisfy Article XXIV and/or Article V is the responsibility of the WTO Council. In the pre-WTO period, a working party was formed to establish if a notified PTA conformed to the GATT rules. Under the WTO, a standing Committee on Regional Trade Agreements (CRTA) was created, which has

[8] Developing countries are not bound by Art. XXIV as a result of the 1979 Decision on Differential and More Favorable Treatment of Developing Countries (the so-called Enabling Clause), GATT Doc. L/4903, 28 November 1979. This essentially removes the 'substantially all trade' test and allows for preferences between developing country preferential trade agreements (PTA) members (that is, the full removal of internal barriers – free trade – is not required).

[9] We say 'arguably' since this term has never been interpreted by the Committee on Regional Trade Agreements (CRTA) or by dispute adjudication panels.

taken over this task. As is well known, the process of testing PTAs against Article XXIV has been very ineffective. Only one PTA has ever been deemed to conform to the WTO rules: the (now defunct) customs union between the Czech and Slovak Republics. The shift to a CRTA did not lead to more effective review of the compliance of PTAs with WTO requirements. In fact, the opposite is the case. We have moved to a world without any review of legal consistency. Following the advent of the Transparency Mechanism for Regional Trade Agreements in 2006, WTO members no longer vote on the legal consistency of notified PTAs.[10] Instead, if they believe they are inconsistent, they can challenge them before a WTO panel, a practice that seldom if ever occurs.

In recent years, the coverage of the average PTA has tended to increase substantially. PTAs have gone from agreements that dealt almost exclusively with tariffs and related restrictive regulations of commerce (such as rules of origin) to becoming contractual arrangements that cover a wide range of regulatory policies. Henrik Horn, Petros Mavroidis and André Sapir review the subject matter signed by the two main hubs (the EU and the USA) between 1992 and 2008 and identify over 50 areas subject to provisions in one or more PTAs, ranging from anti-corruption policies and macroeconomic cooperation to environmental protection and anti-trust policies. The situation is similar for PTAs covering trade and investment in services. Many of the more recent vintage PTAs cover substantially more services and services policies than does GATS.[11]

The analysis by Horn, Mavroidis and Sapir demonstrates that the content of more recent PTAs concerns in large part the treatment of regulatory measures.[12] Recall that all of the GATT requests from FTAs and customs unions are aimed at substantially liberalizing all trade between them while not increasing barriers against the rest of the world. Domestic policies are not meant to protect; hence, members of an FTA/custom union must apply them in a non-discriminatory basis towards their preferential and MFN partners. In other words, the subject matter of PTAs should be limited to instruments of 'protection'. And yet this is not the case. Indeed, PTAs increasingly discuss domestic policies (non-tariff barriers [NTBs]).

One explanation is that disciplines on NTBs that go beyond non-discrimination are easier to contract across like-minded partners. Indeed, as Arnaud Costinot explains, non-discrimination is the guarantee that trading nations sought when contracting GATT that tariff concessions would not be eroded through subsequent unilateral action.[13] It was also an insurance policy for countries with a high level of domestic regulation since it ensured that products that do not meet their regulatory standards would be denied market access. When negotiating a PTA, trading nations can 'select' their partners and, thus, move towards 'deeper' integration without needing to worry

[10] Transparency Mechanism for Regional Trade Agreements (Transparency Mechanism), WTO Doc. WT/L/671, 18 December 2006.

[11] Roy, Marchetti and Lim, 'Services Liberalization in the New Generation of Preferential Trade Agreements: How Much Further than the GATS?', 6(2) *World Trade Review* (*WTR*) (2007) 1455, at 1460ff.

[12] Horn, Mavroidis and Sapir, 'Beyond the WTO: An Anatomy of the EU and US Preferential Trade Agreements', 33 *The World Economy* (*TWE*) (2010) 1565, at 1570ff.

[13] Costinot, 'A Comparative Institutional Analysis of Agreements on Product Standards', 75(1) *Journal of International Economics* (2008) 197, at 202ff.

about an erosion of domestic standards. Regulation of NTBs in PTAs also includes cooperation in areas such as investment, competition and environmental protection where no multilateral disciplines exist at all.

It follows that there is often a discrepancy between the subject matter of PTAs and that of the WTO, both with respect to the subjects discussed as well as with the 'depth' of integration. This gap is widening steadily and has many implications. Of particular interest to the subject of this article is that a less than multilateral legislative framework is developing in areas that escape totally or partially the current multilateral regime. The WTO has nothing to say on many of the new issues that are covered by PTA disciplines and provisions. Indeed, WTO members may not even be aware of developments in PTAs, although the 2006 Transparency Mechanism enhances the access to information that WTO members have in this regard.

2 PAs

As already noted, the WTO does not prejudge the content of PAs. In principle, therefore, a PA may deal with a matter that is already covered by the WTO – for example, a PA on trade in services – as well as subjects that the WTO does not address – for example, investment or competition policies. Thus, a PA may have a broad or very narrow coverage. The beef and dairy agreements were examples of narrow, product-specific arrangements; the GPA is an example of a PA that addresses a policy area that has wider coverage (purchases of goods and services by governments, a market that can represent 5 to 10 per cent of the gross domestic product).

Although the WTO legal texts are unclear in this respect, we believe that a bright line should divide PTAs from PAs. In principle, nothing in the legal statutes prohibits its WTO members from negotiating a PA that would consist of tariff reductions in one tariff line.[14] However, could such types of agreements be accepted as being in the spirit of the overall economy of the agreement? Recall that the reason why there is a requirement for liberalizing 'substantially all trade' (or negotiating PTAs with substantial trade coverage in GATS) is precisely because the membership did not want to see MFN deviations for just one tariff line. Clearly, we should not introduce through the window what we wanted to avoid coming in through the back door. In addition, recall that, as noted earlier, PTAs (in the goods area at least) were conceived of as mechanisms aiming to liberalize policy instruments that could be used to protect domestic producers, essentially tariffs. It is more difficult for WTO members to protect their domestic market through national regulatory instruments, for example, France cannot adopt one environmental policy *vis-à-vis* Germany and a different one *vis-à-vis* the rest of the world. One would therefore expect that PAs should focus on disciplining domestic instruments (non-tariff measures), as has been the case in the GPA, to date the only meaningful PA. The story is somewhat different with respect to trade in services, insofar as domestic instruments can be used to protect the domestic market (this is because national treatment is a specific commitment in GATS and not a general obligation as it is in GATT).

[14] Subject of course to the PA being accepted by the WTO membership as a new Annex 4 agreement.

While Article X.9 of the WTO Agreement allows for WTO members to agree to add new PAs (by consensus), this provision leaves open the question whether the consensus concerns a negotiated document or the acceptance by the membership of a subset of members seeking to negotiate a PA on a given subject. A careful reading of Article X.9 suggests that approval or rejection will be on the basis of the text that the interested countries (participating in the PA) have negotiated. There is a difference in this regard between the treatment of existing PAs and new ones. Of the four PAs that were included in Annex 4 of the WTO Agreement, only one was subsequently modified: the GPA. The new GPA entered into force in April 2014.[15] Nonetheless, the final text of the new amended agreement was not approved by the WTO membership. It sufficed that the membership had approved the procedures for amending the original agreement.

Given the consensus rule, any WTO member can say no when the final text of a proposed PA is presented to them. Thus, plurilateral agreements are Pareto sanctioned since non-participants take the view that the agreement does not hurt them, whereas participants obviously take the view that the new agreement helps them achieve their goals. No one is worse off, and some are better off. Less clear is whether WTO members that are non-participants in a proposed PA can suggest changes or impose conditions for the acceptance of the PA. In principle, there is nothing to preclude this occurrence, although in practice it is unlikely that parties to the proposed agreement would be willing to make changes unless they had the support of a significant number of WTO members. Whether or not any such suggestions are made, a basic difference with PTAs is that the WTO membership can vote down an initiative to negotiate a PA, whereas in the case of PTAs parties are free to do what they like (risking only a challenge before a panel, which as mentioned earlier is a very low probability event).[16] The fact that there are no provisions or criteria on what is (and should be) permitted in terms of sectors or their content/coverage implies that there is great flexibility in principle for those aspiring to establish a PA, but that utilization of this flexibility is constrained by the need to obtain approval by all WTO members, even if many or most do not intend to join.

B *Membership and Accession*

1 PTAs

Two questions are of interest here: (i) who can accede to a PTA and (ii) under what conditions will accession take place? One would think that Article XXIV of GATT (like Article V of GATS) is a discipline to be observed by WTO members only. Article XXIV.5 reads:

> Accordingly, the provisions of this Agreement shall not prevent, *as between the territories of contracting parties*, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area. (emphasis added).

[15] Agreement on Government Procurement, WTO Doc. GPA/W/297, 11 December 2006.

[16] Indeed, as we will develop in more detail later in this article, approval of a PA implies that it becomes impossible to raise legal challenges against it, whereas the de facto non-approval of PTAs as a result of the advent of the 2006 Transparency Mechanism means that PTA members always run the risk of a challenge before a WTO panel.

In this vein, a WTO member, to the extent that it grants an advantage to a non-WTO member by signing a PTA, would have to automatically and unconditionally extend it to all WTO members by virtue of Article I of GATT. Yet practice has developed in a different way.[17] WTO members, irrespective whether they enjoy developed, or developing, country status, have always notified the CRTA and/or the Committee on Trade and Development of their PTAs, including those involving non-WTO members.[18]

The relevant statutes do not provide for a minimum number of signatories that must exist for a PTA to be formed. Thus, two countries suffice, and, in practice, many PTAs have two signatories only. The WTO statutes are also silent regarding the conditions of subsequent accessions to a PTA. There is no right to accede to a PTA even if aspiring members are willing to match (or exceed) the liberalization effort of the incumbents – accession depends solely on the incumbents. As a result, PTAs are, in principle, closed clubs. The absence of 'open regionalism' is a quintessential dimension of PTAs that makes them stumbling blocks for multilateralism in the eyes of some analysts.[19]

2 PAs

The relevant WTO statutes do not provide for a minimum number of WTO members that must agree to participate for a PA to be launched. The term 'plurilateral' would indicate more than two WTO members, but how many more members are needed for an agreement to be called plurilateral is up to the membership to determine. The same is true for accession – there are no general provisions in the WTO defining the criteria for accession to a PA. The terms for accession to the Annex 4 agreements included at the end of the Uruguay Round are spelled out in each PA separately (Article XII.3 of the WTO Agreement). For example, Article XXIV.2 of the GPA reads:

> Any government which is a Member of the WTO, or prior to the date of entry into force of the WTO Agreement which is a contracting party to GATT 1947, and which is not a Party to this Agreement may accede to this Agreement on terms to be agreed between that government and the Parties. Accession shall take place by deposit with the Director-General of the WTO of an instrument of accession *which states the terms so agreed*. The Agreement shall enter into force for an acceding government on the 30th day following the date of its accession to the Agreement. (emphasis added)

Consequently, the terms of accession to a plurilateral agreement are determined by the contractual arrangement between incumbents and the new kid on the block.

[17] Practice has arguably evolved in a way that violates the letter of WTO law as WTO members that sign PTAs with non-WTO members do not have to automatically and unconditionally extend benefits to all other WTO members (assuming of course that they satisfy the statutory conditions for establishing a PTA).

[18] If one of the members of the PTA is a developed country, the PTA will be notified to the CRTA, whereas if they are both developing countries, it will go to the Committe on Trade and Development. EC–CARIFORUM is an example of the former (Bahamas was part of the agreement but not a WTO member), and Ukraine–Uzbekistan is an example of the latter. MERCOSUR involves developing countries only and yet, probably because of the size of the Brazilian market, it had to be notified to both committees.

[19] E.g., Bhagwati and Panagariya, 'Preferential Trading Areas and Multilateralism: Strangers, Friends, or Foes?', in J. Bhagwati, P. Krishna and A. Panagariya (eds), *Trading Blocs* (1999). Many PTAs are closed shops in that they do not have accession provisions, or, if they do, membership is limited to countries from a given geographic area.

There are no *ex ante* general conditions that, if met, would automatically lead to accession; those aspiring to join a PA cannot do so until they have satisfied all requests of the incumbents. Accession, in other words, is a matter of negotiation between the 'ins' and the 'outs'. That said, the language on accession in the GPA makes clear that any WTO member can join. This is quite different from the situation prevailing for PTAs.[20]

Practice does not shed any additional light on these terms. Armenia and Chinese Taipei acceded to the GPA in 2011 and 2009, respectively, but it is difficult to compare the terms and conditions under which they joined with those of the incumbents. The key point is that accession to PAs will not occur when pre-defined, non-discriminatory terms and conditions have been met by aspiring members but, rather, upon satisfaction of conditions unilaterally imposed by the incumbents. They may seek to impose a heavier price than what they paid in order to extend admittance to the club so that WTO members seeking to join a PA might find the door closed.

C *Transparency*

1 PTAs

Both GATT and GATS contain provisions relating to transparency and multilateral surveillance of PTAs. Countries intending to form, join or modify a PTA must notify this to the WTO and make available relevant information requested by WTO members. Although CRTA efforts to determine the consistency of the agreement with multilateral rules are not effective – indeed, as already mentioned, as of 2006 there has been no more discussion on the legal consistency of a notified PTA with the multilateral rules – the process does generate information as a result of the obligation on members to inform the WTO Secretariat of newly launched negotiations as well as newly signed PTAs. Notified PTAs are considered on the basis of a factual presentation by the WTO Secretariat, which is to be concluded within one year of notification. WTO members may ask questions or make comments concerning factual presentations of PTAs. The implementation of the liberalization commitments under the PTA should be notified to the WTO Secretariat.

The transparency mechanism for PTAs may help move the balance of assessments of PTAs back towards what was intended by the drafters of GATT – *ex ante* review and engagement by the collective membership on the design of a PTA, as opposed to what gradually emerged over time – ineffectual *ex post* assessments. However, the track record to date suggests that multilateral scrutiny is not an effective source of discipline on PTAs. The transparency mechanism does not have any teeth, and it was clear from the deliberations that preceded the creation of the mechanism that many WTO members do not intend to use it as a means of exerting greater pressure on countries to abide by the rules. The fact that the process involves a 'consideration' of a PTA as opposed to an 'examination' is revealing in this regard.

[20] Note that only WTO members can accede to a PA, whereas, as noted, WTO members have concluded PTAs with non-WTO members.

2 PAs

There is no analogue to the CRTA for PAs. Transparency is ensured through the process of notification to the General Council and the need for the Council to approve any PA that is brought forward. As decisions to accept a PA are taken on the basis of consensus, all WTO members have the opportunity to scrutinize the terms of a PA. This *ex ante* approval mechanism differentiates PAs from PTAs – which, as already mentioned, effectively are not subject to *ex ante* approval. Moreover, if approved, a PA will be associated with the establishment of the types of WTO bodies that assist members in the implementation of agreements, such as a committee, with regular (annual) reporting on activities to the Council and documentation that is open to all WTO members. As noted earlier, the approval process has important legal repercussions: whereas challenges against PTAs are possible, challenges against approved PAs are legally impossible.

D *Dispute Adjudication*

1 PTAs

Disputes between partners in a PTA that are also WTO members can, in principle, be solved in either the PTA forum or before the WTO if the matter is subject to WTO disciplines. It is possible that the same dispute may be raised both in the PTA forum and before the WTO. In one WTO dispute so far, *Argentina – Poultry Antidumping Duties*, Argentina argued that Brazil was precluded from submitting the dispute to a WTO panel since the very same dispute had already been adjudicated by a MERCOSUR panel.[21] The WTO panel dismissed Argentina's argument because, *inter alia*, in its view, Article 3.2 of the DSU did not require panels to rule in any particular way and thus need not conform to decisions by other adjudicating fora.[22]

Some PTAs require disputes to be addressed through PTA-specific mechanisms. Thus, NAFTA provides that for certain kinds of disputes (for instance, environmental disputes) that in principle could be subject to both NAFTA and WTO proceedings, the complainant is required to use NAFTA facilities exclusively.[23] Submitting a dispute to the PTA forum will deprive the WTO judge from 'completing' the original contract through case law interpretation and will eviscerate the relevance of the WTO dispute settlement system in a more general manner.

Barbara Koremenos shows that roughly half of all existing PTAs contain dispute settlement rules.[24] While many are quite inactive in settling disputes, countries may find it more useful/appropriate in the future to submit disputes to a PTA forum. As the coverage of PTAs extends further beyond the WTO, this becomes more likely, as the

[21] WTO, *Argentina – Definitive Anti-Dumping Duties from Brazil – Report of the Panel*, WT/DS241/R, 22 April 2003.

[22] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 1994, 1869 UNTS 401.

[23] North American Free Trade Agreement 1992, 32 ILM 289, 605 (1993).

[24] Koremenos, 'If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?', 36 *Journal of Legal Studies* (2007) 189, at 194ff.

DSU will not be applicable. There is, therefore, a strong likelihood of fragmentation in case law and in the interpretation of provisions as well as less transparency, which would then would arise if all disputes were addressed through a common dispute settlement mechanism.

2 PAs

A similar risk does not arise with PAs. Disputes under the GPA must be submitted to WTO panels (and eventually the Appellate Body). This is beneficial for the development of the legal regime of the world trading system as judges can ensure consistency with other WTO case law in interpreting the meaning of the agreed contractual arrangement. It is a guarantee that case law regarding plurilaterals will develop harmoniously with case law regarding the multilateral WTO agreements. This aspect of adjudication is beneficial to the world trading system since the same concepts will often be used in plurilateral and multilateral agreements. Assigning the competence to adjudicate disputes coming under the purview of a PA to bodies other than WTO panels would result in less legal certainty and diverging case law.

3 Discussion

A *Commonalities and Discrepancies between PTAs and PAs*

The earlier discussion of the legal regime reveals that there are not only similarities but also differences between PTAs and PAs from a systemic perspective. One important commonality is that both can be non-MFN. Both PTAs and PAs will be negotiated because there might be concerns about free-riding, and it is feasible (legal) to exclude non-parties. If exclusion is not possible, a critical mass approach will need to be pursued, with the outcome applied on an MFN basis (such as investment treaty arbitration or sector-specific tariff elimination agreements). PTAs and PAs are likely to involve discrimination and can give rise to trade diversion.[25]

Another common element is that both instruments involve binding commitments that are enforceable. Neither Article XXIV of GATT (or Article V of GATS) nor the various provisions regulating PAs discuss this point explicitly, and, yet, unless we understand these provisions as legally enforceable, they become senseless. Why bother reviewing a PA or PTA that contains only best endeavour provisions? However, another commonality is that neither is a very effective instrument to address the major market access issues that have been a key source of the deadlock in the Doha Round – that is, the fact that at the end of the day large trading powers want more liberalization in the areas of agricultural trade policies and non-agricultural market access to allow them to take a proposed deal to their legislatures. A situation where

[25] As has long been noted in the literature on PTAs, diversion effects often will be a political precondition (driver) for a PTA. See A. Hirschman, *Essays in Trespassing* (1981) for the basic insight, and Grossman and Helpman, 'The Politics of Free Trade Agreements', 85 *American Economic Review* (1995) 667, at 672ff, for a formal analysis.

large players all want to see more on the 'market access table' can only be addressed very partially by shifting the focus to PTAs or to PAs – what is needed is to agree on a negotiating set that has enough to interest the major powers.

PAs differ from PTAs in many respects, and it is important to recognize that the two mechanisms are by no means perfect substitutes, although they could, assuming certain contingencies, be alternative instruments to achieve the same goal. PTAs will often have as a major objective the integration of the markets of the participating countries on an explicitly discriminatory basis – something that is recognized and accepted by all WTO members. This is not something that PAs are an appropriate vehicle for, since the potential for subsequent accessions is explicitly acknowledged.[26]

PAs ensure greater transparency, a much closer 'connection' with day-to-day WTO activities and processes, and greater coherence when it comes to case law/dispute settlement. An implication is that PAs will impose more of a burden on the WTO Secretariat than PTAs – that is, they are associated with administrative costs for the WTO. This may be one reason why, in contrast to PTAs, PAs must be approved by the WTO membership, whereas the only source of potential discipline on PTAs is the DSU. However, as this has not been used to date, multilateral disciplines on PTAs, in practice, are much weaker than those on PAs.

PAs also differ from PTAs in that the former have been, and most likely will be, (much) narrower in scope. A PTA will usually cover many policy areas, ranging from trade in goods and services to investment, intellectual property rights and development assistance and other forms of (often 'soft law') cooperation. Recall that, unless all trade is substantially covered, PTA partners might see their agreement challenged before a WTO panel. The condition imposed on WTO members that PTAs cover substantially all trade (have substantial sectoral coverage in the case of services) is intended to ensure that a PTA is not used as a mechanism to engage in selective discrimination for just a few products or a specific sector. Although there have been only a few cases contesting the consistency of a PTA with the multilateral rules, one reason for this is that in practice WTO members have designed PTAs to have broad sectoral coverage.

In contrast to a PTA, a PA may deal with just one issue. If approved by the membership, it is not open to challenge under the DSU as a PTA may be. Of course, the chosen issue may have many dimensions and cover many types of activities, as is the case with procurement, but it need not. The agreements on dairy and bovine meat are examples of very narrow product-specific agreements, while the PA on civil aircraft deals with a specific sector. A sector-specific PA is an example of a deal that the rules written down in Article XXIV of GATT and Article V of GATS were designed to preclude. Clearly, a PA that is designed to extend narrowly defined market access concessions only to those WTO members who reciprocate will imply a blatant undercutting of the MFN rule and a shift to a world where small countries without large markets and the ability to affect their terms of trade could end up being excluded from the benefits of (reciprocal)

[26] As noted previously, each PA defines the applicable accession modalities and procedures. There is no explicit requirement in the WTO that states that the PAs be open to any WTO member. Art. XII.3 of the WTO Agreement simply states that '[a]ccession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement'.

market openings by a group of countries. Such PAs, therefore, can be expected to be rejected by those who are excluded from (or simply decided not to participate in) the PA. Moreover, if the potential club members go ahead and conclude such a PA outside the WTO that undercuts existing WTO commitments, they can – and presumably will – be taken to court in the WTO for violation of the MFN rule.

PAs may deal with issues that are already subject to WTO disciplines or which cover matters that are not covered by the WTO. It would appear that fewer concerns are raised by PAs dealing with new issues than subjects that are already covered by the WTO. The GPA stayed a PA after the Uruguay Round because procurement is explicitly excluded from the reach of Article III of GATT (national treatment) and Article XIII.1 of GATS – although, in contrast to the GATT, GATS calls for negotiations on the procurement of services to be launched two years after the entry into force of the agreement (that is, 1997).[27] The GPA precedent suggests that one rationale or function of PAs could be as an instrument to allow WTO members to deal with issues that are not (yet) covered by the WTO – any disciplines that are agreed among a subset of countries will not undercut existing commitments as there are none. This is not the case for PAs dealing with subjects that are already covered by the WTO. An example is the recent suggestion by some countries to negotiate PAs on services or on trade facilitation. In such instances, a PA may undercut the MFN rule insofar as signatories apply commitments on a discriminatory basis. While this is detrimental to non-signatories, the alternative to a PA may be a PTA. In the case of services, a PTA is a feasible option; in the case of other topics, it may not be. If a PTA is not a feasible alternative, countries may pursue cooperation outside the WTO. In assessing the implications of a potential or proposed PA, it is therefore necessary to consider whether PTAs are an alternative and, more generally, an outside option for the countries that are interested in cooperating in a PA. Any discrimination that is associated with a PA will also arise if the outside option is chosen. However, a PA will have systemic benefits that a PTA does not – including greater transparency and inclusiveness (the prospect of eventual accession if countries decide to join at a future date).

The fact that PAs can be adopted as an Annex 4 agreement exclusively by consensus (after they have been negotiated, that is, and once their content has been established) and that participation is voluntary (whatever disciplines are negotiated only apply to signatories) would appear to offer substantial assurance to WTO members that they have little to fear from efforts by some countries to negotiate PAs. Why are they such a sensitive issue then? A number of arguments have been put forward by analysts and governments about why the PA approach should be opposed. We revert to this discussion in the sections that follow.

B Arguments against PAs

A major advantage of continued efforts to agree to multilateral disciplines that apply in principle to all members – even if 'special and differential treatment' provisions

[27] Such talks have been taking place in the working party on the GATS rules since 1995, but no progress has been made on the subject – leaving the GPA as the only mechanism in the WTO dealing with the procurement of services (as well as goods).

imply that some countries will be exempted from implementation for some time – is that all countries have a say in what the applicable rules should be for a given issue.[28] An objection to PAs that has been made by India in the WTO discussions and echoed by Peter Sutherland and his colleagues is that this could open the door to agreements among subsets of countries on controversial issues such as labour or environmental standards.[29] Greater use of PAs will result in a multi-tier system with differentiated commitments and, thus, some erosion of the MFN principle – as club members would have the right to restrict benefits to other members. If PAs address areas not covered by the current WTO mandate, erosion of MFN is not an issue, although there will be a 'precedent-setting effect'. If PAs deal with matters covered by the WTO and entail preferential improvements in market access commitments, then the MFN principle will unavoidably be eroded. MFN will become conditional – that is, only those making the commitments will profit from it.

However, existing WTO disciplines provide assurances that efforts to incorporate new PAs on controversial issues or that result in the erosion of MFN can be blocked. Thus, if a PA were to involve signatories preferentially lowering tariffs, or removing market access restrictions in services sectors where commitments have been made under GATS or providing preferential treatment in other areas that are subject to WTO rules – for example, exempting a country from the application of anti-dumping duties – and so forth, the PA can always be rejected by the WTO membership. The high threshold for approval of any new PA guarantees that WTO members have the ability to block PAs that are deemed to be against the interests of non-signatories.

Second, PAs will define the rules of the game in a specific area. Robert Wolfe notes that any PA will invariably include the Organisation of Economic Co-operation and Development (OECD) member countries that may already have achieved much of whatever level of cooperation-cum-discipline is agreed for an issue and that many non-OECD countries are not going to have the capacity to participate in the negotiations that will set a precedent.[30] PAs are likely to reflect the interests and current practices of the initial signatories, which may not be appropriate for all countries. Capacity constraints and resulting non-participation by developing countries in a negotiation makes it less likely that an agreement will address issues that are of primary concern to low-income economies. Clubs will define the rules of the game in an area that will be difficult to change if and when the initial non-signatories decide to participate. Experience illustrates that it is very difficult to amend (renegotiate) disciplines, so that a plurilateral approach may well become analogous to the *acquis communautaire* for prospective members of the EU – that is, non-negotiable.

Thus, even if countries opt out, there may be a first mover's advantage that should not be under-estimated – in practice, the advantage may be in favour of OECD countries and major emerging markets that have the capacity to engage effectively on the

[28] See, e.g., Wolfe, 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor', 12(4) *JIEL* (2009) 835, at 840ff, for a discussion of the objections that can be raised against PAs.

[29] Peter Sutherland *et al.*, Consultative Board to the Director-General, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004).

[30] *Ibid.*, at 840ff.

substance of the proposed rules.[31] While this may be true, the presumption that PAs will be dominated by large OECD countries such as the USA may not necessarily be correct. PAs also offer a mechanism that a broad set of WTO members could use to move forward in an area where one of the large WTO members is not willing or able to participate. A PA that centres on operationalizing 100 per cent duty-free, quota-free access for least developed countries (LDCs) is a potential example – something that is currently not feasible for the USA to agree to but that has already been implemented by many other countries and where greater cooperation on issues such as rules of origin among these countries could enhance the benefits for LDCs.

Third, a PA approach may result in a long-term bifurcation in the WTO membership, splitting 'insiders' from 'outsiders'. This was the pattern that emerged during the GATT years, with very few countries subsequently joining the Tokyo Round codes after their initial negotiation. If so, the plurilateral approach would move the WTO towards a two-track regime with subsets of countries (clubs) playing in their own sandbox. Many developing countries have argued that this is contrary to the basic character of the WTO and conflicts with the consensus-based approach that has historically been the norm.[32] In practice, much will depend on the substantive content of a PA and the intent of those countries that agree to negotiate a PA. Given the great heterogeneity in levels of development, social preferences, endowments and so forth that prevails in the WTO, it is inevitable that a PA might address issues that are not seen to be priorities for some (many) WTO members.

This is arguably a good reason to have the PA option in the first place, as it allows countries to cooperate on a given policy area. However, there is also the possibility that a group of countries may seek to negotiate a PA with the strategic objective of excluding others. Reports suggest that in the case of the trade in service agreement (TISA) talks on services, some of the participants have not wanted to include countries that they deem to be opposed to pursuing further liberalization of services markets. If the club members end up agreeing to disciplines that are unacceptable to countries that are not part of the negotiations/agreement (for example, by including provisions that greatly circumscribe the scope for state-owned enterprises to operate in specific sectors), the question then is whether a PA would be worse from a global welfare/multilateral system perspective than if these countries concluded a PTA. A world in which there are many PTAs that deal differently with a specific subject area could well be worse for global welfare (efficiency) than one in which the issue is addressed through a PA.[33] Of course, much depends here on the counter-factual – whether an issue is addressed in PTAs and whether the weight that is accorded by the WTO membership

[31] This has been emphasized by the non-governmental organization community. See, e.g., Green and Melamed, *Four Arguments against a Plurilateral Investment Agreement in the WTO*, Paper on behalf of CAFOD, Christian Aid, Oxfam, Action Aid and World Development Movement (November 2003).

[32] Bangladesh *et al.*, Singapore Issues: The Way Forward, Joint Communication from Bangladesh, Botswana, China, Cuba, Egypt, India, Indonesia, Kenya, Malaysia, Nigeria, Philippines, Tanzania, Uganda, Venezuela, Zambia and Zimbabwe, WTO Doc. WT/GC/W/522, 12 December 2003.

[33] This need not be the case, as differences in preferences and circumstances may imply that it is more efficient for sets of countries to adopt different rules of the game – i.e., 'one size fits all' is not the first best solution.

on maintaining a WTO does not allow for additional distinctions across its membership even if this generates less in the way of overall welfare gains (irrespective of their distribution).

Fourth, PAs may have implications for (constraining) the use of alternative approaches to cooperate on an issue area. This would only apply to situations where the focus is on regulatory types of issues. One such alternative is 'soft law' forms of cooperation – mechanisms that encourage learning through regular interactions of relevant policy makers and stakeholders and monitoring of the impacts of policies and their effectiveness in attaining the stated objectives. A characteristic of PAs is that they are binding – they can be enforced through the DSU. This is an important reason why they are attractive to *demandeurs*. If a binding set of rules was not the objective, use could be made of alternative fora to provide an institutional framework for cooperation in a specific area – there is no need to go to the WTO. Depending on the issue, a good case may exist for a non-binding approach to cooperation. However, it is unclear why a PA would preclude countries from pursuing such forms of cooperation.

Fifth, PAs will impose additional costs on the rest of the WTO membership by utilizing the WTO 'infrastructure' – including operation of a committee, making use of the WTO facilities, potential invocation of the DSU, calling on the Secretariat for support, and so on. The fact that the operation of a PA is centred in the WTO, as opposed to occurring outside it, is a positive feature, but it does come with additional direct costs as well as potential opportunity costs, given the limited Secretariat resources. There is a straightforward solution to this problem. Signatories can be required to provide additional contributions to the WTO in order to cover the cost of implementing and administering PAs. They would need to incur these costs in any event if the PTA route is chosen instead, assuming that is feasible, or through another form of cooperation if it is not (for example, if the issue involves regulatory cooperation). This might be particularly important since PAs could extend to areas on which there is no embedded expertise in the WTO Secretariat. Assuming unwillingness to outsource the servicing of the PAs, the WTO will need to be provided with additional expertise in the areas covered.

Finally, moving down the PA track may imply that countries give up negotiating chips that could be used to obtain concessions in other areas in a multilateral negotiation. The fundamental premise underlying the single undertaking is that it permits issue linkage: Country A can get something it wants by giving up something that Country B wants, and the trade may involve subjects that have nothing to do with each other. If PAs are negotiated for specific issues, the scope for such linkage may decline. Much depends here on the subject matter of the potential PA – that is, contracting costs.[34] If it does not offer much in the way of negotiating leverage for the

[34] See H. Horn and P.C. Mavroidis, *MEAs in the WTO: Silence Speaks Volumes*, European University Institute mimeo (2013), for an analysis of the conditions under which separate agreements dominate a broader 'single undertaking' agreement that encompasses a variety of issue linkages. Given uncertainty regarding the overall size of the 'cake' that is defined by an agreement that spans many issue areas, and the costs associated with the negotiations, including the opportunity costs of delay, there may be good reason for governments to pursue separate agreements as opposed to big bang package deals where everything is conditional on everything else.

countries that are involved – that is, nobody is inclined to 'pay' much, if anything, for a deal – the 'linkage downside' will be small. The absence of linkage potential might, under some circumstances, act as incentive to join the PA in the first place if it reduces the opportunity cost of participation. Of course, there is no presumption that this will be the case, but the countries concerned will always have the option of not participating in the PA.

On the other hand, absence of linkage might prove a blessing in disguise. In an earlier volume, we criticized arguments for linking disciplines on competition law to tariff or other market access concessions.[35] We feared that issues of paramount importance for the functioning of internal markets could be treated in a haphazard manner in the name of satisfying exporters' requests. Negotiators, by narrowing down the scope of their exercise to one negotiating objective, will strive, other things equal, towards addressing the substantive issues that arise in that area.

4 Supporting Greater Use of PAs

Some of the foregoing concerns and arguments that have been raised regarding the potential effects of PAs on the multilateral trading system are compelling; others are not. For the reasons discussed earlier and in light of the heterogeneity of the WTO membership, we take the view that it would be beneficial to allow for more 'variable geometry' to be pursued under the umbrella of the WTO. This is preferable to a situation where countries are pushed into ever greater reliance on PTAs – which effectively escape multilateral disciplines – or are induced to engage in cooperation outside the WTO (as in the case of the Anti-Counterfeiting Trade Agreement negotiations).[36]

We should note at this point that even the EU, a regime with arguably substantially greater homogeneity, allows for the establishment of PAs across a sub-set of its membership, the most notorious being the European Monetary Union (EMU). Besides the EMU, enhanced cooperation agreements (ECA) are possible for a sub-set of the EU membership (Article 20 of the Treaty on European Union [TEU]).[37] Although practice has been scarce so far, many believe that in the future this could be an instrument that could propel further European integration.[38] As Massimo Bordignon and Sandro Brusco observe, 'heterogeneity among EU members has become so large that it is difficult to find common policies beneficial to all countries'.[39] They show that when centralization is not politically feasible sub-union formation could be optimal if it takes into account the utility of excluded countries. If this is true for the EU, it is even more

[35] Hoekman and Mavroidis, 'Competition, Competition Policy and the GATT', 17 *TWE* (1994) 121, at 126ff.

[36] Anti-Counterfeiting Trade Agreement, October 2011.

[37] Treaty on European Union (TEU) [2010] OJ C83/13.

[38] E.g., R. Baldwin *et al.*, *Nice Try: Should the Treaty of Nice Be Ratified?* (2001); Harstad, 'Flexible Integration? Mandatory and Minimum Participation Rules', 108(4) *Scandinavian Journal of Economics* (2006) 683, at 688ff.

[39] Bordignon and Brusco, 'On Enhanced Cooperation', 90 *Journal of Public Economics* (2006) 2063, at 2068ff.

so for the WTO. There are some features of the EU ECA regime that, if adopted in the WTO, would strengthen the case for PAs:[40]

i. Article 20 of the TEU makes clear that ECA should aim to 'further the objectives of the Union, protect its interests and reinforce the integration process';
ii. Article 326.1 of the Treaty on the Functioning of the European Union (TFEU) underscores that ECAs shall not 'constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them';[41]
iii. Article 329 of the TFEU suggests that at least nine of the 27 EU member states must propose an ECA and
iv. Article 328 of the TFEU explicitly states that ECAs should be open to all member states that can demonstrate that they have met the requirements embedded in the authorizing (ECA) decision.[42]

Providing for a quorum, ensuring that PAs will be in line with the objectives of the WTO, and agreeing *ex ante* to submit to arbitration/dispute adjudication disagreements as to whether accession requirements have been met could be usefully implemented in the current WTO legislative framework. What is needed are clear *ex ante* rules on PAs that ensure that such agreements are not vehicles for some countries to escape their general or specific WTO obligations and that the interests of small/poor countries are protected.

Robert Lawrence discusses a number of criteria that would help ensure that what he calls the club-of-clubs option is facilitated while safeguarding the interests of those that are not interested in participating.[43] He suggests that PAs be restricted to subjects that are clearly trade related; that any new PA be open to all WTO members in the negotiation stage – that is, participation in the development of rules should not be limited to likely signatories and that PA members be required to use the DSU to settle disputes, with eventual retaliation being restricted to the area covered by the agreement (as is the case under the GPA).

The DSU is presumably an important reason why countries would want to bring a PA to the WTO in the first place. The 'open to all *ex ante*' norm may be problematical, however, in that it assumes that participation will be in good faith. However, what happens if countries stonewall and seek to block progress on an issue by a majority of participants? WTO members that have no intention to participate might behave 'strategically' and try to raise the costs for those that are eager to establish new rules. Some countries engaged in the TISA talks have indicated that they are not seeking to pull in countries that have shown very limited interest in making substantial liberalization

[40] Cantore, 'We're One, But We're Not the Same: Enhanced Cooperation and the Tension between Unity and Asymmetry in the EU', 3 *Perspectives on Federalism* (2011) 3, at 3ff, provides an excellent overview of the EU regime.

[41] Treaty on the Functioning of the European Union, as adopted by the Treaty of Lisbon (TFEU) [2010] OJ C83/49.

[42] *Ibid.*, at 8ff, notes there are features of the enhanced cooperation agreements that cannot find application in the WTO regime. For example, the 'no veto – no exclusion' regime is administered centrally by the European Commission. This is not – and will not be – the case in the current WTO regime.

[43] Lawrence, *supra* note 5, at 28ff.

commitments in the course of the Doha negotiations. This scenario suggests that an 'open access' criterion for the initial negotiation phase of a PA should be tempered by recognition and acceptance that at some point a PA negotiation must be limited to those countries that are serious about making commitments on a specific matter.

As noted, open access in the sense that any PA, once negotiated, allows for accession by any WTO member is not explicitly required in Article X.9. Instead, accession provisions are defined in the individual PAs. It would be desirable to agree explicitly that 'open access' defined in this way be a precondition for approval of any PA. Other criteria might be considered as well, for example, prohibiting incumbents from ratcheting up the entry price for latecomers and making this enforceable through binding arbitration if contested.

In practice, not all countries will be able to engage on an equal footing in the negotiation of a PA. There are major differences in capacities to engage on regulatory matters and the ability to participate in a fully informed way. Some governments may find it difficult to determine the 'return' to applying a proposed rule (for example, the direct administrative costs or the size – and perhaps even the sign – of the net economic impact of implementing a proposed set of disciplines). A lack of capacity and human resources is one reason why many countries were not keen to negotiate on the Singapore issues. Moving to a plurilateral approach in defining new rules for a subset of WTO members will not alleviate capacity constraints. However, capacity constraints are general – they apply as much to MFN negotiations as they do to PAs.[44] Given the existence of capacity constraints, opportunity cost considerations become important as well. Countries will presumably allocate scarce resources to issue areas where they perceive the greatest potential for gains from cooperation.

LDCs are likely to be among the least able to engage in PA talks that focus on regulatory issues or matters that are not covered by the WTO. Whatever the subject of a PA, consideration could be given to extending whatever is negotiated among a club of WTO members to all LDCs on a non-reciprocal basis. This would help reduce the extent of any discrimination, be one way to give meaning to the LDC waiver and ensure that PAs have a development dimension. Of course, the value of such action will depend on the capacity of the LDCs to benefit from (make use of) whatever is agreed among the PA members. In practice, even if a PA opens up market access opportunities for signatories, LDCs may not have the capacity to benefit, especially if a precondition is satisfying specific minimum standards. This suggests that to be effective any PA should include an aid-for-trade component – mechanisms to assist the LDCs improve their standards, regulations, and so on to the level that is required to benefit from the PA. Such mechanisms will need to be tailored to address whatever the associated capacity-building needs are. One possibility would be to develop PA-specific 'platforms' that help LDCs, as well as other developing countries with an interest in acceding to the PA, to undertake diagnostic analysis, identify action plans and implement needed reforms

[44] There are mechanisms that can be used to address the issue, including delegation to an 'agent' that represents countries with limited capacity to engage in the negotiations. This can take the form of coalition formation and bundling of resources or it could involve bringing in technical expertise.

with funding and assistance from high-income PA signatories.[45] Including an operational aid for trade dimension in PAs could enhance the relevance of PAs for LDCs and other low-income countries and give them a development dimension.[46]

Another question is whether PAs should be permitted for any trade-related issue. One dimension of this idea is whether a distinction should be made between matters that are already subject to WTO disciplines (that is, the PA would be WTO+) as opposed to matters that are not (yet) subject to multilateral rules (that is, it is WTO-X).[47] If an issue area is already subject to the WTO, any PA will, by definition, result in greater fragmentation of the applicable rules, whether the focus of the PA is on disciplines for certain policies and/or involves signatories granting discriminatory access to each other. If the PA is WTO-X, it may be precedent setting but there is no issue of fragmentation or undercutting MFN as this rule does not apply. Given that an agreement on a WTO-X subject will need to be accepted by the WTO membership, there is no compelling reason why there would need to be restrictions on the types of WTO-X issues that might be addressed in a PA, beyond that they are 'trade related'.

This is not the case for WTO+ PAs. Here, a distinction can be made between WTO+ agreements that involve discriminatory market access concessions and PAs that involve regulatory commitments and cooperation. The former are more likely to be problematical from a trading system perspective for reasons discussed previously (they imply a targeted, narrow discrimination of the type that the rules on PTAs were intended to prevent). The latter may also be discriminatory, but any discrimination is more likely to be a side effect of whatever is jointly implemented – for example, harmonization of regulatory standards and practices. In such situations, there may be little scope for free-riding by other countries. An example would be a PA on trade facilitation that involves signatories committing to specific actions (such as risk assessment practices, collection and sharing of data on consignments) that ensures reciprocal 'green channel' treatment for goods. This regulation would imply better market access conditions for signatories, but it would be conditional on them having put in place an agreed set of procedures, having made the necessary policy reforms and investments and so on.

In sum, we would argue that if a PA involves regulatory cooperation/convergence for a policy area that is covered by the WTO (that is, is WTO+) or addresses a WTO-X issue, it is unlikely to have detrimental consequences for the trading system. However, if the PA involves discriminatory market access in an area that is covered by the WTO, it will matter whether the PA is a narrow/product-specific agreement or is broad based.

[45] See Hoekman and Mattoo, 'Liberalizing Trade in Services: Lessons from Regional and WTO Negotiations', 18 *International Negotiation* (2013) 131, at 136ff, for suggestions along these lines in the area of services trade and investment.

[46] Given that PTAs may be used by countries as a substitute for non-reciprocal generalized system of preferences-type programmes, PAs could also be conceived to be designed to advance specific development goals. E.g., a PA might aim to promote technical expertise at the micro-level in dealing with conformity assessment, customs cooperation and so on.

[47] Horn, Mavroidis and Sapir, *supra* note 12, at 1570ff, distinguish between WTO+ and WTO-X obligations in PTAs: the former cover matters that fall under the current mandate of the WTO but where commitments in the PTA context are more comprehensive (e.g., deeper than MFN tariff cuts); the latter refer to policy areas currently not addressed by the WTO (e.g., cooperation on macro-economic policies).

The former is likely to violate MFN and, thus, is likely to be precluded on that basis. The latter will also violate MFN. However, a broad-based agreement might also be pursued through a PTA. If this is a credible alternative to a PA, WTO members need to consider the benefits that will come with a PA approach relative to a PTA – including greater transparency, potential for accession and gradual multilateralization,[48] common dispute settlement and so on. The clearest example of such a trade-off is the current discussion on TISA. If signatories of a TISA make specific commitments in areas that they have excluded from the reach of GATS, there may be no violation of MFN.[49]

A *The Consensus Constraint*

A constraint in pursuing the plurilateral route is that the incorporation of a PA into the WTO requires unanimity ('exclusively by consensus'). Greater use of PAs arguably will require a relaxation of this rule.[50] Some are of the view that no such change is needed and that non-members should be comfortable with the terms of any PA that is tabled.[51] Recent discussions on a possible TISA suggest that consensus is likely to be a binding constraint on greater use of PAs. With the exception of product/sector-specific agreements that grant PA members discriminatory access to each other's markets, it is not clear that using the blocking option is in the interest of countries that do not have any intention of becoming a signatory to a proposed PA. This is because the counter-factual is not a critical mass MFN deal – the single undertaking with associated issue linkages or continued deadlock – that is, no action. More likely is that those states that are prevented from moving forward in a PA will pursue more PTAs/deeper PTAs (if feasible) or issue-specific agreements outside the WTO that address regulatory policies that are not covered by existing WTO disciplines.[52] In both scenarios, the WTO will become increasingly a set of 'minimum standards' – a global trade institution that establishes only certain baseline conditions.

Maintaining the strong consensus rule is arguably a recipe for inefficient outcomes. While presumably intended to ensure that any PA is consistent with multilateralism, it is arguably too strong a constraint. A rationale for the consensus rule may have been concern about countries putting forward subject areas simply because of the DSU or for 'strategic' reasons – for example, controversial issues such as labour standards. However, consensus is not needed to provide assurances that efforts to introduce PAs on controversial matters that are only weakly trade related can be blocked. Relaxing the consensus requirement – for example, through agreement that 'substantial coverage' of world trade or production is sufficient[53] or acceptance that a two-thirds

[48] One potential advantage of a PA is that the design of market access and national treatment commitments in the agreement is more likely to be consistent with (i.e., allow) 'docking' with GATS at a later time.

[49] Of course, the issue becomes moot insofar as specific commitments are applied on a MFN basis.

[50] Tijmes-Lhl, 'Consensus and Majority Voting in the WTO', 8 *WTR* (2009) 417, at 422ff.

[51] Lawrence, *supra* note 5, at 28ff.

[52] Or, for that matter, that build on WTO disciplines. The Anti-Counterfeiting Trade Agreement is an example.

[53] They suggest a minimum coverage of 40 per cent of world trade as opposed to the norm of 90 per cent, which empirically has defined the feasibility of critical mass agreements in the GATT/WTO. Hufbauer and Schott, *supra* note 6.

majority suffices – would still ensure that controversial issues can be rejected while removing the ability of a limited number of countries to block a PA that the majority of the WTO membership finds acceptable. Recall that the ECAs that are foreseen in the EU context only require participation by nine out of 27 member states in instances where consensus cannot be obtained on an issue.

By this, we do not want to 'push' PAs towards the realm of PTAs. We do like the idea of having Pareto-sanctioned PAs. What we are arguing here is that, as long as a representative sample of WTO members has sanctioned a PA, it should be allowed to enter into force. The modalities (for example, two-thirds majority or 'substantial coverage') should be discussed by the membership. In the same vein, we would like to see the following procedural rule imposed: WTO members who oppose a PA should explain the reasons for their opposition. Such procedural obligations would reduce the potential for 'tactical' opposition that aims to extract promises (side payments) in other areas, which could include all sorts of negative external effects. Finally, we support the arguments developed and advanced by Lawrence,[54] the World Economic Forum[55] and Peter Draper and Memory Dube,[56] who have suggested that a necessary condition for moving towards greater use of PAs is to address the concerns that have been expressed by WTO members. One way of doing this is to focus on negotiating upfront a 'code of conduct' for PAs to be negotiated under the umbrella of the WTO. Qualified majorities – as suggested earlier – could be incorporated as one modality and buttressed by other principles that any PA should embody for it to be acceptable, such as aid for trade.

A code of conduct could include, among other things, the underlying principles that (i) membership is voluntary; (ii) the subject of the plurilateral is a core trade-related issue; (iii) those participating in plurilateral negotiations should have the means, or be provided with the means as part of the agreement, to implement the outcomes; (iv) the issue under negotiation should enjoy substantial support from the WTO's membership and (v) the 'subsidiarity' principle should apply in order to minimize the intrusion of 'club rules' on national autonomy.

5 Conclusion

The apparent inability of WTO members 'to get to yes' in the Doha Round have led to numerous calls to revisit the single undertaking practice and consensus-based decision making. It is not clear that suggestions to move away from these norms would be effective in addressing the reasons for the Doha deadlock. The lack of progress in the Doha Round reflects the assessment of major players that what has emerged on the table is not of sufficient interest to them – it is not that a small group of small countries are holding up a deal. Trade agreements are self-enforcing treaties. If the large

[54] Lawrence, *supra* note 5, at 28ff.

[55] World Economic Forum, *A Plurilateral 'Club-of-Clubs' Approach to World Trade Organization Reform and New Issues*, Global Agenda Council on the Global Trade System and Foreign Direct Investment (2010).

[56] P. Draper and M. Dube, *Plurilaterals and the Multilateral Trading System*, E15 background paper (2013).

players do not see it in their interest to deal, no amount of fiddling with alternative institutional arrangements will make a difference. Thus, the role that PAs could play in moving forward subjects that have deadlocked the Doha Development Agenda is inherently limited. However, enabling even limited progress on specific policy areas and rule making should be welcomed.

PAs offer a mechanism for subsets of WTO members to move forward on issues of common concern, especially those that involve rule making in areas that do not have a major market-access dimension. An example is trade facilitation and logistics, where common standards and rules of the game that would lower trade costs would benefit all countries that agree to move forward, while not being very valuable from an issue linkage perspective – as most of the gains (and currently costs of non-action) accrue to the countries that would join the agreement. Eventually PAs could be multilateralized, and it is probably wise to insist on a clause to this effect to be inserted in each PA, ensuring that access will be on terms similar to those that the original signatories had to comply with. Viewed from this perspective, PAs could be the 'regulatory hothouse' for the WTO, the forum where PAs originally became multilateralized at a later stage.

A small digression is warranted here. As tariffs gradually become a non-issue for international trade relations, negotiators shift their attention to the negotiation of NTBs. We explained earlier why non-discrimination is ill-suited to guarantee market access with respect to NTBs. Recognition and/or harmonization, on the other hand – for example, the instruments that can effectively guarantee market access when NTBs are standing in the way – are for good reasons contracted across like-minded countries – that is, in between club members.[57] Deeper integration will inevitably occur within clubs, and if the WTO cannot build bridges with them its relevance can only decline. Deep integration is contracted now in PTAs, but it can also be contracted under the roof of PAs. The WTO should build its bridges with both and privilege PAs for all of the reasons mentioned earlier.

Absent the PA option, WTO members may be induced to pursue PTAs more intensively, which will be less inclusive (open) than PAs, or to engage in cooperation outside the WTO (if the issue is a WTO-X subject) in the process of replicating some of the WTO machinery (for example, transparency related; dispute settlement). For countries to have an incentive to negotiate a PA, there need to be policy spillovers – otherwise, there is no need for a binding deal that can be enforced through the DSU. The same is true of PTAs. To be meaningful, any PTA needs to involve binding commitments that can be enforced. An implication is that both PAs and PTAs will involve discrimination. If they did not, the countries involved could (and presumably would) apply whatever they negotiate on a MFN basis (that is, pursue a critical mass approach). It may well be that regulatory commitments that are implemented by PA members will also benefit non-members, but the focus of PA signatories – as is the case for those that conclude

[57] The theoretical case for this position is presented in Costinot, *supra* note 13. Evidence has been supplied by many. See, *inter alia*, Marchetti and Mavroidis, 'I Now Recognize You (and Only You) As Equal: An Anatomy of (Mutual) Recognition Agreements in the GATS', in I. Lianos and O. Odudu (eds), *Regulating Trade in Services in the EU and the WTO, Trust, Distrust, and Economic Integration* (2012) 415, at 420ff.

PTAs – presumably will be on internalizing spillovers that their policies (or lack of policies) create for each other. Any PA will define the rules of the game in a given policy area, with the associated benefits (and implementation costs) accruing primarily to signatories.

The need for explicit approval of a PA for it to be incorporated as an Annex 4 agreement provides a strong assurance that PAs that are considered to be detrimental to the interests of non-members can be rejected. In our view, ensuring that this assurance exists does not require consensus. It would still be guaranteed if the WTO membership moved towards a weaker majority rule for acceptance of new PAs. Any PA will define the rules for non-members down the road when and if they want to join, but the precedent-setting effects of the initial negotiation should not be overblown. Large countries will be able to negotiate terms – if incumbents do not demonstrate any flexibility in this regard, the end result will be that the benefits of the PA for signatories are reduced, as outsiders will not have an interest in joining. Accession discussions can be a useful trigger for the incumbents to reconsider the utility of specific provisions if this is tabled by prospective new members.

Adding an aid for trade dimension to PAs can help improve the relevance of PAs for LDCs and other low-income countries. As LDCs are less likely to participate in PA negotiations, granting them all of the benefits of what is agreed in the PA on a non-reciprocal basis would help to make PAs more inclusive. Whether a PA has a broad market access focus or is centred on rules regarding policies in a given area, it is likely that LDCs will need to improve their standards of regulation and bolster relevant implementing institutions. Dedicated mechanisms created as part of new PAs that provide assistance to LDCs and other low-income countries in establishing the preconditions for benefiting from them – or participating in the PA – would ensure that PAs have a development dimension and are not limited to simply satisfying the needs and interests of the signatories.