

Plurilateral Cooperation in a Multilateral Trade Order*

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Abstract: At the end of 2017 different groups of WTO members decided to launch talks on four subjects, setting aside the WTO consensus working practice. This paper argues that these ‘joint statement initiatives’ (JSIs) should seek to establish open plurilateral agreements (OPAs) even in instances where the outcome can be incorporated into existing schedules of commitments of participating WTO members. Designing agreements as OPAs provides an institutional framework for collaboration among the responsible national authorities, transparency, mutual review and learning, as well as alternatives to default WTO dispute settlement procedures which may not be appropriate for supporting cooperation on the matters addressed by the JSIs. In parallel, WTO members should establish enforceable multilateral principles to ensure OPAs are compatible with an open global trade regime.

Keywords: Open plurilateral agreements, WTO, joint statement initiatives, trade agreements, international regulatory cooperation

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Introduction

Since its establishment in 1995 the WTO has had little success in negotiating new disciplines on the use discriminatory trade policies. Instead, new rulemaking has been occurring in deep preferential trade agreements (PTAs) (Dür, Baccini and Elsig, 2014). While beneficial to participating countries, deep PTAs are inherently constrained in addressing international policy spillovers given that major emerging economies have not been willing to participate in them. Such spillovers have been increasing, reflecting a steady rise in competition-distorting trade measures in the last decade (Evenett, 2019), many of which are only partially subject to WTO disciplines, if at all. The inability to (re-)negotiate multilateral rules has led to trade conflicts, notably between the US and China, and impeded cooperation to address global market failures and use trade policy for sustainable development.

Consensus-based decision-making has been a factor inhibiting the ability of the WTO to engage in deliberations on new agreements. At the December 2017 Ministerial Conference, groups of WTO members abandoned the long-standing consensus working practice and launched four “joint statement initiatives” (JSIs) spanning e-commerce, domestic regulation of services, investment facilitation, and measures to enhance the ability of micro and small and medium enterprises (MSMEs) to utilize the trade opportunities.¹ This shift to plurilateral engagement offers an alternative to the negotiation of (deep) PTAs to countries seeking to bolster trade governance by providing a mechanism for countries to cooperate on an issue-specific basis without having to liberalize substantially all trade. In doing so it creates opportunities for cooperation without requiring all 164 WTO members to agree.

This paper reflects on the question whether and how plurilateral cooperation can revitalize the WTO, focusing on the JSIs. It builds on a previous article (Hoekman and Sabel, 2019) on open plurilateral agreements (OPAs) as a vehicle to support international regulatory cooperation in the WTO, arguing that JSIs should be conceptualized as OPAs, complementing the trade agreements that to date have been the staple of the WTO. The paper is organized as follows. Section 1 briefly discusses the ongoing JSI talks in the WTO and recent plurilateral trade initiatives outside the WTO. Section 2 presents a typology of trade-related cooperation to address different types of problems. Section 3 applies the typology to the JSIs and argues that OPAs provide a useful institutional framework to support the implementation of what is agreed in negotiations. Section 4 discusses governance principles that could be applied by WTO members to OPAs to ensure plurilateral initiatives are consistent with an open rules-based multilateral trading system. Section 5 concludes.

1. The nascent shift to plurilateral initiatives

Plurilateral cooperation is not new for the WTO. Many WTO agreements are the outcome of negotiations among the ‘principal suppliers’ of products and the principal ‘demandeurs’ for rules pertaining to a given area of trade policy. Although the practice has been to pursue cooperation through large ‘rounds’ that encompass many policy areas to permit cross-issue linkages and tradeoffs with a view to satisfying the Pareto criterion and increasing the potential gains from cooperation, in the GATT years there were several agreements that bound only signatories, ranging from anti-dumping to product standards. Almost all came to be incorporated as multilateral

¹ https://www.wto.org/english/news_e/news17_e/minis_13dec17_e.htm.

agreements when the WTO was created in 1995, but GATT practice illustrates that plurilateral agreements are nothing new for the trading system.²

The JSIs span a cross-section of the WTO membership. The US participates in one (e-commerce). China and the EU participate in all four.³ Independent of whether a WTO member is a sponsor of a group, deliberations are open to all WTO members. The E-commerce JSI talks involve 80+ WTO Members. Most are middle- and high-income nations.⁴ The focus of deliberation is on a mix of trade restrictive policies and digital trade facilitation.⁵ The former include regulation of cross-border data flows and data localization requirements, the latter include issues like electronic signatures, e-invoicing, facilitating electronic payment for cross-border transactions, and cooperation on consumer protection (e.g., combatting fraud).

Services domestic regulation talks involve 60+ WTO Members and center on matters associated with authorization and certification of foreign services providers (licensing, qualification, and technical standards), not on substance of regulations. The aim is to reduce the trade-impeding effects of domestic regulation by enhancing transparency of policies through enquiry points; establishing good practice timeframes for processing of applications; acceptance of electronic applications by service providers, use of objective criteria, ensuring national authorizing bodies are independent and impartial, and mechanisms for foreign providers to request domestic review of decisions.

Neither e-commerce or services regulation are new for the WTO. Both have been discussed since the late 1990s. A WTO work program on e-commerce was initiated in 1998, and a Working Party on Domestic Regulation was established in 1999. These work programs were anchored in existing WTO treaties. In the case of e-commerce this spans all three of the major WTO multilateral agreements – GATT, GATS, and TRIPS. The mandate of the working party on domestic regulation of services was to develop horizontal (cross-sectoral) disciplines called for in Art. VI GATS.

The MSME and investment facilitation groups differ from the other two JSIs in not being tied to specific existing WTO agreements. The informal working group on MSMEs includes 90 WTO members.⁶ The aim is to identify measures governments can take to support internationalization of small firms. Recommendations to this effect will not be mandatory but be open to participating WTO members to adopt on a voluntary basis.⁷ Talks on investment facilitation were launched by some 70 WTO Members in Buenos Aires in 2017 and grew to encompass more than 100 participants in late 2020.⁸ The agenda excludes liberalization of inward FDI policies, measures related to protection of foreign investors and investor-State dispute settlement. The focus is solely on facilitation. All investment is covered, including services, i.e., facilitation of mode 3 is part of the discussion. Talks center on “good regulatory practices” such as transparency and predictability of investment-related

² See, e.g., Hoekman and Kosteci (2009).

³ China was a co-sponsor of three of the four groups in 2017. Initially China did not participate in the JSI on e-commerce, but it joined subsequently.

⁴ As of end 2020, only five African countries participated: Benin, Cameroun, Cote d’Ivoire, Kenya and Nigeria.

⁵ For a summary of the issues that have been tabled by different participants, see <https://etradeforall.org/wto-members-submit-proposals-aimed-at-advancing-exploratory-e-commerce-work/> and Ismail (2020).

⁶ https://www.wto.org/english/news_e/news20_e/msmes_05nov20_e.htm

⁷ See Campos-Leal et al. (2020).

⁸ https://www.wto.org/english/news_e/news19_e/infac_05nov19_e.htm. See Baliño et al. (2020).

policies; streamlining administrative procedures; soliciting feedback on proposed regulatory measures; information sharing on best practices and ex post monitoring and evaluation (learning).

Outside the WTO, groups of countries have also begun to negotiate plurilateral agreements that are distinct from PTAs to address trade-related matters and nontrade policies. Examples include the Digital Economy Partnership Agreement between Chile, New Zealand and Singapore,⁹ the Digital Economy Agreement between Australia and Singapore,¹⁰ the Japan-US Agreement on Digital Trade,¹¹ and negotiations between Singapore and South Korea on a digital partnership agreement.¹² Observers have proposed extending such arrangements to create a ‘single data areas’ encompassing like-minded countries (Leblond and Aronson, 2019). Beyond the digital arena, there are ongoing negotiations between New Zealand and includes Costa Rica, Fiji, Iceland, Norway, and Switzerland on a plurilateral Agreement on Climate Change, Trade and Sustainability (ACCTS).¹³ The Asia-Pacific digital agreements build on the e-commerce chapters of the Comprehensive and Progressive Agreement on Trans-Pacific Partnership (CPTPP) and bilateral PTAs. The purported goal of the ACCTS is to negotiate an open plurilateral agreement, in the process demonstrating that countries can agree on how trade policy and trade rules can help drive the transformation of the economy to become more sustainable and inclusive.

2. Horses for courses

Plurilateral initiatives differ from traditional trade agreements in that (i) they are issue-specific or combine a small number of policy issues and (ii) do not center (solely) on liberalization of market access barriers. They raise important conceptual – and practical – questions regarding the incentive constraints facing participants that determine the feasibility of negotiating and implementing agreements.

Trade agreements have four salient characteristics that are relevant from the perspective of considering when and how they may support – or impede – cooperation to reduce cross-border negative policy spillovers. First, they liberalize access to markets through a process of reciprocal exchange of trade policy concessions. Reciprocity permits internalization of the benefits of liberalization. Second, they rely on the national treatment principle to prevent ‘concession erosion’ – the use of domestic policies to substitute for trade policies, while leaving parties free to define their domestic regulations as they wish as long as regulation is applied equally to domestic and foreign agents. Third, there is a focus on trade facilitation as well as liberalization, i.e., efforts to reduce

⁹ Chile, New Zealand and Singapore (2020); <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/digital-economy-partnership-agreement/>.

¹⁰ Australia and Singapore (2020); <https://www.dfat.gov.au/trade/services-and-digital-trade/Pages/australia-and-singapore-digital-economy-agreement>

¹¹ The agreement bans data localization, barriers to cross-border data flows and conditioning access to the market on transfer of source code or algorithms, and covers financial services. See [https://ustr.gov/sites/default/files/files/agreements/japan/Agreement between the United States and Japan concerning Digital Trade.pdf](https://ustr.gov/sites/default/files/files/agreements/japan/Agreement%20between%20the%20United%20States%20and%20Japan%20concerning%20Digital%20Trade.pdf)

¹² <https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2020/06/22-Jun-2020-Singapore-and-the-Republic-of-Korea-launch-negotiations-on-Digital-Partnership-Agreement.pdf>

¹³ <https://www.mfat.govt.nz/en/media-and-resources/ministry-statements-and-speeches/trade-ministers-express-support-for-the-agreement-on-climate-change-trade-and-sustainability-at-the-world-economic-forum-davos-2020/>

trade costs through transparency and identification of good policy practices. Fourth, they are self-enforcing: the threat of withdrawal of market access commitments (retaliation) is the mechanism used to sustain cooperation.

An implication of these characteristics is that by design most PTAs are shallow integration instruments in the sense that signatories retain national regulatory sovereignty: they are free to regulate as they wish as long as measures conform to the national treatment and most-favored-nation (MFN) principles. 'Deeper' PTAs go beyond the four basic characteristics by including provisions on the substance of domestic regulation, intellectual property rights, foreign investment, and product and factor markets more broadly. Deeper integration touches on matters that are of interest to a much broader constellation of domestic interest groups and is therefore – appropriately – more politically sensitive and complex than shallow trade agreements. However, the core feature of all PTAs – shallow or deep – is preferential liberalization of market access barriers.

In addition to PTAs, the WTO envisages two other forms of plurilateral cooperation among members on a sector- or issue-specific basis. In contrast to a PTA, neither requires liberalization of substantially all trade between signatories. The first alternative is to conclude a plurilateral agreement under Art. II.3 WTO. The second is to negotiate a so-called critical mass agreement (CMA). In both cases negotiated disciplines apply only to signatories. They differ in that the benefits of CMAs apply on a nondiscriminatory basis to all countries, including non-participating nations, whereas Art. II:3 plurilateral agreements do not. An example of a CMA is the Information Technology Agreement (ITA). The main example of an Art. II plurilateral is the Agreement on Government Procurement (GPA).

In considering different types of trade cooperation, countries must determine whether free-riding constraints apply and, if so, what constitutes a critical mass of participation that internalizes enough of the benefits within the participating group of countries. CMAs are only feasible if most of the benefits associated with trade liberalization are internalized by participants. If not, the WTO MFN requirement will preclude agreement. This constraint can be difficult to overcome, as shown by ITA negotiations and the talks on an Environmental Goods Agreement (EGA) to reduce tariffs on products salient for reducing carbon emissions, which have yet to be concluded.¹⁴ The ITA demonstrates that CMAs can be negotiated, but also that a necessary condition is that enough products are covered and a large enough set of countries participate.¹⁵

The top part of Table 1 characterizes these different types of trade agreements: multilateral package deals (trade rounds), PTAs, CMAs and Art. II plurilateral agreements. All involve policy commitments and international cooperation among signatories. All address policies that by design discriminate and impede market access. The bottom part of Table 1 presents forms of cooperation that are domain-specific, where the primary focus is not on liberalization (constraining the use of discriminatory policies). Such cooperation can take the form of harmonization (e.g., a commitment to develop and adopt common standards), implementing agreed good regulatory practices, and mutual recognition of equivalence of regulatory regimes. Cooperation will often have a market access dimension, but the focus is on domestic regulation.

¹⁴ Mavroidis and Neven (2019) and De Melo and Solleder (2020) assess reasons for the difficulties in concluding the EGA negotiations successfully.

¹⁵ Gnutzmann-Mkrtchyan and Henn (2018) analyze the economic dimensions of the ITA.

Table 1 Alternative Instruments for Cooperation

Type of cooperation	Main issue	Type of spillover	Characteristics of cooperation outcome	
			Nondiscrimination (MFN)	Benefits limited to participants
Type 1: Trade agreements Binding State-to-State treaties with fixed terms and binding, self-enforcing dispute resolution	<i>Discriminatory policies affecting market access</i>	“Terms of trade” effects of trade/industrial policies	Multi-issue <u>multilateral agreements</u> (Uruguay and Doha rounds)	Reciprocal <u>preferential trade agreements</u> (PTAs)
		Pecuniary spillovers	Issue-specific <u>critical mass agreements</u> (e.g. Information Technology Agreement; GATS Telecom Reference paper; Environmental Goods negotiations)	Issue-specific, discriminatory <u>plurilateral agreements</u> under Art. II WTO (e.g. Government Procurement Agreement)
			Open, nondiscrimination	Open, conditional application
Type 2: Open plurilateral cooperation Severable, flexible, dynamic, issue-specific	<i>Regulatory heterogeneity</i>	Cross border effects of domestic regulatory policies	<u>International standard setting</u> (ISO, Codex Alimentarius, UNECE)	<u>Mutual recognition</u> (conformity assessment agreements)
		Non-pecuniary spillovers	<u>Good regulatory practices</u> (OECD; APEC) <u>Open plurilateral agreements</u> (OPAs) <ul style="list-style-type: none"> • Digital Economy Partnerships • COVID-19-related public health agreements • New WTO clubs 	<u>Regulatory equivalence regimes</u> (Unilateral: EU data adequacy findings Bilateral: air safety agreements; EU Forest Law Enforcement, Governance and Trade regime <u>Clubs with trade penalty defaults</u> (e.g., Agreement on Climate Change, Trade & Sustainability negotiations)

The benefits of cooperation may apply unconditionally to all countries on a nondiscriminatory basis or on a conditional basis. Examples of the former include collaborative efforts in fora such as the OECD and APEC to define good regulatory practices and agreement by countries to adopt these. They also include international collaboration to develop product and process standards in inter-governmental bodies such as the ISO. Cooperation involving identification and agreement on good regulatory practices can be applied on an unconditional MFN basis as it is insensitive to free riding considerations: the policies are in the self-interest of countries independent of whether other countries do so.

In many cases cooperation is likely to require joint action by the parties. Such conditionality can vary in depth and intensity, ranging from low to medium to high forms. A low form example is mutual recognition of conformity assessment mechanisms. A medium form is what Mattoo (2018) calls destination-specific exporter regulatory commitments, where a regulator (government) accepts to look after the interests of consumers in countries to which firms under its jurisdiction export (as defined by the regulatory authorities in the importing nations), without necessarily adopting an identical regulatory regime.¹⁶ A high form of conditionality is a regulatory equivalence regime, in which the regulators establish that regimes pursue similar objectives and are implemented so as to achieve the shared goal, permitting two-way flow of the goods or services concerned. Countries that do not have adequate regulatory capacity and enforcement institutions will not be able to benefit from mutual recognition, let alone equivalence arrangements.

3. Fitting JSIs into the WTO

An important question confronting JSI participants is the form of cooperation that is envisaged. The JSIs provide an opportunity to create OPAs, thereby demonstrating the capacity of the WTO to encompass variable geometry and cooperate on a nondiscriminatory basis. However, the JSI talks are not explicitly aimed at negotiating OPAs. As mentioned, the MSME initiative is not aimed to result in a binding agreement, but is limited to ‘soft law’, best endeavor-type commitments that will be embodied in a Ministerial declaration signed by participating countries. The JSIs on e-commerce and services domestic regulation are linked to existing WTO agreements and the outcome of negotiations may be embedded in participating WTO members’ schedule of commitments as opposed to a distinct agreement. Scheduling in the GATT and/or GATS is less of an option for the outcome of investment facilitation talks.

Inscribing the results of negotiations into participants’ GATT and/or GATS schedules will insulate signatories from legal challenges by nonsignatories to whatever is agreed by participants, as scheduling ensures that implementation will occur on a nondiscriminatory basis (Hoekman and Mavroidis, 2017). At the same time embedding JSI outcomes into national schedules makes the provisions enforceable through the WTO Dispute Settlement Understanding (DSU). This may have implications for the feasibility of cooperation that goes beyond the need for attaining critical mass to address free riding concerns if this is a concern. As discussed below, the DSU may not be the most appropriate instrument to support implementation of agreements that go beyond disciplining the

¹⁶ One can ask what the incentive is for the importing country to negotiate an agreement to this effect, insofar as it can – and presumably will – impose its domestic standards on imports. One possible reason is agreement permits cross-issue linkages to be made; another is that agreement may assist the exporting country to obtain assistance in strengthening institutional capacity needed for implementation.

use of discriminatory policies. Explicitly conceiving and designing the substantive elements of what is agreed in the JSIs as an OPA could help to support successful cooperation by specifying enforcement mechanisms that are better designed to serve the purpose of signatories to an agreement.

OPAs differ from ‘standard’ trade agreements – ‘Type 1 cooperation’ – in at least four ways (Hoekman and Sabel, 2019). First, OPAs are open to participation of any country able to satisfy the membership conditions, in contrast to PTAs that generally are closed to access by new countries. Second, insofar as OPAs address trade costs created by regulatory heterogeneity they do not lend themselves to quid pro quo exchange of concessions – what Bhagwati (1988) terms first difference reciprocity. Third, because they are domain specific, OPAs involve narrower and more limited commitments. A member must only undertake to meet the requirements that have been agreed for the issue or class of goods and services concerned. Insofar as an OPA requires only equivalent performance—not identical procedures or institutions—they permit members to produce the required outcome through their own regulatory regimes and institutions. Fourth, and related, implementation of OPAs calls for continuing reciprocal review of existing regulatory policies and their implementation, and joint evaluation of potential adaption to changes in circumstances. The potential for learning through regular interactions between regulators and/or a broader epistemic community involved in a policy area may also arise in the implementation of trade agreements but is less of a central feature given the narrow focus on disciplining discrimination.

An implication of these different features is that OPAs may require less in the way of cross-issue linkage to permit cooperation. This is an explicit feature of the New Zealand, Chile and Singapore Digital Economy Partnership Agreement which is conceived to be open to any country interested in joining, and to facilitate participation through a modular design, allowing signatories to opt in or out of modules. This is very different from a standard trade agreement. A basic feature of all types of trade agreements is that they involve cross-issue linkages.¹⁷ If a proposed agreement reduces welfare for a country, linkage will be needed to satisfy the Pareto criterion, permitting cooperation if the benefits from including another subject exceed the losses associated with the initial proposal. Linkage may take many forms, including adding/subtracting issues, compensation mechanisms and side-payments.¹⁸ Maggi (2016) identifies three types of issue linkage in international agreements: negotiation linkage; enforcement linkage and participation linkage. All three are features of trade agreements. The first of these involves negotiating two or more issues in one agreement, with the possibility of trade-offs across issues, the goal being to conclude one agreement – a package deal that is Pareto sanctioned: all participants are better off. Given agreement, enforcement linkage involves action in one issue area to enforce compliance with commitments in another (cross-retaliation). An example is conditioning preferential access to the market on reform and enforcement of labor standards or protection of human rights.¹⁹

Participation linkage comprises situations where the threat of sanctions in one area induces participation in an agreement addressing another policy area. All three types of linkage fall under

¹⁷ See e.g., Conconi and Perroni (2002) and Limão (2005).

¹⁸ On issue linkage and international cooperation see Haas (1980), Sebenius (1983), McGinnis (1986).

¹⁹ A feature of nonreciprocal trade preference programs in which richer countries grant poorer countries better access to their markets without requiring the latter to offer reciprocity in terms of market opening is that conditionality may be imposed in other policy areas – i.e., there is cross-issue linkage. See e.g., Borchert et al. (2020).

the broader concept of conditionality – making cooperation in one area a condition for cooperation in another. Conconi and Perroni (2002) contrast this notion of conditionality with a separation rule, in which there are explicit prohibitions on using sanctions in one area to induce (enforce) cooperation in another. OPAs are a mechanism to assure separability. Cooperation is severable in the sense that if (part of) an OPA fails this need not affect cooperation in other areas.

Issue linkage may increase overall potential gains, but as demonstrated by the failure of the Doha round, crafting a negotiating agenda that delivers large enough net gains to all parties is difficult. This is true especially if there are groups that lose from agreement to cooperate on a given policy area. While overall, in the aggregate, there may be welfare (real income) gains, in the absence of credible and effective compensation for specific losses, negatively affected groups have good reason to oppose a proposed deal. If policies are separable, cross-issue linkage is not needed – the payoffs of cooperation are independent of what governments may or may not do in other policy areas.

Trade agreements are self-enforcing – the threat of withdrawing concessions sustains cooperation. There is no need for enforcement linkage. Binding dispute settlement enforced by the (threat of) withdrawal of market access is unlikely to be useful for encouraging cooperation on regulatory matters. It is more likely to have a chilling effect on the willingness to consider cooperation – due to fear of uncertain contingent liability or views by regulators that market access considerations will have adverse effects on the realization of regulatory goals.²⁰ Different systems are needed, based on transparency mechanisms (information collection, incident reporting, sharing of data, dialogue) and, as Hoekman and Sabel (2019) argue, severability. The latter is a feature of the CPTPP chapter on regulatory coherence which is not subject to binding dispute resolution. This was also taken off the table by the EU in the aborted TTIP talks.

Enforcement linkages may be required in domain-specific cooperation where the aim is to internalize negative cross-border spillovers. These may be pecuniary or nonpecuniary. Examples include policy areas such as subsidies, activities of state-owned enterprises (SOEs), digital economy policies and cooperation in the use of trade policies to reduce national carbon footprints. In such cases retaliation within the domain of the policy area is not desirable. Enforcement linkage is needed instead.

The domain-specific nature of OPAs and limited salience of enforcement mechanisms that rely on the threat of ceasing to apply what was agreed implies a need for variable geometry when it comes to enforcement. If cooperation involves implementation of good practices and a party to an OPA comes to believe that other approaches should be applied, this calls for discussion between parties to assess the reasons underlying a decision to pursue a different path. Matters are different for cooperation centering on policies that generate negative international spillovers, where the threat of retaliation may be effective. The upshot is that careful consideration is needed both when designing the substance of an agreement and the type of enforcement mechanism that is appropriate.

The Working Party on Domestic Regulation that was the precursor to the JSI on services regulation proved unable to achieve consensus on criteria determining whether (when) restrictions on trade

²⁰ Such concerns were an important factor in the demise of talks in the WTO on competition policy in the early 2000s. Competition authorities held the view that their mandate was to safeguard consumer interests, the contestability of markets and national welfare. In doing so, they do not distinguish between the behavior of domestic and foreign firms on the market, as opposed to the focus of trade negotiators on improving conditions of competition for national firms.

are needed to attain a regulatory objective and whether disciplines should encompass private standard-setting bodies (Delimatsis, 2008; Hoekman and Mavroidis, 2016). Similarly, the e-commerce work program launched in 1999 did not lead to specific suggestions supported by the membership, aside from a time limited agreement not to levy taxes on data flows that has periodically been extended. Lack of progress in coming to an agreement, notwithstanding extensive deliberation and effort, was in (large) part due to WTO members demanding (cross-issue) linkages with the Doha round,²¹ tactics that were in turn facilitated by the (perceived) need to anchor the outcome of discussions to existing WTO agreements. Shifting the focus to stand-alone agreements, even if implemented in part through incorporation of negotiated provisions into the existing schedules of participating WTO members, may facilitate getting to yes. In the case of services regulation such scheduling is straightforward, but in the case of e-commerce an OPA that addresses specific policies may be more efficient and effective than adding to extant GATT, GATS and/or TRIPS commitments (Nakatomi, 2019). An OPA permits updating and improving salient existing WTO agreements in a holistic manner, and also can insulate signatories from the DSU by making explicit whether and when the DSU applies, thereby expanding the scope for cooperation by defining alternative conflict resolution arrangements.

4. Preparing the ground for more variable geometry in the WTO

What follows briefly discusses actions to support negotiation of OPAs, in the process highlighting areas where current JSIs could be strengthened and measures proponents of OPAs should consider in moving forward. The prospects for successful OPA negotiations will be enhanced if they are based on a solid evidence base, address a serious problem of concern to a clear constituency, are transparent as regards deliberations and eventual implementation, open to new members, and encompass appropriate conflict resolution systems. The latter can build on innovations that have been introduced in several extant WTO agreements, such as discussion of ‘specific trade concerns’ (STCs) in WTO committees (Karttunen, 2020) and recourse to experts to assess reasons for non-implementation of an agreement, as is foreseen in the WTO Agreement on Trade Facilitation (Hoekman and Sabel, 2019).

4.1 Informing deliberations: epistemic communities and extant PTAs

Successful international agreements addressing regulatory policies such as the WTO agreements on sanitary and phytosanitary measures, technical barriers to trade and trade facilitation are all associated with a body of agreed technical knowledge and accumulated good will among the relevant national regulatory agencies. Haas (1992) refers to a group of stakeholders and experts linked in this way as an epistemic community. Specifically, he defines an epistemic community as a group of professionals who share:

- a set of normative and principled beliefs, which provide a value-based rationale for the social action of community members;

²¹ A precursor Working Party on Professional Services agreed in 1998 on a set of principles for regulation of licensing of accountants and accountancy services. These were adopted by the Council on Trade in Services in 1998 but did not enter into force because of linkage to a successful conclusion of the Doha round negotiations.

- causal beliefs, derived from their analysis of practices to address problems in their domain, that serve as the basis for understanding how possible policy actions can support desired outcomes;
- notions of validity—criteria for weighing and validating knowledge in the domain of their expertise; and
- a set of common practices—associated with the problems to which their professional competence is directed with a view to enhance welfare.

There are a many policy domains in which such epistemic communities help support international cooperation, including trade facilitation (Hoekman, 2016), product safety (Yates and Murphy, 2019), competition policy (Kovacic and Hollman, 2011) and environmental policy (Sabel and Victor, 2020). A necessary condition for successful OPAs is a community that has an interest in international regulatory cooperation and a mechanism that supports informed deliberation in each policy area.²² Such fora can generate information on applied policies across countries, facilitate sharing experiences and help to identify good practices that reflect and respond to local capabilities and priorities. APEC, the OECD, and the World Bank are examples of entities that provide institutional homes for this type of engagement.

In the TFA context, such a community was organized around the WCO (which brings together all national customs administrations) and several international organizations), including UNCTAD, ITC, OECD, the World Bank and the Inter-American Development Bank. Many of the regulatory standards referred to in the TFA were established in relevant international standards-setting bodies, notably the WCO. The WTO is not the appropriate institution for discussion on the substance of regulatory standards and makes no claim to that effect. It is a trade facilitating organization, not a standards setter. International regulatory cooperation and standardization efforts are important but are – and should be – pursued outside the WTO. This applies to areas addressed by WTO agreements such as the trade effects of product standards (the TBT and SPS agreements) and to areas that may become the subject of new WTO agreements or OPAs, e.g., the regulation of the digital economy. What matters for trade cooperation is that the trade community connects to the relevant epistemic communities and standards setting organizations when considering efforts to reduce the trade-impeding effects of domestic regulatory regimes.

The prevalence/role of epistemic communities varies across the JSIs. Two of the JSIs – e-commerce and domestic regulation of services – build on long-standing discussions in the WTO, and in both instances international business is an important demandeur for multilateral rules, reflected in active engagement by organizations such as the US Coalition of Service Industries and the European Services Forum.

Digital trade has become a central focus of many APEC governments as well as the EU. The e-commerce JSI builds on the experience obtained in negotiating provisions on digital trade and e-commerce in recent PTAs,²³ elements of which were included in the Regional Comprehensive Economic Partnership agreement that was concluded at the end of 2020. RCEP includes the 10

²² See Hoekman and Sabel (2019); Hoekman and Nelson (2020). Sebenius (1992) discusses the importance of considering the interaction between the existence of epistemic communities and the form of bargaining that is pursued, including the scope/use of issue linkage.

²³ Burri (2021), Burri and Polanco (2020), Mitchell and Mishra (2020) and Wu (2017) discuss the coverage of digital trade and e-commerce in recent PTAs.

Association of Southeast Asian Nations (ASEAN) countries (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam), and Australia, China, Japan, New Zealand and South Korea. Because China is a signatory, RCEP may provide a baseline for what is feasible to agree in the JSI talks, although many OECD member countries are seeking to go significantly beyond what is embodied in RCEP.²⁴

The recent experience of Asia-Pacific countries in negotiating digital partnerships mentioned previously reveals that there are differences in preferences and the feasibility of negotiating plurilateral digital trade agreements even among like-minded economies with very similar regulatory objectives. One reason for the multiplicity of digital trade agreements emerging in the Pacific is that countries are not all on the same page. This is not surprising and should not be an impediment to cooperation. It suggests the value of JSI participants seeking to create a digital trade OPA that establishes a common denominator set of provisions, and that is flexible in the sense of being able to incorporate modules that need not be adopted by all OPA members and that encourage regular interaction between authorities and stakeholders on the experience with implementing digital trade-related cooperation that spans only a few of its members. This is also an argument for seeking to pursue an OPA under the umbrella of the WTO as opposed to pursuing cooperation outside the WTO.²⁵

The JSIs on investment facilitation and MSMEs benefitted from joint engagement between G20 members and international organizations working through the G20 Trade and Investment Working Group (TIWG). While this was a factor in moving the issues onto the WTO agenda, in comparison to the other two groups there are less clearly defined epistemic communities with a strong stake in international cooperation. This in turn is reflected in the discussions being centered on identifying good domestic practices – the focus (mandate) of most of the international organizations participating in the TIWG.

In the case of MSMEs the informal working group is largely driven by governments and international organizations, notably the Geneva-based International Trade Centre. International industry associations are less of a factor reflecting the nature of MSMEs, although organizations such as the ICC have been supportive, as has been the WEF. Given that the focus of deliberation is on good practice measures to support internationalization of small firms that can (will) be implemented on a

²⁴ The RCEP chapter on e-commerce includes provisions on consumer protection, protection of personal information, acceptance of e-signatures, measures requiring consent and removal of unsolicited spam at request of recipients that are similar to the CPTPP. Language on localization requirements and cross-border data flows is significantly weaker. In any event, provisions in the e-commerce chapter are excluded from dispute settlement. Instead members are called on to consult bilaterally and raise a matter in RCEP Joint Committee. Cambodia, Lao PDR, Myanmar, and Vietnam have 5 years longer to implement different e-commerce provisions.

²⁵ The various digital partnership agreements negotiated by Singapore are a case in point. Singapore has one with Chile and New Zealand, another with Australia, and is negotiating a third with South Korea. An OPA on digital trade in the WTO would provide a platform on which such agreements could be based, permitting deeper cooperation among a subset of countries. Such an OPA could also provide a forum for exchange of information on data adequacy equivalence decisions and deliberation on potential plurilateralization of bilateral initiatives. It is interesting to observe that the EU has recognized New Zealand as providing adequate data protection, but not Australia, whereas Australia has a digital economy agreement with Singapore that goes further than the digital economy partnership between Singapore, New Zealand and Chile.

voluntary basis,²⁶ there is no concern regarding free riding and neither scope nor need for cross-issue linkages or enforcement. The working group finalized a package of six recommendations and declarations to facilitate the participation of smaller businesses in international trade towards the end of 2020. Although voluntary, going beyond a Ministerial Declaration to create an OPA on MSMEs would have value by establishing a permanent focal point for deliberation and a platform for review of progress in adoption of the recommendations, sharing experiences by engaging with MSME representatives and orchestrating technical assistance programs.

Several international organizations – UNCTAD, the World Bank – have actively supported the investment facilitation agenda, but there no analogue to the role played by WCO in the TFA talks, i.e., no international organization representing (bringing together) the national agencies responsible for the administration of investment-related policies. As argued by Berger et al. (2019), one reflection of this is that there has been limited empirical research on the impact of a potential agreement to help identify what an agreement could do to promote development or assist negotiators to focus on measures based on the size of likely benefits and the potential need for technical assistance for developing countries.

4.2 A multilateral governance framework for OPAs

Plurilateral initiatives offer a means to attenuate the need for consensus, but they raise potential concerns for nonmembers. Even if agreements do not discriminate – which is the presumption – countries that decide not to participate may have an interest in what is agreed to constitute good practice by a plurilateral group. In part this is because they may want to participate later, and in part because their firms may have to comply with regulatory policies adopted by a club of WTO members. In practice not all countries will be able to engage on an equal footing in the negotiation of an OPA. 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. This suggests that any OPA should include an aid for trade component—mechanisms to assist countries improve their standards, regulation, etc. to the level that is required to benefit from the OPA. Including an operational aid for trade dimension in OPAs could enhance their relevance to low-income countries and enhance their inclusiveness.

Ensuring that agreements are truly open to any country wishing to join, are fully transparent, and encourage participation by international and sectoral organizations with relevant expertise could help address potential concerns of nonmembers. Particularly important are to put in place mechanisms to assist countries not able to participate despite being interested in doing so because of weaknesses in institutional capacity and capabilities. While there is no basis for litigation on the substance of an OPA if it is scheduled and applied on a nondiscriminatory basis (Hoekman and Mavroidis, 2017), an agreed set of principles that apply to new OPAs would provide assurance that incorporation of such clubs is consistent with the goals of the multilateral trade system. The absence of such a governance framework is a gap in ongoing JSI discussions in the WTO: it arguably reduces the incentive for nonparticipants to accept efforts by WTO members to form clubs and the credibility of claims by proponents that the aim is to promote multilateral cooperation.

Addressing these types of concerns is important. One way to do so is through establishment of a code of conduct that signatories of plurilateral agreements commit to apply. Providing a governance

²⁶ See Campos-Leal et al. (2020).

framework for new plurilateral agreements that ensures they are consistent with multilateralism would help to recognize valid concerns of nonmembers.²⁷

This can take the form of binding code of conduct that is incorporated in the schedules of commitments of WTO members that decide to apply them. There is a precedent for this in the GATS Reference Paper on basic telecommunications, which sets out specific obligations on the behavior of telecom operators that control access to the network. These disciplines become binding on signatories, and thus enforceable, through inclusion of the Reference Paper into their schedule of GATS commitments. Such inclusion cannot be blocked by any country as WTO members are free to make additional commitments if they wish to (Hoekman and Mavroidis, 2017). A Reference Paper on OPAs could be incorporated in the schedules of members who drafted it, with any WTO member interested in participating in an OPA negotiation or acceding to an OPA accepting to incorporate the paper into their schedules. As amendment of the WTO to include new provisions to govern the design elements of OPAs will be difficult if not impossible given the need for consensus, a pragmatic approach to incorporating a code of conduct is for a common Reference Paper to be incorporated into each new OPA that is negotiated.

A Reference Paper on OPAs could include the following elements and provisions:

1. Membership of an OPA is voluntary; WTO members that decide not to participate will not be pressured to join at a later date;
2. An OPA must be implemented on a nondiscriminatory basis, with benefits extending to nonsignatories.
3. Openness to subsequent membership by WTO Members that did not join when an OPA was first agreed, and inclusion of a section laying out the requirements and procedures to be followed for accession by aspiring members;²⁸
4. Language stating that accession to an OPA cannot be on terms that are more stringent than those that applied to the incumbent parties, adjusted for any changes in substantive disciplines adopted by signatories over time;²⁹
5. An obligation to provide reasons to accession-seeking countries for decisions to reject membership applications;
6. A provision committing signatories to provide assistance to WTO members that are not in a position to satisfy the preconditions for membership in terms of applying the substantive provisions of the agreement but desire to do so;³⁰
7. Where feasible and in instances where capacities must be built for a country to meet OPA requirements, consideration be given to establish a stepwise schedule of compliance;
8. Provisions ensuring that nonparticipants have full information on the implementation and operation of the agreement. These should include:
 - a. Compliance with WTO requirements pertaining to publication of information on measures covered by the OPA (along lines of Art. X GATT);

²⁷ This suggestion was first made by Lawrence (2006).

²⁸ Open access in the sense that once negotiated any OPA must permit accession by any WTO Member is not explicitly required in Art. X(9) WTO.

²⁹ This leaves open the possibility that parties to an OPA can offer accession on less demanding terms for developing countries if they agree to do so, but for reasons discussed below does not make this obligatory.

³⁰ Such provisions can draw on the approach embodied in the TFA – see e.g., Hoekman (2016).

- b. Simple, robust notification requirements for OPA members regarding the implementation of the agreement, which could draw on recent proposals to develop augmented procedural guidelines for the operation of WTO bodies;³¹
 - c. Creation of a body to oversee implementation of the OPA that is open to observation by nonsignatories, including mechanisms to engage stakeholders in an ongoing conversation about how the agreement is working and future needs;³²
 - d. Annual reporting to the WTO General Council by the OPA on its activities;
 - e. A mandate for the WTO Secretariat to assess the effects of implementing OPAs on the functioning of the trading system as part of the Director-General's annual monitoring report of developments in the trading system.
9. Inclusion of consultation and conflict resolution procedures for non-signatories of OPAs in cases where they perceive that incumbents do not live up to the foregoing principles;
 10. Provisions indicating whether the OPA envisages recourse to WTO dispute settlement mechanisms to enforce the agreement, and if so, specifying the standard of review as well as the criteria that will apply in the selection of arbitrators.

These principles do not include a binding requirement to provide 'special and differential treatment' (SDT) of the type currently embodied in the WTO which permits developing countries to offer 'less than full reciprocity'. This traditional notion of SDT would defeat a major rationale for pursuing many OPAs: to permit subset of countries to cooperate in areas not covered by WTO rules or to go beyond them by adopting what all agree are good policy practices. Insofar as OPAs deal with regulatory matters it makes no sense to consider that some countries should only partially implement whatever standards and processes are agreed, as this would undercut the achievement of common regulatory objectives of OPA members. The requirement that parties to OPAs must assist non-members desiring to participate but unable to do so because of capacity weaknesses addresses development differences more effectively than traditional SDT, and consideration of step-wise accession of new members addresses the problem of capacity constraints.

Enforcement considerations

The need for enforcement and recourse to DSU is an important design decision for potential OPAs. There are two dimensions to this question. The first concerns the type of cooperation that is envisaged – binding or best endeavors – and if binding, the substance of disciplines and the associated standard of review. The second concerns the ability of nonsignatories to invoke the DSU to challenge signatories of JSI agreements.

Apart from the MSME case, if successful, the JSIs are likely to involve a mix of hard and soft law, akin to what is found in the TFA. The presumption of WTO members engaged in JSIs appears to be that if binding commitments are agreed, the DSU will apply. In the case of investment facilitation, for example, the EU has made this explicit (EU, 2020). If commitments pertain to discriminatory application of policies, recourse to dispute settlement is straightforward – the matter is no different from bringing cases under current WTO agreements. The ability to bring such cases would span both signatories and nonsignatories given the presumption that signatories apply agreements on a MFN

³¹ See Wolfe (2018) for an extended discussion on improving notification processes and performance.

³² Wolfe (2021) suggests options for WTO bodies to organize periodic sessions that focus on learning and engagement with stakeholders.

basis. The delicate part will be to define what MFN means when it comes to provisions of an OPA pertaining to regulatory regimes – e.g., data adequacy, privacy, etc. Whether the DSU should – or even can – apply deserves careful consideration. In practice, it is very unlikely that regulators will accept to have a WTO panel second guess their decisions. This was demonstrated in the context of the Transatlantic Trade and Investment Partnership (TTIP) negotiations, which removed the possibility of disputes being brought based on the regulatory cooperation chapter (Hoekman and Sabel, 2018). Analogously, the effort to establish ‘necessity test’ criteria in the WTO talks on services domestic regulation arguably was a major factor impeding success, given the associated prospect of litigation, even if the focus of an agreement were to be limited to procedural/process requirements.

As noted previously, aside from commitments to refrain from explicit discrimination against foreign firms and service providers, recourse to the DSU may not serve signatories to an agreement. Alternative mechanisms are likely to be required. For example, insofar as enforceable provisions will be agreed in an investment facilitation agreement, alternatives to the DSU, including deliberations in the body charged with oversight of the agreement, consultations between parties informed by independent expert groups to understand and propose solutions to implementation problems, and regular independent monitoring of implementation progress may be more suitable. This in turn is a strong argument for crafting OPAs to provide the framework for cooperation. Each OPA can specify that measures involving disciplines on the use of discriminatory instruments will be subject to the DSU while providing for alternative conflict resolution procedures for regulatory matters.

If parties to an OPA decide to rely on the DSU for dispute settlement for matters that do not pertain to discrimination, it is important to specify the standard of review that applies, e.g., limiting disputes on regulatory matters to procedural commitments that have been agreed, with no scope for striking down a jurisdiction’s substantive regulations. Disputes should be arbitrated by people with the salient professional background and expertise who understand the institutional context and the goals of a given agreement. This in turn requires revisiting the current process of selecting panelists which tends to draw from a pool of trade diplomats who are unlikely to have the requisite specialist knowledge of contested matters.

The second dimension of enforcement concerns the ability and mechanism through which nonsignatories can challenge JSI members regarding the implementation of an agreement. Suppose a non-signatory WTO member C claims that its regulatory regime is equivalent to those of JSI agreement members A and B, whereas the latter decide to the contrary. If C has not expressed an interest in joining the negotiated agreement this should exclude it from bringing such litigation insofar as the application of provisions is conditional on joint action that permit cooperation between A and B. But what if C has sought to join an OPA and A and B reject it based, for example, on differences in regulatory regimes that are such to not permit C to be included? Similar issues arise in cases where incumbent OPA members are alleged to impose more stringent requirements on countries wishing to accede to an OPA than apply to insiders.

Assuming enforceable principles along the lines suggested above are agreed, such questions also arise for signatories of OPAs. Is the DSU the appropriate instrument? One reason it may not be is that the standard remedy – a call to bring measures into compliance – is unlikely to be very meaningful. Another is that a standard WTO panel and the Appellate Body may not be well placed to determine if authorities in a signatory are acting inconsistently with one of more principles. What is called for instead are approaches that put the emphasis on engagement between the relevant

authorities and that aim to establish the facts of a matter in an objective and independent manner, providing information that can serve as a basis to identify actions that can be taken to support the realization the principles that are agreed to apply to OPAs. The type of expert advisory group process that was incorporated in the TFA is a good example, as it is premised on a presumption of good faith and focuses on identifying and resolving specific implementation problems.

Putting in place such alternative dispute resolution mechanisms is likely to be beneficial to the WTO more broadly. To take an EU example, data adequacy decisions are not very transparent and it is not necessarily clear what the criteria are that apply, reducing predictability and accountability. It would improve WTO conflict resolution if OPAs incorporate processes that build on innovations that have been put in place over time at the level of WTO committees, such as the use of STCs (Karttunen, 2020), and the use of subject matter experts to establish the facts of a matter and ways of resolving implementation problems through constructive engagement.

5. Concluding remarks

Plurilateral agreements are nothing new for the trade regime. They were a core element of the GATT, permitting like-minded jurisdictions to agree on rules that applied only to signatories. In the transition to the WTO it was decided that most of the then extant 'Tokyo Round codes' would be incorporated into the WTO as multilateral agreements and thus apply to all WTO members, including the many developing countries that had not signed the Tokyo Round codes. This was possible because it was made part of a take or leave it package deal – this became part and parcel of accession to the WTO. At the time this linkage strategy was regarded as a unique opportunity to induce (force) all GATT contracting parties to implement what had been negotiated in the various plurilateral agreements during the 1970s and 1980s (Hoekman and Kostecky, 2009). In retrospect this stratagem looks to have been much less strategic than many high-income country negotiators perceived it to be at the time. It is arguably one factor why getting to yes in the WTO years was so difficult, and why many developing countries used the consensus working practice to oppose efforts to engage in deliberations on 'new' issues, which in turn helped incentivize the turn to deep PTAs.

Success in converting the JSIs into agreements would help establish a foundation for WTO members interested in pursuing additional rulemaking. Plurilateral cooperation is not a panacea. It can however be part of the answer to the difficulties the WTO membership has experienced in addressing trade conflicts and negotiating new agreements. Much of what is on the table in the JSIs involves coordination failures or and efforts to identify good regulatory practices. This is valuable. The subjects of discussion are all areas where there are significant potential gains from cooperation and policy coordination. However, apart from the e-commerce talks, they do not address fundamental sources of recent trade tensions and conflicts. Preparing the ground for efforts to do so would ensure the WTO stays relevant in the 21st century.

There are many policy issues that generate spillovers that could be addressed by OPAs. Incorporating the results of JSIs into formal OPAs will help establish a basis for large trading powers to consider using OPAs to agree on rules of the game in a range of contested policy areas. An example is the use of trade policy instruments in programs to combat climate change. The Paris Agreement authorizes countries to set national decarbonization targets and to form sector-specific 'climate clubs' for joint pursuit of national targets. As noted by Sabel and Victor (2020), an implication of the voluntary nature of national commitments under Paris is that any penalty defaults

defined by climate clubs involving trade restrictions fall outside Paris. Although countries can invoke the general exceptions provision of the WTO to justify the use of trade measures as part of decarbonization initiatives, an OPA can make explicit how trade sanctions will be applied among members of the OPA to attain decarbonization targets they have agreed. The ongoing negotiations between Costa Rica, Fiji, Iceland, New Zealand and Norway on an Agreement on Climate Change, Trade and Sustainability are seeking to do this. Preparing the ground for OPAs on these matters requires preparation, including data collection and analysis to assess the magnitude of spillovers and provide a basis for informed deliberation on the need for and potential form of international cooperation. This was a central necessary condition for the successful conclusion of the TFA. Launching such deliberations and developing a common understanding of what is at stake and what can be done is an important input into negotiating OPAs (Hoekman and Nelson, 2020).

The scope for using OPAs as an instrument for cooperation would benefit from actions to facilitate deliberation in the WTO (Wolfe 2021) and, as noted above, from agreeing on a set of principles that participants in OPAs would sign on to. Much also depends on re-establishing an effective multilateral dispute settlement system. This is a key element of the ‘value proposition’ offered by the WTO: providing a de-politicized third-party system to enforce disciplines on the use of discriminatory policies. Action to ensure that the system can work effectively is therefore an important part of making the WTO fit for purpose to attenuate negative spillovers caused by domestic policies. As important is to develop and build on alternative conflict resolution mechanisms that have been used in WTO committees and are needed to support regulatory cooperation. OPAs offer an opportunity to do so and in the process also renovate this function of the WTO.

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