

Making plurilateral negotiations support the multilateral trading system

WTO Public Forum, Session #52, 30th September 2021

Questions from the audience (chat and email)

Q1: Jane Drake-Brockman, Adelaide University, Australia

So both speakers (H.M., S.R.) would agree that there is no legal constraint to adoption of a Reference Paper on Services Domestic Regulation via concerted autonomous additions to GATS schedules?

A1: SH- **Yes, I agree there is no legal constraint, as long as the schedules are technically sound.**

A1 HM- **The short answer is YES. The rules of the GATS allow Members to unilaterally improve commitments in their schedules through the legal procedure of “certification”. The Council for Trade in services adopted (by consensus) procedures specifically for that purpose (see document S/L/84 adopted on 14 April 2000). These procedures have been already used for that purpose. There is no legal constraint on a group of Members to do the same thing in a coordinated manner. What could be done individually could certainly be done collectively.**

A1 PM - **Going by the precedent of the GATS Reference Paper on basic telecommunications, it may be possible to adopt a Reference Paper on Services Domestic Regulation within the GATS architecture. Yet, it should not be overlooked that the telecommunications issue was specifically included in the GATS Annex on Negotiations on Basic Telecommunications, while there is no similar mandate for the Services-DR negotiations. How far outcomes on Services-DR can be incorporated into WTO members’ schedules and made enforceable as rules remains unclear. Modification of schedules should not become a way to amend the rules, even if done in an open manner on MFN basis.**

Q2: Khalid Alaamer, Permanent Mission of the Kingdom of Bahrain to the WTO

Regardless of how these plurilateral are shaped, do you think that they should all come under the auspices of the DSU or would some agreements be better off with their own dispute settlement?

A2 : SH- **If incorporated into schedules, the commitments are subject to the DSU. But there could be other situations when separate DS mechanisms would be more appropriate.**

A2 HM - **Once members parties to a plurilateral agreement make it legally enforceable inside the WTO framework, there would be no advantage in having multiple dispute settlement mechanisms. If such an agreement is outside the WTO, it would then need to have its own dispute settlement mechanism.**

A2 PM - **There is a threat of a fragmented dispute settlement system with different plurilaterals having different degrees of binding dispute settlement. If plurilaterals do take concrete shape and are embedded into the WTO framework, the participating members will have to decide which aspects of the agreement they wish to subject to binding dispute settlement. Given that the areas under plurilateral discussion are broadly regulatory areas, there is a good chance that members**

remain desirous of keeping certain aspects of the agreements outside the scope of dispute settlement. They may prefer to have consultative mechanisms instead.

Q3: Dr Achim Kampf, Civil Servant, Director (Regierungsdirektor), Germany Trade and Invest (Bund)
There are WTO-Rules concerning plurilateral agreements, no doubt. But on the other hand, the whole WTO-architecture is to be focused on a multilateral approach. Wouldn't it be sensible to reform Art 3 WTO-Convention to enable the WTO as a forum for plurilateral agreements?

A3: SH – **My personal perspective is that, in current circumstances, the WTO should be more flexible as regards accommodating plurilaterals, subject to a general set of conditions to address concerns such as those I mentioned in my talk. Achieving this might indeed involve some amendment to Art III and Art X.9 of the WTO Agreement. This seems an unrealistic ambition in the short term but there should at least be some initial discussion.**

A3: HM - **The multilateral approach never prohibited plurilateral negotiations that lead to multilaterally applied outcomes on an MFN basis. Allowing the long-standing practice to continue would not require amending Article III of the WTO Agreement. Even plurilateral outcomes that are not applied on an MFN basis are allowed through the amendment procedures of Article X of the WTO Agreement with the consent of the entire membership. What would be sensible, at the end of the day, would be to allow the negotiating function the kind of variable geometry of different negotiating modalities and processes while ensuring that the outcomes that would be consolidated into the treaty structure of the WTO do not adversely affect the rights of non-participants but rather expand such rights.**

A3: PM - **The WTO already provides a framework for plurilateral agreements in Articles II and III of the Marrakesh Agreement. However, Article III emphasises the role of the WTO as “the forum for negotiations among its Members concerning their multilateral trade relations”. Amending Article III to restructure the WTO as a forum more focussed on plurilateral agreements will not be desirable. While the need for a flexible approach and variable geometry is evident, such efforts should converge at the multilateral level. Making the WTO a “club of clubs” will strike at the core of the WTO’s foundation as a multilateral institution.**

Q4: Ronald Steenblik, IISD, Senior Fellow, previously OECD
The six-nation, Plurilateral Agreement on Climate Change, Trade and Sustainability (ACCTS), which would – among other things – liberalise trade in an agreed list of environmental goods, also for environmental services, and impose disciplines limiting their own use of subsidies for fossil fuels, will be applied on an MFN basis. What risk, if any, are there to developing countries of this kind of approach?

A4: SH - **WTO Members should in my view be free to adopt more open import regimes for environmental goods and services, even on a concerted basis, as long as this is MFN. They could similarly adopt domestic disciplines on their own use of subsidies for fossil fuels but in doing so might have to be attentive to any potential negative spillovers in terms of discrimination between and on trading partners. The term 'developing countries' as used in the WTO is extremely wide and it is difficult to generalise as to the risks, if any, to such a vastly differing array of economies.**

A4: HM - If a trade liberalization initiative is applied on an MFN basis, it would be difficult to see how it would carry risks to developing countries. The same goes for limiting fossil fuel subsidies. If a particular situation presents unforeseen adverse effects, it should be addressed on a case-by-case basis.

A4: PM- The ACCTS negotiations are taking place outside the WTO. The extent to which trade rules can play a role in combating climate change and improving sustainability is still not entirely clear. When issues such as reduction of tariffs on environmental goods and greater disciplines on certain categories of subsidies are made central to trade negotiations, there is a danger that they can impair the ability of developing countries to generate revenue and undertake developmental activities. The ACCTS negotiations, which include nations like Fiji, also show that dimensions of both development and vulnerability to climate change are going to be more interlinked in trade negotiations going forward. While trade policies can play a role, there cannot be a one-size-fits-all approach towards using trade as an instrument for promoting environmental sustainability and protection.

Q5: Susan Brown, Trade Expert, previously WTI Berne

Picking up on the transparency issues that were raised by Peter Draper and others, apparently draft texts have not released for e-commerce and investment facilitation negotiations (<https://eyeonglobaltransparency.net/2021/09/22/lack-of-transparency-at-wto-increases-key-draft-texts-given-restricted-status/>). Is this consistent with the “more-inclusive, sustainable and multi-stakeholder WTO” that you were suggesting “new plurilaterals” might enable?

A5: SH - I certainly agree that more transparency is needed , e.g. in the JSIs on E-com and IFD. This could be either at the WTO level and/or at the national level. National governments generally have the responsibility to consult/brief stakeholders in arriving at policy positions before engaging in inter-governmental negotiations. Having said that, I note that the more recent initiative on Trade and Environmental Sustainability Structured Discussions (TESSD) envisages direct engagement with relevant stakeholders and I take this as a positive development which might encourage others to follow in their footsteps in due course.

A5: HM - A 5: More transparency is always desirable. Having said that, the negotiating texts of the JSIs are readily available and circulated to all, including to non-participating Members. They are issued, however, as restricted documents and therefore not made available to the general public outside the WTO. This, of course, raises a transparency concern. However, treating negotiating documents as “restricted” has always been the practice in WTO negotiations, including throughout the Doha Round. That concern is not particular to plurilateral negotiations.

A5: PM- Transparency remains a concern. The consolidated negotiation texts are categorised as ‘restricted’ and initially circulated only with the members of the plurilateral JSIs. The convenors of the JSIs still mention that all WTO Members have access to the relevant documents through an online portal. The extent to which the WTO’s institutional resources are being used for facilitating the JSIs is also unclear.

Legend:

SH = Stuart Harbinson

HM = Hamid Mamdouh

PM = Pradeep Mehta

CSEND, Geneva, 14th October 2021