KING & SPALDING

King & Spalding LLP
5 Quai du Mont Blanc
1201 Geneva
Switzerland
Tel: +41 22 591 0800
www.kslaw.com

Hamid Mamdouh
Direct Dial: +41 22 591 0804
hmamdouh@kslaw.com

Plurilateral Negotiations and Outcomes in the WTO

16 April 2021

SUMMARY

1. In the context of WTO reform efforts, a discussion about the negotiating function **will have to be political in the first order**, guided by Members' views about the future direction of the Organization and how it should serve its "purpose" through its three vital functions: negotiations, dispute settlement and the deliberative/transparency functions.

2. **Clarifying existing rules,** however, should be a sound starting point for any reform effort. That involves clarifying the rules that govern negotiations and their outcomes to establish whether changes might be needed, and if so, where.

3. Existing rules make a **crucial distinction between "processes" and "outcomes"** of plurilateral negotiations.

4. A review of those rules leads to the following conclusions:

   a) As far as negotiating **processes** are concerned, current rules in the WTO Agreement and its Annexes provide flexibility to accommodate various negotiating configurations, approaches, and modalities. This feature is key for the future effectiveness of the negotiating function, given the extent of diversity among the 164 Members.

   b) A decision by all Members (by consensus or voting) to start a plurilateral negotiating process is not legally required.

   c) When it comes to **outcomes** of plurilateral negotiations, the WTO Agreement and its Annexes provide all necessary legal guarantees to ensure that plurilateral outcomes **do not adversely affect existing rights of non-participating Members**.

   d) **An insightful diagnostic review is necessary** of how the negotiations were conducted in the WTO over the past quarter of a century would reveal whether reform efforts should seek to change the rules, or the way they are understood and applied.

e) **The plurilateral approach to WTO negotiations remains a legally viable and useful tool** for various groups of Members to advance their interests consistent with the multilateral rulebook.

f) **In the end**, the success or failure of a negotiating process depends on several factors, but it should always start with a political vision for a balanced and well-packaged agenda with "trade-offs" across diverse interests that provide incentives for Members to gather around the negotiating table. WTO rules are made by Members and can be changed by Members. Moving beyond rules, the strategic discussion will be about what Members want from the system and how do they see the "WTO of the future" – a future in which the negotiating function must play a central role.

I. INTRODUCTION

5. A discussion has been long overdue among Members of the WTO regarding what is referred to generally as "plurilaterals". This is particularly timely as Members embark on a WTO reform effort that aims, among other things, at restoring the functionality of the WTO negotiating arm. While the discussion in that context will be of a predominantly political nature, guided by Members' aspirations for the WTO, it would be helpful to start the discussion by clarifying where the legal lines are drawn in current WTO rules.

6. This paper aims at clarifying current WTO rules on plurilaterals. It will not address Members' positions on the subject, nor will it address ongoing plurilateral negotiations in the WTO. It will also not cover plurilateral negotiations or agreements outside the framework of the WTO, as these are governed by separate WTO rules (Article XXIV of the GATT and Article V of the GATS).

7. As a first step in considering the legal framework for "plurilaterals" in the WTO, there is a need to make a clear distinction between **"processes"** and **"outcomes"** of plurilateral negotiations, particularly when it comes to legal questions. Such questions arise normally in relation to outcomes and how to consolidate the results of plurilateral negotiations into the legal architecture of the WTO. Such legal questions do not arise in relation to WTO negotiating processes. **There are no legal requirements in the WTO regarding how a negotiating process should be launched, conducted, or concluded.** While it may be politically desirable for WTO Members to take decisions by consensus in launching a negotiation, such action is not legally required by the WTO Agreement.

8. Some historic examples of association between collective decisions of Members and the launch of plurilateral negotiations could create the misperception that such decisions are legally required in all cases. Attention to the text of the WTO Agreement and reference to pertinent examples of Members' actions will clarify the matter.

9. For example, we recall that the consensus decisions taken in connection with plurilateral negotiations on telecommunications, financial services, and maritime transport at the end of the Uruguay Round were not legally required to continue the

negotiations, but rather to allow temporary deviations from certain Articles of the GATS. Specifically, to allow at the end of the negotiations (depending on the results) the listing of new MFN Exemptions post entry into force of the WTO Agreement (notwithstanding Article II and the Annex on MFN Exemptions) and to allow the modification or withdrawal of commitments without compensation (notwithstanding Article XXI). The legal bases for these deviations from GATS provisions are to be found in the three Annexes to the GATS relating to these negotiations.[1]After the WTO Agreement entered into force, such legal actions now take the form of waivers under Article IX of the WTO Agreement. However, at the time of concluding the UR, the WTO Agreement had not yet entered into force and waivers under Article IX were not an option. Therefore, an alternative legal solution was developed in the form of the Annexes, which, due to their legal nature (i.e., of equal legal status to the Agreement itself), required consensus decisions by all Participants of the UR, which are reflected in corresponding Ministerial Decisions adopted at the end of the Round[2].

10. Plurilateral negotiating processes in the WTO have always been open to any WTO member who wishes to participate. However, they raise in each case a range of political and substantive negotiating issues that need to be resolved, including critical mass, the risk of "free riding", and linkages with other negotiating interests across subjects. These are not “legal” questions but rather political bargaining issues for Members to resolve during negotiation. Such issues are critical in determining outcomes but are beyond the scope of this paper.

II. WTO NEGOTIATING PROCESSES

11. Plurilateral negotiating processes (involving a subset of the Membership and open to any member who wishes to participate) have been a standard feature of the functioning of the Multilateral Trading System since its creation (with the GATT 1947) and throughout its negotiating rounds. With the establishment of the WTO, the practice continued with the benefit of an improved legal and institutional infrastructure, particularly when taking place within the scope of an existing multilateral trade agreement (GATT or GATS) where the results are consolidated as new and improved commitments in the schedules of participating Members.

12. As mentioned above, while a consensus-based decision on negotiating initiatives may be politically desirable, it is nowhere found in WTO rules as a legal requirement. The Marrakesh Agreement establishing the WTO defines in Article III the functions of the Organization. In relation to the negotiating function, it states in paragraph 2 that:

> The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members concerning their multilateral trade relations,

[1] *See* SECOND ANNEX ON FINANCIAL SERVICES, ANNEX ON NEGOTIATIONS ON MARITIME TRANSPORT SERVICES AND, ANNEX ON NEGOTIATIONS ON BASIC TELECOMMUNICATIONS.
[2] *See* Decisions adopted by the FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS.

> **and a framework for the implementation of the results of such negotiations**, **as may be decided by the Ministerial Conference**. (emphasis added)

13. This provision distinguishes between **two types of scenarios**. The first involving matters that fall within the scope of existing Agreements contained in the Annexes to the WTO Agreement. The second, involves matters that are not yet dealt with under those Agreements. When it comes to "processes", in neither of these two situations is there a requirement for a collective decision by all Members for the start of a negotiation for the logical reason that, if the negotiations were multilateral, it would be agreed by consensus anyway. If, on the other hand, the negotiations were plurilateral, it would be a matter primarily for participating Members to decide on. Such logic has always been foreseen by explicit provisions as well as followed in practice. However, when it comes to "outcomes", this provision distinguishes between the two scenarios regarding the implementation of the results of the negotiations. On matters not covered by existing Agreements, there is an explicit requirement for a decision by the Ministerial Conference. Clearly, no such requirement applies to matters covered by existing Agreements.

14. Furthermore, plurilateral trade negotiations are explicitly recognized by Article XIX of the GATS (Negotiation of Specific Commitments) which states in paragraph 4 that:

> The process of progressive liberalisation shall be advanced in each such round through bilateral, **plurilateral** or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement. (emphasis added)

15. This provision, which directly calls on Members to engage in plurilateral negotiations, does not require non-participating Members to take part in deciding on the launch, conduct or conclusion of such negotiation. However, the GATS provides for the necessary legal guarantees and procedural tools to ensure that the outcomes of such plurilateral negotiations are consistent with the rules of the Agreement and do not affect existing rights of non-participants.

16. While such a plurilateral approach has often been used in market access negotiations, it has also been used, albeit to a lesser extent, in rulemaking. The development of a template on Regulatory Principles for Basic Telecommunications is a particularly relevant case in point. Such a template was developed by a group of negotiating participants and has been inscribed through further negotiations in the schedules of commitments of many Members.

17. In the case of the GATT, plurilateral negotiating processes have always proceeded in a similar manner. In the context of the Information Technology Agreement (ITA), for example, not a single decision was adopted by all Members to launch, conduct, or conclude the negotiations.

III. OUTCOMES OF PLURILATERAL NEGOTIATIONS AND THEIR LEGAL FORMS

18. Apart from the negotiating process itself, integrating a negotiated outcome into the legal architecture of the WTO is, of course, a different matter. Such integration must involve non-participants in various ways, depending on the situation, to ensure that outcomes do not prejudice existing rights of non-participants. In matters dealt with under existing covered Agreements in the Annexes to the WTO Agreement, a legal infrastructure is established in those Agreements which provides guidance for the integration of such outcomes. However, going beyond existing Agreements is a matter for the Ministerial Conference to decide, and could conceivably relate to an amendment to the WTO Agreement itself. Such matters would normally involve political considerations that go beyond legal questions.

19. The history of the WTO provides examples of plurilateral negotiations that successfully integrated their outcomes into the GATT and the GATS in the form of improved schedules with new commitments covering different types of obligations. The ITA outcome took the form of new tariff concessions consolidated in the schedules of participants. The Fourth and Fifth Protocols to the GATS on telecommunications and financial services, respectively consolidated new commitments on market access and national treatment as well as new rules on regulatory matters in these two sectors to the respective schedules of participating Members.

20. There are different types of such outcomes from plurilateral negotiating processes to which different legal procedures may apply. Outcomes can conceivably be divided into two groups:

A. Outcomes negotiated under existing multilateral Agreements

21. Outcomes of plurilateral negotiations under existing multilateral agreements in the WTO are those that can be consolidated in Members' schedules under the GATT and the GATS. In such situations, which are by no means exceptional in the history of the GATT and the WTO, **the negotiating processes are plurilateral while the outcomes are implemented multilaterally on an MFN basis**. This has been the case for the ITA under the GATT as well as other plurilateral negotiations under the GATS.

22. A Member's schedule of concessions under the GATT and schedule of commitments under the GATS are integral parts of the respective Agreements to which they are annexed. Article II of the GATT (Schedules of Concessions) state in paragraph 7 that:

> The Schedules annexed to this Agreement **are hereby made an integral part of part I of this Agreement.**

23. Article XX of the GATS (Schedules of Specific Commitments) states in paragraph 3 that:

> Schedules of specific commitments shall be annexed to this Agreement and **shall form an integral part thereof**. (emphasis added)

24. Accordingly, any new commitments to be consolidated in a Member's schedule, after fulfilling the necessary procedures to give them legal effect, would have to be

implemented in accordance with all other relevant provisions of the GATS, including Articles I (Scope and Definition), II (Most-Favoured Nation Treatment), III (Transparency), VI (Domestic Regulation) as well as Article XXI (Modification of Schedules).This also means that new commitments would be subject to Articles XIV (General Exceptions) and XIV bis (Security Exceptions) as well as all other institutional provisions in the Agreement.

25. This means that new commitments, which are negotiated pursuant to Part III of the GATS (Articles XVI (Market Access), XVII (National Treatment) and XVIII (Additional Commitments)) would only apply within the scope of the GATS, that is to "measures by Members affecting trade in services"[3], through the four modes of supply and on a most-favoured nation basis to the benefit of any other Member of the WTO, including non-participants in the plurilateral negotiations.

26. Such new commitments under part III of the GATS can only take the form of either bindings (in the form of "limitations") on market access and national treatment or, new obligations ("undertakings") regarding services related measures as "Additional Commitments". In relation to the latter, the Guidelines for the scheduling of commitments under the GATS state that:

> A Member may, in a given sector, make commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI and XVII. Such commitments can include, but are not limited to, undertakings with respect to qualifications, technical standards, licensing requirements or procedures, and other domestic regulations that are consistent with Article VI. **Additional commitments are expressed in the form of undertakings, not limitations.**[4] (emphasis added)

27. Accordingly, **such "Additional Commitments" could only take the form of new rules** adding to a Member's overall level of obligations. Additional Commitments can relate to any regulatory matter that falls within the scope of the GATS (measures affecting trade in services) to the extent the measures in question are not subject to scheduling as market access or national treatment limitations under Articles XVI (Market Access) and XVII (National Treatment), respectively. Of course, such new rules can only add to a Member's obligations under GATS. They cannot diminish such obligations or amend any of the existing provisions of the GATS, which can only be achieved through the rules and procedures in Article X (Amendments) of the WTO Agreement.

28. It is particularly important in this context to point out the distinction between new rules incorporated in GATS schedules as additional commitments, subject to certain parameters and consistent with the rules and procedures of the Agreement, on the one hand, and amendments of provisions of the WTO Agreement and its Annexes, as

[3] *See* Article I:1 of the GATS (Scope and Definition)
[4] *See* "GUIDELINES FOR THE SCHEDULING OF SPECIFIC COMMITMENTS UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)". Adopted by the Council for Trade in Services on 23 March 2001 (S/L/92).

provided for in Article X, on the other. Each is governed by different rules and legal procedures.

29. Consolidating new commitments into a Member's GATS schedule is to be achieved by means of "certification". The Council for Trade in Services has adopted procedural rules specifically for that purpose.[5] The rules state as follows:

> Modifications in the authentic texts of Schedules annexed to the GATS ……**which consist of new commitments, improvements to existing ones**, or rectifications or changes of a purely technical character that do not alter the scope or the substance of the existing commitments, **shall take effect by means of certification**. (emphasis added)

30. These procedures lay down the steps to be followed in situations where Members, whether individually or collectively, wish to improve or add new commitments to their schedules. Notably, there are many examples of individual cases where Members have scheduled "Additional Commitments". As early as 2002, there were 72 Members who had scheduled such commitments in a wide range of sectors[6]. Many more Members have since undertaken similar commitments in accession negotiations and notably, some have done so AUTONOMOUSLY.

31. Considering these examples under the GATS, together with those under the GATT (e.g., ITA), the individual "scheduling" of plurilateral outcomes in the context of covered WTO Agreements must be recognized as consistent with WTO rules and practice. That is to say, there is no legal difference between a Member scheduling liberalization decided autonomously, and a Member scheduling liberalization decided plurilaterally. It would be absurd to interpret WTO rules to restrict Members from autonomously sharing the benefits of increased commitments with all other WTO Members on an MFN basis. The same logic applies to the interpretation of WTO rules concerning outcomes of plurilateral negotiations applied on an MFN basis. A certification procedure can always be subject to objection from other Members within a period of 45 days under the GATS and 90 days under the GATT. However, an objecting Member should identify the specific elements of the modification to the schedule that give rise to the objection.

32. While completing a certification procedure requires the absence of objection by other Members, this should not be equated with "consensus" within the meaning of Article IX (Decision-Making) of the WTO Agreement. **While the latter provides the rules for joint action that binds the entire Membership** through consensus-based decisions (and voting if necessary), **a schedule certification procedure has the sole object and purpose of the verification of the content of the modifying Member's schedule regarding its effect on existing rights of other Members under the Agreement.** Hence, the expectation is that an objecting Member would identify the

[5] *See* "PROCEDURES FOR THE CERTIFICATION OF RECTIFICATIONS OR IMPROVEMENTS TO SCHEDULES OF SPECIFIC COMMITMENTS". Adopted by the Council for Trade in Services on 14 April 2000 (S/L/84).
[6] *See* Note by the WTO Secretariat on ADDITIONAL COMMITMENTS UNDER ARTICLE XVIII OF THE GATS (S/CSC/34), 16 July 2002.

specific elements giving rise to an objection. The mere fact that footnote to Article IX refers to the absence of objections[7] does not create equivalence between the certification of a schedule and the adoption of a consensus decision by all Members.

33. Apart from the conclusion of the certification process as such and securing the non-objection of any Member, there are normally other procedural questions that participants in the negotiations would need to agree on, such as conditions for, and dates of entry into force of new commitments. In this regard, two scenarios have been followed in the past. In the first, as in the case of the ITA, participants have resorted to individual certification of schedules of concessions, each specifying the date of entry into force of the new obligations once certification is completed. Such an arrangement should be based on an understanding among participants in the negotiations regarding the timing of different procedural steps.

34. In the second scenario, as in the case of telecommunications and financial services, participants in the negotiations would resort to a protocol to synchronize the various procedural steps all the way to the entry into force of the new commitment. Typically, a protocol, to which new commitments would be annexed, would contain elements such as:

- Timeframe for acceptance of the Protocol
- Date of entry into force of the protocol (and annexed commitments)
- Conditions required for the entry into force of the Protocol (e.g., acceptance by all Members concerned/a certain number of Members)
- The legal effect of entry into force of the Protocol on participants' schedules (replacing, supplementing, or modifying pre-existing commitments)
- Contingent scenarios upon the expiry of the timeframe for acceptance in case not all Members concerned have accepted (e.g., those who have accepted would decide upon entry into force)
- Institutional provisions such as depositary, registration, date, and venue

35. Such a protocol is normally used only if needed to coordinate procedural steps among participants regarding timing and conditions for entry into force as well as guarantee the "conditionality" of commitments made by each participant, being contingent upon other participants fulfilling theirs. Such an arrangement is likely to be more desirable as the circle of participation in the negotiations gets larger. A protocol of this type is only binding on participants. Therefore, although its adoption by all Members would be politically desirable, it would not be legally required.

[7] Footnote 1 to Article IX of the WTO Agreement states: "The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

B. Outcomes in the form of new standalone agreements

36. Integrating, into the WTO legal structure, an outcome of a process which is not negotiated under any of the existing multilateral Agreements (GATT or GATS) and not subject to scheduling, calls for a distinction to be made in terms of outcomes between **A**greements and **a**greements. That is, outcomes that take the form of a new stand-alone Agreement as opposed to an agreement on an outcome that takes the form of a package of new commitments to be consolidated through scheduling into a pre-existing Agreement and applied on an MFN basis. For example, the TFA took the form of a new standalone Agreement (with capital A) that was added to the WTO treaty architecture and for which an amendment procedure was followed, in accordance with Article X of the WTO Agreement[8]. However, the ITA is an agreement (with small a) that took the form of new MFN-based commitments added to schedules under a pre-existing Agreement (GATT).

37. Apart from amendments to existing WTO provisions, as provided for in Article X of the WTO Agreement, any negotiated outcome that takes the form of a new standalone "Agreement" would require an amendment in accordance with the provisions of that Article. A further question to be considered, however, is in which of the Annexes to the Agreement should the new "Agreement" be inserted. Under the current structure, if the "Agreement" in question would be binding on all Members and creates rights for all Members, it should then be inserted in Annex 1. On the other hand, if it is not binding on all Members and creating rights only for its signatories, it should then be inserted in Annex 4. However, if the new "Agreement" in question is not binding on all Members but nonetheless creates rights for all Members, in other words, would be applied on an MFN basis, it would then raise a new question for Members to consider. All decisions needed for any of these scenarios would need to be taken by all Members, not only by Members participating in the negotiations.

IV. FINAL OBSERVATIONS

38. As the WTO faces a deep crisis of disfunction, restoring the long-time broken negotiating arm represents one of the most urgent priorities. In the broader context of WTO reform efforts, a constructive discussion about plurilateral negotiations and their outcomes would be most critical. Such a **discussion will have to be political in the first order**, guided by Members' views about the future direction of the WTO and how it should serve its purpose through its three vital functions (negotiations, dispute settlement and the deliberative/transparency functions).

39. To clearly identify the path forward in reforming the WTO's negotiating function it is necessary to clarify where it stands today. A solid diagnostic analysis is always a sound starting point for any reform effort. That involves clarifying the rules that govern negotiations and their outcomes to establish whether changes might be needed, and if so, where.

[8] *See* PROTOCOL AMENDING THE MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION (WT/L/940).

40. From the preceding discussion, the following conclusions emerge:

a) As far as negotiating **processes** are concerned, current rules in the WTO Agreement and its Annexes provide flexibility to accommodate various negotiating configurations, approaches, and modalities. This feature is key for the future effectiveness of the negotiating function, given the extent of diversity among the 164 Members as well as the range and complexity of issues for negotiation.

b) A decision by all Members (by consensus or voting) to start a plurilateral negotiating process is <u>not</u> legally required.

c) When it comes to **outcomes** of plurilateral negotiations, the WTO Agreement and its Annexes provide all necessary legal guarantees to ensure that plurilateral outcomes do not adversely affect existing rights of non-participating Members.

d) An insightful diagnostic view of how the negotiations were conducted in the WTO over the past quarter of a century would reveal whether reform efforts should seek to change the rules, or the way they are understood and applied.

e) WTO rules are made by Members and can be changed by Members. Moving beyond rules, the strategic discussion will be about what Members want from the system and how do they see the "WTO of the future" – a future in which the negotiating function must play a central role.

f) Since its inception, the multilateral system has included "plurilateral" approaches to negotiations to allow various configurations of GATT Contracting Parties and WTO Members to adopt new rules and commitments progressively at different paces.

g) The plurilateral approach to WTO negotiations remains a legal and viable tool for various groups of Members to advance their interests consistent with the multilateral rulebook.