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IMAGINING A POST-DOHA FUTURE: THE FUTURE STABILITY OF THE GLOBAL TRADING SYSTEM

Jo Feldman and David Brightling*

This paper examines the difficulties World Trade Organization (WTO) Members face in concluding the Doha Development Round. It considers whether useful lessons might be learnt from the Uruguay Round and the role plurilateral agreements, first concluded at the Tokyo Round, played in the successful conclusion of the Marrakesh Agreement. The paper will examine the potential for plurilateral agreements to be used to progress the Doha Development Round and the legal and practical issues that arise in relation to those agreements. Finally, the paper will discuss the value of the WTO dedicating greater attention and resources to its powers in relation to oversight and enforcement of the consistency of plurilateral trade agreements with the WTO Agreements, and how such a role may have a broader benefit to the interaction between the WTO Agreements and other areas of international law.

I INTRODUCTION

The Uruguay Round was the most comprehensive, ambitious and successful trade negotiation in modern international economic law. Notably, it began as a series of plurilateral negotiations on discrete agreements, and with far fewer participating states than today's World Trade Organization (WTO).[1] Eleven years after its launch, the Uruguay Round's successor, the Doha Development

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1 The negotiations that formed the General Agreement on Tariffs and Trade, 55 UNTS 187 (opened for signature 30 October 1947, entered into force 1 January 1948) [GATT] began with 15 countries and involved 23 countries by the time the GATT was signed. Eighty-three countries were Members of GATT prior to 1979 when the Tokyo Round (where many of the Uruguay multilateral agreements began as plurilateral agreements) concluded. Another seven countries joined the GATT after the Tokyo Round and another 33 countries joined the GATT during the Uruguay round of negotiations (with 11 of those 33 joining in the last six months). There are now 157 Members of the World Trade Organization [WTO], all of whom are involved in the Doha Development Round negotiations.

Round (the Doha Round), is yet to be completed and is struggling to reach consensus.[2] In April 2011, Pascal Lamy, Director-General of the WTO, stated:[3]

> [F]ailure of the WTO to deliver on its legislative function, failure of the WTO to update the rules governing international trade ... risks a slow, silent weakening of the multilateral trading system in the longer term.
>
> … an erosion of the rules-based multilateral trading system, a creeping return to the law of the jungle.

Multilateral agreement through the Doha Round represents the highest opportunity for trade liberalisation and the greatest gains for the global trading system.[4] No one would deny that having 157 engaged Members is a positive feature of the multilateral system. However, balancing the interests of 157 Members across a plethora of issues on the table has made it increasingly difficult to achieve an agreement and a resolution to the Doha Round has eluded negotiators for 11 years.

With so many countries, negotiators and interests at stake, it is timely to ask whether the current impasse can be overcome. It is neither politically or practically feasible to return to an era where a trade deal is brokered between the "majors" that everyone else then accepts, nor would this process do justice to the spirit of multilateralism and consensus which marks the WTO. Further, the very purpose of the Doha Development Round is to capture the needs of the broader Membership. The question of what can be done to break the Doha Round impasse has been posed by many, with a range of solutions floated.[5] At the December 2011 WTO Ministerial Conference, Ministers noted that "… Members need to more fully explore different negotiating approaches while respecting the

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2 *Doha WTO Ministerial Declaration* WT/MIN(01)/DEC/1, 20 November 2001 [*Doha Ministerial Declaration*].

3 See "Members confront Doha Round deadlock with pledge to seek meaningful way out" (29 April 2011) World Trade Organization <www.wto.org>.

4 Supachai Panitchpakdi, Director-General of the Conference on Trade and Development, said at the United Nations Conference of Trade and Development [UNCTAD] XI:

> While some may attribute importance to bilateral, regional or plurilateral agreements, including deals between developing countries on selected sectors, as alternatives, there is little evidence to suggest that they can match the potential gains from a round of global trade negotiations. Moreover, we all know that there are certain subjects, such as agriculture and anti-dumping, where comprehensive reform can only be obtained through a WTO round of global trade negotiations.

See "Dr. Supachai calls on UNCTAD XI to deliver clear message in support of Doha Round" (14 June 2011) World Trade Organization <www.wto.org>. See also Australian Government: Department of Foreign Affairs and Trade "Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity" (April 2011) Australian Department of Foreign Affairs and Trade <www.dfat.gov.au> at 10.

5 A popular solution floated is the concept of an "early harvest". See for example Gary Hufbauer and Jeffrey Schott "Will the WTO Enjoy a Bright Future? – Report Prepared for the ICC Foundation" (Peterson Institute for International Economics, March 2012).

principles of transparency and inclusiveness."[6] One option often proposed is to remove the consensus rule[7] so that a *single* Member cannot thwart a conclusion to the Doha Round.[8] This solution is less than ideal, as decisions taken by consensus have greater democratic legitimacy.[9] The consensus rule provides a stronger basis to ensure that the decisions adopted have better chance of being implemented, because these decisions are not opposed by any one Member.[10]

History may provide inspiration for an alternative solution to solve the current Doha Round impasse. The Tokyo Round of negotiations, conducted between 1973 and 1979, saw a series of plurilateral agreements (labelled "Codes") on non-tariff barriers of key interest emerge.[11] For the

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6 *Eight Ministerial Conference: Concluding statement of the Chair* WT/MIN(11)/11, 17 December 2011 (Minutes of the Ministerial Conference) [*Report of the Ministerial Conference*].

7 Marrakesh Agreement establishing the World Trade Organization 1867 UNTS 410 (opened for signature 15 April 1994, entered into force 1 January 1995), article IX(1). This agreement allows decisions to be taken by voting where consensus is not achievable, but the suggestion to use this option and depart from the consensus rule has not been well received: see Peter Van den Bossche *The Law and Policy of the World Trade Organization* (2nd ed, Cambridge University Press, Cambridge (UK), 2008) at 146.

8 In 2004 the Sutherland Report noted:

> As the number of measures grow larger and larger ... it becomes harder and harder to implement needed measures that require decisions, even when there is a vast majority of the Members that desire a measure. The consensus requirement can result in the majority's will being blocked by even one country. If the measure involved a fundamental change, such difficulty would probably be worthwhile, as adding a measure of "constitutional stability" to the organization. But often there are non-fundamental measures at stake, some of which are just fine-tuning to keep the rules abreast of changing economic and other circumstances.

Peter Sutherland and others *The Future of the WTO: Addressing Institutional Challenges in the New Millennium Report by the Consultative Board to the Director-General Supachai Panitchpakdi* (World Trade Organization, Geneva, 2004) [*Sutherland Report*] at [283].

9 At [282].

10 Bernard Hoekman and Michael Kostecki *The Political Economy of the World Trading System: The WTO and Beyond* (2nd ed, Oxford University Press, Oxford, 2001) at 57.

11 Agreement on the Interpretation of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies and Countervailing Measures) 1186 UNTS 204 (signed 12 April 1979, entered into force 1 January 1980); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (Customs Valuation) 1235 UNTS 126 (signed 12 April 1979, entered into force 1 January 1981); Agreement on Implementation of Article VI (Anti-Dumping) 1186 UNTS 2 (signed 12 April 1979, entered into force 1 January 1980); Agreement on Import Licensing Procedures 1186 UNTS 372 (signed 12 April 1979, entered into force 1980); Agreement on Technical Barriers to Trade (The Standards Code) 1186 UNTS 276 (signed 12 April 1979, entered into force 1 January 1980); Agreement on Trade in Civil Aircraft 1186 UNTS 170 (signed 12 April 1979, entered into force 1 January 1980); Agreement on Government Procurement 1235 UNTS 258 (signed 12 April 1979, entered into force 1 January 1981); International Dairy Agreement 1186 UNTS 54 (signed 12 April 1979, entered into force 1 January 1980); and Arrangement Regarding Bovine Meat 1186 UNTS 344 (signed 12 April 1979, entered into force 1 January 1980).

first time, important attention was given to non-tariff barriers as well as to tariffs.[12] Several of the Codes then went on to be amended, extended and included as multilateral agreements in the Marrakesh Agreement,[13] while others remained as successful plurilateral agreements annexed to the Marrakesh Agreement.[14] Arguably, it was the results of the Tokyo Round that paved the way for the successes of the Uruguay Round.

Perhaps a plurilateral approach could again help pave the way towards multilateral agreement in the WTO. This article will discuss the benefits and challenges of a plurilateral approach and how such agreements can achieve meaningful liberalisation that leads towards, rather than away from, future multilateral consensus.

II IS A PLURILATERAL APPROACH PERMITTED BY THE DOHA ROUND'S SINGLE UNDERTAKING REQUIREMENT

The Doha Ministerial Declaration, which launched the Doha Round, provides that:[15]

> With the exception of the improvements and clarifications of the Dispute Settlement Understanding, *the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking*. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.

The Warwick Report noted that there are "two different but not necessarily mutually exclusive meanings that attach to the concept of a single undertaking". First, nothing is agreed until everything

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12 John H Jackson *The Jurisprudence of GATT and the WTO* (Cambridge University Press, Cambridge (UK), 2000) at 52.

13 Agreement on Subsidies and Countervailing Measures (interpreting arts VI, XVI and XXIII of the GATT 1994) 1869 UNTS 14 (signed 15 April 1994, entered into force 1 January 1995); Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (Customs Valuation Agreement) 1868 UNTS 279 (signed 15 April 1994, entered into force 1 January 1995); Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) 1868 UNTS 201 (signed 15 April 1994, entered into force 1 January 1995) (replacing the Kennedy Round Anti-Dumping Code –Agreement on the Implementation of Article VI 650 UNTS 320 (opened for signature 30 June 1967, entered into force 1 July 1968)); Agreement on Import Licensing Procedures 1868 UNTS 436 (signed 15 April 1995, entered into force 1 January 1995); Agreement on Technical Barriers to Trade 1868 UNTS 120 (signed 15 April 1994, entered into force 1 January 1995).

14 Agreement on Government Procurement; International Bovine Meat Agreement; International Dairy Arrangement; and Agreement on Trade in Civil Aircraft. The International Dairy Agreement and the International Bovine Meat Agreement were terminated in 1997.

15 *Doha Ministerial Declaration*, above n 2, at [47] (emphasis added).

is agreed. Secondly, all Members are obliged to subscribe to all the constituent parts of a negotiated package.[16]

Authority for ministerial decisions arises from the Marrakesh Agreement. Peter Van Den Bossche has commented, prior to his appointment to the WTO Appellate Body, that "it is not clear whether this very broad power to make decisions, in fact, enables the Ministerial Conference to take decisions which are legally binding on Members".[17] Certainly, some see the Doha Ministerial Declaration as simply a statement of political intent without legal force.[18] The entire WTO Membership at the time agreed to the Doha Ministerial Declaration and, in the case of paragraph 47, uses binding language ("shall"). It is, therefore, possible that paragraph 47 of the Doha Ministerial Declaration, which contains the single undertaking requirement, is legally binding and could only be modified by consensus of the Membership. However, paragraph 47 does allow that "agreements reached at an early stage may be implemented on a provisional or a definitive basis". Therefore, even if paragraph 47 is legally binding, it appears that the single undertaking rule may not preclude plurilateral agreements on select issues.[19]

If the window for concluding the Doha Round closes without agreement being reached, or an early harvest is concluded with a forward work program, is it possible for a group of Members to enter into a plurilateral agreement on any one of the outstanding issues? Any plurilateral agreement would either have to be consistent with the WTO Agreements, comply with article XXIV of the General Agreement on Tariffs and Trade (GATT), or comply with article X of the Marrakesh Agreement. The first two options would allow a plurilateral agreement to operate without breaching the WTO Agreements, but only the last option would allow the plurilateral agreement to operate within the WTO framework (through amendment of the Marrakesh Agreement). This last option will be the focus of this article.

III ANNEXING PLURILATERAL AGREEMENTS TO THE MARRAKESH AGREEMENT

The Marrakesh Agreement provides that the agreements listed in its Annexes 1, 2 and 3 (which contain the entire collection of multilateral WTO Agreements) are "integral parts of this Agreement,

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16 The Warwick Commission *The Multilateral Trade Regime: Which Way Forward?* (University of Warwick, United Kingdom, 2007) [*Warwick Report*] at 30.

17 Van den Bossche, above n 7, at 146.

18 See J Michael Finger and Andrei Zlate "WTO Rules That Allow New Trade Restrictions: The Public Interest is a Bastard Child" (paper prepared for the United Nations Millennium Project Task Force on Trade, 16 April 2003).

19 Ministers commit to advance negotiations, where progress can be achieved, including focusing on the elements of the Doha Declaration that allow Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking, see *Report of the Ministerial Conference*, above n 6.

binding on all Members".[20] The Marrakesh Agreement further provides that the plurilateral agreements listed in Annex 4[21] "are also part of this Agreement for those Members that have accepted them, and are binding on those Members" and that those agreements "do not create either obligations or rights for Members that have not accepted them".[22] Article X(9) of the Marrakesh Agreement establishes that an agreement may be added to Annex 4 "exclusively by consensus".[23]

This consensus requirement may make it difficult to add plurilateral agreements to the WTO framework. If Members cannot settle on a single undertaking that sufficiently meets each of their interests, it is difficult to imagine why Members would agree to add plurilateral agreements into the WTO framework, which they will not necessarily benefit from. In reality, to achieve consensus on the addition of plurilateral agreements to Annex 4, Members would probably have to approve a "package" of plurilateral agreements such that every Member had an interest in, and contributed to the negotiation of, at least one of the agreements. Members might, therefore, agree to include all of the agreements in Annex 4 in order to include particular agreements. This would effectively be a plurilateral conclusion to the Doha Round: a collection of ambitious agreements with like-minded countries, where every Member has enough vested interest in an individual agreement to be willing to agree to all other plurilaterals. Rather than a multilateral agreement of low hanging fruit, a package of agreements containing more ambitious commitments and disciplines would be annexed to the Marrakesh Agreement, with Members being party to the plurilaterals of their choosing.

This form of plurilateral conclusion to the Doha Round might be marginally easier to achieve than a single, multilateral conclusion because Members would not have to agree to everything in all of the agreements, Members would only need to be particularly interested in some issues in some agreements and they would not be offended by the commitments in the agreements to which they are not a party. However, this outcome would still be more difficult to achieve than simply separating out discrete subject areas from the negotiations and completing them plurilaterally. To get discrete outcomes on discrete pieces of low hanging fruit, Members may need to utilise the options for amending the WTO Agreements that do not require consensus.

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20 Marrakesh Agreement, article II(2) and the list of Annexes.

21 The four plurilateral WTO agreements: the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement and the International Bovine Meat Agreement. The International Dairy Agreement and the International Bovine Meat Agreement were terminated in 1997.

22 Marrakesh Agreement, article II(3).

23 Article X(3) allows amendment to the Marrakesh Agreement (and, therefore, presumably article X(9)) to take effect upon acceptance by two thirds of the Membership, but amendments will only take effect for the Members who have accepted them. This means that the consensus requirement in article X(9) could not be amended without consensus.

IV MAKING PLURILATERAL AMENDMENTS TO THE MULTILATERAL AGREEMENTS

Amending the multilateral WTO Agreements is another option that would allow for the inclusion of plurilateral agreements on individual issues within the WTO framework.

A Amendments to Multilateral Agreements that Cannot be Achieved Plurilaterally

Certain amendments to the multilateral agreements can only be made when there is consensus amongst all Members. These include amendments to:

- Articles I and II of the General Agreement on Tariffs and Trade 1994 (GATT 1994). This is the Most-Favoured Nation (MFN) provision in respect of goods and requires that Members do not impose tariffs on goods in excess of the levels bound in their tariff schedules.[24]
- Article II(1) of the General Agreement on Trade in Services (GATS), which is the MFN provision in respect of services.[25]
- Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which is the MFN provision in respect of intellectual property.[26]
- Amendments to the Understanding on Rules and Procedures Government the Settlement of Disputes (DSU).[27]

Therefore, all Members would need to agree to any changes to tariffs, dispute settlement or the MFN provisions. For this reason, a plurilateral approach is unlikely to work for the core market access issues in Doha. In practice, many countries have unilaterally lowered their tariffs below their bound tariff rates in the WTO. However, without a reciprocal offer (or an offer which is perceived to be equal), Members are unlikely to be willing to commit to be *bound* to lower tariffs that will also apply to Members who do not reciprocate. The Members that have already lowered their tariffs may like to hold such a commitment as leverage to achieve reciprocal lower bound-tariff rates. The conditions are not ripe for a "trade-off" to occur. Furthermore, it may not even be possible to get

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24 General Agreement on Tarriffs and Trade 1867 UNTS 187 (signed 15 April 1994, entered into force 1 January 1995); Marrakesh Agreement, article X(2).

25 General Agreement on Trade in Services 1869 UNTS 183 (signed 15 April 1994, entered into force 1 January 1995) [GATS]; Marrakesh Agreement, article X(2).

26 Agreement on Trade-Related Aspects of Intellectual Property Rights 1869 UNTS 299 (signed 15 April 1994, entered into force 1 January 1995) (TRIPS Agreement); Marrakesh Agreement, article X(2).

27 Understanding on Rules and Procedures Governing the Settlement of Disputes 1867 UNTS 3 (signed 15 April 1994, entered into force 1 January 1995); Marrakesh Agreement, article X(8).

plurilateral support for some of these issues such as agricultural market access, because the like-minded countries (such as the Cairns group) have no incentive to agree amongst themselves.[28]

B Amendments to Multilateral Agreements that Can be Achieved Plurilaterally with Two Thirds Agreement but Which Will Apply Multilaterally

Amendments to Parts IV, V or VI of the GATS and the GATS Annexes can be made plurilaterally with the agreement of two thirds of WTO Members. These amendments will apply multilaterally.[29] Thus, revision of the GATS Schedules (which are prepared under Part IV and sit as Annexes to GATS) only requires acceptance by two-thirds of Members. To some extent, the liberalisation of GATS Schedules is a simpler negotiating prospect because the positive lists of the GATS Schedules are effectively unilateral agreements, or "offerings", that apply multilaterally. Members do not need to agree on principles or language to achieve liberalisation; they simply have to decide unilaterally which service sectors they are willing to liberalise to the GATS standard. For this reason too, any plurilateral agreement on services would not be an impediment to further future multilateralism as the content and structure of GATS would not be affected.

Whether an individual Member is willing to make a unilateral decision will be influenced by the unilateral commitments they see other WTO Members as being willing to make. Will Members be willing to commit to greater services liberalisation (or bind themselves to existing treatment that is higher than their current commitments) when other Members who do not bind themselves to liberalisation (or do not liberalise to the same extent) will still be able to benefit (the free-rider concern)? Many WTO Members believe that the benefits of unilateral liberalisation, and often the benefits of regional trade agreements, are implemented domestically on an MFN basis because it is difficult to maintain a bifurcated system. Further, services liberalisation is in a sense already unilateral because Members schedule the commitments to which they are willing to commit.[30]

However, while the services sector may in a sense operate unilaterally, the negotiating strategy behind it cannot be ignored; liberalisation is agreed to as part of bilateral or plurilateral reciprocity. Looking beyond trade policy to a broader negotiating strategy, Members may consider it a disadvantage to plurilaterally lock in revised GATS Schedules to the benefit of free-riders and thereby removing the ability to use this liberalisation not only as leverage or incentive for services

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28 The Cairns Group is a coalition of 19 agricultural exporting countries: see <http://cairnsgroup.org>.

29 Marrakesh Agreement, article X(5).

30 Some commentators have also noted that through a process of regulatory reform, changes are being made in market access arrangements for developing country services providers, though these are not necessarily reflected in scheduled commitments in the GATS: see John Whalley "Assessing the Benefits To Developing Countries of Liberalization in Services Trade" (National Bureau of Economic Research, Working Paper 10181, 2003).

liberalisation of (otherwise) free-riders, but also as leverage for the broader negotiations. Unless a WTO Member is a fervent believer in the benefits of unilateral liberalisation, or is willing to set an example by unilaterally binding themselves to existing levels of protection that are higher than their current commitments,[31] it will be difficult to get agreement to increase services liberalisation without a trade-off. Alternatively, liberalisation may happen if all of a plurilateral group agrees to liberalise services, and each member of that group feels that it is worth increasing their liberalisation for everyone because they will disproportionately benefit from the liberalisation of another member of the plurilateral group. In such circumstances, a Member may be willing to commit to services liberalisation, if this move would be reciprocated by a group of key trading partners; after all, Members are willing to bind themselves to greater services liberalisation in regional trade agreements in exchange for reciprocal liberalisation from just one key trading partner. However, this type of plurilateral agreement would require a particular plurilateral collection of vested interests in services liberalisation that would be difficult to develop and align.

In a positive development, however, a diverse group of WTO Members have commenced plurilateral services negotiations in Geneva. This initiative seeks to support the multilateral system while exploring options for advancing services reform. This group consists of WTO Members of both developed and developing countries, which altogether make up 70 per cent of world trade in services.[32] The initiative is still in the early stages, but it will be interesting to watch its progress over the coming years.

C Amendments to Multilateral Agreements that can be Achieved Plurilaterally with Two Thirds Agreement and which will Only Apply Plurilaterally

Aside from the instances discussed above, amendments to the remaining parts of the multilateral agreements can "take effect for the Members that have accepted them upon acceptance by two thirds of the Members and thereafter for each Member upon acceptance by it".[33] Given that there are 157 WTO Members, 105 Members would need to accept any such changes for them to come into operation for those Members. This would include, for example, amendments in respect of the

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31 Note however the Australian Government's ongoing advocacy for unilateral economic reform: Australian Government: Department of Foreign Affairs and Trade, above n 4, at 12–13.

32 While discussions for this initiative have been ongoing, a group of countries announced, on 5 July 2012, that discussions were ready to "enter a new phase", and would begin in earnest in September 2012. Signatories to the 5 July statement were Australia, Canada, Colombia, Costa Rica, the European Union, Hong Kong China, Israel, Japan, Mexico, New Zealand, Norway, Pakistan, Peru, South Korea, Switzerland, Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Turkey, and the United States: "Services Liberalisation Talks Among Group of WTO Members to Enter 'New Phase'" (2012) 16 *Bridges Weekly* 27.

33 Marrakesh Agreement, article X(3).

domestic regulation disciplines in GATS, most commitments in TRIPS and amendments to technical barriers to trade, trade remedies and subsidies.

1 Areas where it would be too administratively onerous for the obligations only to take effect plurilaterally

Article X(3) of the Marrakesh Agreement states that amendments "of a nature that would alter the rights and obligations of the Members, shall take effect for the Members that have accepted them." Non-signatories cannot be bound by the new obligations arising under the amendments, nor can the amendments affect the rights of non-signatories. Therefore, some plurilateral amendments would be too difficult to implement because they could only be implemented as against other signatories. An example would be an amendment to the Agreement on Technical Barriers to Trade (TBT Agreement)[34] to facilitate environmental labelling. If any country that did not agree to the labelling rule could insist that signatories apply their original obligations, under the TBT Agreement and GATT 1994, in respect of non-signatories, signatory Members could not insist that goods from non-signatory Members be labelled according to the new amendment. Applying a two-tiered system in this situation would be expensive and potentially ineffective in achieving the labelling aim.

2 Areas where the benefits could not be prevented from applying multilaterally

Does the consensus requirement for amendments to the MFN obligations in the agreements,[35] require a reading down of article X(3) such that the benefits of amendments made by two thirds agreement must be extended to all Members on an MFN basis? Or does the language "amendments … of a nature that would alter the *rights* and obligations of the Members, shall take effect for the Members that have accepted them" (emphasis added) allow the benefits to be restricted to the signatories? This really goes to the question of whether MFN applies universally, or only to the issues covered by the WTO Agreements.

Article X(3), unlike article X(4), does not expressly state that the plurilaterally agreed amendments must apply multilaterally. Article X(3) would seem to support the following reading: article X(2) prevents amendments to the existing MFN obligations and existing rights under the WTO Agreements and prevents plurilateral amendments from winding back the rights or benefits accruing to WTO Agreements, but plurilateral amendments can create new rights and benefits under article X(3) that are not subject to MFN.[36] However, this seems to be contrary to the drafting of the

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34 Agreement on Technical Barriers to Trade 1868 UNTS 120 (opened for signature 15 April 1994, entered into force 1 January 1995).

35 Marrakesh Agreement, article X(2).

36 The language of art X(3) of the Marrakesh Agreement states that obligations "take effect for the Members that have accepted them", thereby suggesting that the new obligations only apply to signatories. However, does "take effect" refer to benefits as well as the obligations? Such a reading would give additional meaning

MFN provisions in the WTO Agreements, which suggest that MFN treatment must be offered on *all* trade in goods, services and intellectual property, unless an exception (such as article XXIV of GATT) is met. This interpretation is consistent with provisions such as article 1.1 of TRIPS that "Members may, but shall not be obliged to implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement" – one of those provisions is the obligation to provide MFN treatment "with regard to the protection of intellectual property" unqualified by the language of "as covered by this agreement". Therefore, it may be arguable that the *benefits* of amendments under article X(3) would need to be applied on an MFN basis, unless there was consensus agreement to the contrary.

Even if signatories are legally able to exclude non-signatories from the benefits of plurilateral amendments, it may be practically difficult to restrict the benefits of some amendments. Members who do not commit to the obligations would, therefore, still benefit from the measures. For example, if a group of Members agreed to prohibit certain types of fisheries subsidies, the benefits of those commitments could not be confined to the group of Members that entered into the obligations. The signatory group would reduce their subsidies, but non-signatories would be under no obligation to reduce subsidies. Thus, not only would the prohibition be less effective at achieving its fish resources management goal, but the prohibition would also make it harder for exporters from signatory Members to compete with the exports of non-signatory Members. The latter problem also arises for plurilateral agreement to reduce domestic agricultural support. Similarly, a plurilateral amendment could be made to reduce signatory Members' use of trade remedies, for example by reducing time periods for the application of safeguards. However, as safeguards are applied against imports from all Members, all Members would benefit from such a reduction irrespective of whether they are signatories to the agreement to reduce safeguard usage.

Therefore, many of the issues of the Doha Round would not be conducive to plurilateral amendment to the WTO Agreements because free riders could also enjoy the benefits of the plurilateral amendment. Even if Members subscribe to the theory that unilateral liberalisation is beneficial, they would probably be concerned about the lack of incentive for non-parties to sign up to the plurilateral amendment, either at the time of the amendment or at a later date. As raised in the above discussion on GATS Schedules amendments, if Members plurilaterally agree to commitments that benefit free-riders, this takes a negotiating point off the table, not only as leverage or incentive

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to art X(2) of the Marrakesh Agreement, which requires that amendments to the Most Favoured Nation (MFN) obligations under the agreements must be made by consensus. That provision would otherwise be read as limited to not allowing amendment of the existing MFN obligations in the existing agreements. Amendments that are agreed between two thirds of Members might, therefore, still have to be consistent with the MFN rule in these agreements, otherwise they would effectively be amending the MFN rule, which can only be done with consensus. If the amended provisions expressly stated that the MFN obligation in the agreement did not apply to the new provision, this would not be an amendment to the original MFN obligation as it originally applied and is cited in article X(2).

to engage the (otherwise) free-riders on that issue, but also as leverage for the broader negotiations. There would need to be significant plurilateral benefits or interests to overcome these disincentives. In reality, Members are unlikely to agree to such amendments without consensus.

3 Areas where the benefits might be prevented from applying multilaterally

There are some amendments that only require two-thirds approval that may be able to limit the benefits to the signatories. These areas may therefore be more viable candidates for plurilateral amendment.

4 Annexes to GATS covering discrete sector domestic regulation of services

As discussed above, amendments in respect of the domestic regulation disciplines in GATS take effect for the Members that have accepted them, upon acceptance by two thirds of the Members and thereafter for each Member upon that Member's acceptance. If the benefits of new commitments do not need to be extended on an MFN basis, then this is an area where an agreement could more easily limit the obligations and benefits to the signatories. Article VI:4 of GATS states:

> With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in services shall, through appropriate bodies it may establish, develop necessary disciplines.

In 1998, the WTO's Council for Trade in Services adopted the Disciplines on Domestic Regulation in the Accountancy Sector (Accountancy Disciplines). However, the disciplines did not take immediate legal effect. WTO Members decided to continue to work towards developing general disciplines on professional services and possibly further sectoral specific disciplines, and to integrate them into the GATS at the end of the Doha Round. The Accountancy Disciplines are yet to come into effect. Developing general disciplines on professional services to incorporate into GATS at the end of the Doha Round is an important step towards broader liberalisation. However, in the interim, while waiting for consensus on general principles, Members could presumably reach agreement on limited sector specific agreements like the Accountancy Disciplines for sectors such as law, engineering or medical sectors. On consensus, these agreements could take effect immediately.

Other plurilateral agreements could sit within the agreements themselves, in the way that the Berne Convention's[37] intellectual property provisions sit within the text of the TRIPS Agreement.[38]

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37 Berne Convention for the Protection of Literary and Artistic Works 1161 UNTS 30 (signed 9 September 1886, revised at Paris 24 July 1971, Paris revisions entered into force 15 December 1972).

38 TRIPS Agreement, article 9:1.

Article 4 of TRIPS establishes an MFN obligation on WTO Members in relation to intellectual property. However, the obligation exempts any favour, privilege or immunity granted, in accordance with the provisions of the Berne Convention (1971), authorising that "the treatment accorded be a function not of national treatment but of the treatment accorded in another country". Article 14 of the Berne Convention, for example, identifies resale royalty rights (or *droit de suite*) as one of the "author's rights" comprised in copyright. However, the Convention identifies it not as a required minimum standard of intellectual property law, but rather as a right the protection of which can be offered selectively to signatories on the basis of reciprocity from those signatories. Therefore, WTO Members only have to offer protections for resale royalty rights to Members that also protect resale royalty rights and this will not constitute a breach of the TRIPS MFN obligation.

It might be possible for WTO Members to negotiate similar amendments that offer additional protection on a reciprocal basis in relation to other intellectual property obligations, which are part of the Doha negotiations, such as additional protections or fast-track processing of rights registration for geographical indications. Article 1.1 of TRIPS states that: "Members may, but shall not be obliged to implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement." However, due to the obligation to maintain consistency with the provisions of the TRIPS Agreement, it may not be possible to offer additional protection on a selective, reciprocal, basis without breaching the MFN obligation under TRIPS; amendment of that MFN obligation requires consensus.

V AGREEMENT ON WAIVING THE WTO RULES

Instead of seeking to plurilaterally amend the multilateral WTO Agreements, Members could instead agree to waive certain flexibilities under the agreements. For example, in a decision of the General Council of 30 August 2003, WTO Members waived the obligations of an exporting Member under article 31(f) of TRIPS. This amendment aimed to make it easier for poorer countries to import cheaper generic pharmaceuticals made under compulsory licensing if those poorer countries are unable to manufacture the medicines themselves.

Waivers of obligations under the WTO Agreements must be agreed by three quarters of Members and the waivers must be reviewed annually.[39] However waivers of flexibilities under the Agreements would not require such approval, although they would also be unenforceable. As any Member could breach the plurilateral commitment and exercise their right to the flexibility in the Agreements at any time, this voluntary waiver of flexibilities would probably only work in rare circumstances where all Members have an interest in amending or not enforcing the rules. However, the DSU negotiations may contain some of those rare examples.

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39 Marrakesh Agreement, articles IX(4) and IX(5).

Negotiations to amend the DSU have been ongoing for over 14 years.[40] While this might suggest a lack of consensus, given the negotiations began as housekeeping, many of the proposals for improving the DSU could be classified as "non-fundamental measures … which are just fine-tuning to keep the rules abreast of changing economic and other circumstances". The Sutherland report saw them being held hostage by the consensus rule,[41] and possibly also by the single undertaking commitment. Without those two requirements, surely some fine-tuning of the DSU could be agreed to under a plurilateral agreement between the Members that regularly use the dispute settlement system, and, therefore, have an interest in upgrading the system.

As noted above, article X(8) of the Marrakesh Agreement requires that amendments to the DSU must be made by consensus. However, Article 12.1 of the DSU states: "Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute". Accordingly, signatories to a plurilateral agreement could agree that whenever they were the primary parties to a dispute, they would agree to modify the DSU rules in accordance with upgrades contained in the plurilateral agreement. The plurilateral agreement would be unenforceable if either party to the dispute refused to honour it, because the plurilateral agreement would be unenforceable in the WTO (because it does not sit under the WTO Agreements), and the Panel would be unlikely to apply a new timeline without agreement of the parties. However, it could apply wherever the updated procedures are preferable to the standard DSU rules for each party to the dispute.

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40 The 1994 Marrakesh Ministerial Conference mandated WTO Members' governments to conduct a review of the Dispute Settlement Understanding within four years of the entry into force of the Marrakesh Agreement (this is, by 1 January 1999). The Dispute Settlement Body (DSB) started the review in late 1997, and held a series of informal discussions on the basis of proposals and issues raised by Members. That review was ultimately rolled into the Doha Development Round through the commitment in paragraph 30 of the *Doha Ministerial Declaration* in which the Ministerial Conference agreed to:

> Negotiations on improvements and clarifications of the Dispute Settlement Understanding. The negotiations should be based on the work done thus far as well as any additional proposals by members, and aim to agree on improvements and clarifications.

The negotiations were originally set to conclude by May 2003, but are continuing without a deadline.

41 In 2004 the *Sutherland Report* noted:

> The consensus requirement can result in the majority's will being blocked by even one country. If the measure involved a fundamental change, such difficulty would probably be worthwhile, as adding a measure of "constitutional stability" to the organization. But often there are non-fundamental measures at stake, some of which are just fine-tuning to keep the rules abreast of changing economic and other circumstances.

Although legally the single undertaking does not cover amendments for the Dispute Settlement Understanding, the general mindset in favour of consensus over plurilateral agreement probably has an effect: *Sutherland Report*, above n 8, at [283].

If signatories were involved in a dispute with non-signatories, the non-signatory could choose under article 12.1 of the DSU to agree to modify the timeline for that particular dispute in accordance with the plurilateral agreement to which it is not a signatory. In the absence of such agreement by the non-signatory, the dispute would proceed under the rules of the original DSU.

Third parties' rights would need to remain unaffected. The DSU distinguishes between "parties to the dispute" and "third parties". Third parties' rights are set out in article 10 of the DSU. They have the right to have an opportunity to be heard, to make a written submission and to have that written submission be given to the parties to the dispute and to be reflected in the panel report. They also have the right to receive the submissions of the other parties to the dispute made for the first meeting of the panel. Article 17.4 of the DSU also requires that third parties have the right to make written submissions and be heard by the Appellate Body. Therefore, as long as the plurilateral agreement does not contravene these third party rights set out in articles 10 and 17 of the DSU, there would seem to be no impediment to the plurilateral agreement applying to disputes involving third parties, which are not parties to the plurilateral agreement.

VI AMENDING THE MARRAKESH AGREEMENT'S RULES GOVERNING AMENDMENTS TO THE WTO AGREEMENTS

Implementation difficulties seem to limit the number of Doha Round issues that could be resolved through plurilateral agreement. From a negotiating standpoint, it should be easier to agree on discrete plurilateral agreements annexed to the Marrakesh Agreement, because these agreements would not carry the same stigma as plurilateral amendments to the multilateral agreements. Discrete plurilateral agreements would probably have fewer complications. However, the consensus rule makes it very difficult to add plurilateral agreements to the WTO umbrella. A high threshold for such additions is important. It helps prevent a proliferation of inconsistent plurilateral agreements, which would be disastrous for the multilateral system. It also helps to minimise a risk of conflicting provisions between the plurilateral agreements. But there does not seem to be stronger arguments in favour of a higher threshold than that for plurilaterally amending the multilateral agreements.

Article X(2) of the Marrakesh Agreement requires that amendments to article X(9) (which contains the consensus rule requirement for adding plurilateral agreements to Annex 4 of the Marrakesh Agreement) must be made by consensus. Therefore, consensus among WTO Members would be required to lower the voting threshold for including plurilateral agreements. Consensus for such an amendment might be possible if all Members had a vested interest in making it easier to annex plurilateral agreements under the WTO umbrella. There might be support for an amendment to lower the threshold from consensus to two-thirds support (which is the threshold for most other amendments). This is because, like any other amendments and the current plurilaterals in Annex 4, only Members that are signatories to the plurilateral agreement can be bound by it; and the plurilateral agreements cannot undermine the existing rights under the WTO Agreements because all WTO Members are still bound by those obligations.

It might be prudent to couple such an amendment with the inclusion in article X:9 of an oversight committee (a more activist version than the Committee on Regional Trade Agreements has been). This committee could monitor the workability of the plurilateral agreements with the multilateral agreements and develop some sort of test criteria for plurilateral agreements in addition to two thirds agreement. A trade policy review to ensure that the plurilateral agreement does not undermine the WTO Agreements would be an example. Although, if it were too difficult to reach consensus on these amendments (bearing in mind that the Committee on Regional Trade Agreements has still not reached agreement on what "substantially all trade" means in 15 years[42]), then perhaps the two thirds agreement requirement would be sufficient to prevent a plethora of inconsistent or WTO minus plurilateral agreements.

Reaching consensus on such an amendment seems ambitious given the very consensus issues in Doha that have lead to this suggestion. However, Doha has now taken more than 10 years; the likelihood is that even if Members reach a single undertaking agreement, issues will be farmed off to future working groups just as they were after the Uruguay Round. If Members can agree on little else, they might at least be able to agree that this is the best way forward in terms of empowering the WTO to continue to work effectively towards agreement on outstanding issues.

VII COLLATERAL BENEFITS OF A PLURILATERAL APPROACH

A return to a grass roots plurilateral approach with subsequent accession could be a new way forward for Doha while also taking a step towards a 21st century WTO. The WTO offers arguably the most comprehensive and effective structure of rules in international law. If that structure can develop a management framework that oversees and links trade-related international treaties (much as the Committee on Regional Trade Agreements was intended to do), the WTO could develop a significant role in addressing broader issues of fragmentation in international law. In doing so, the WTO could play a greater role in addressing the challenges of fragmentation caused by diversification and specialisation that now characterises the international law system. In particular, there may be a new role for the WTO to play in assisting to bring together fragmentation in fisheries governance which Margaret Young suggests is a product of the proliferation of regimes that seek to address fisheries sustainability.[43] One example of this is in areas for ongoing collaboration with other fisheries governance regimes that have been identified by the Chair of the Rules Group. These include notification of fisheries subsidies, the classification of fisheries subsidies and the use of benchmarks for fisheries management. If multilateral negotiations falter, or conclude with a limited multilateral agreement with issues reserved for future negotiations, states will naturally migrate towards Regional Trade Agreements (RTAs) or plurilateral agreements on specific issues. L Alan

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42 "Regional Trade Agreements: Regionalism and the multilateral trading system" (2001) World Trade Organization <www.wto.org>.

43 Margaret Young *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press, Cambridge (UK), 2011) at 137.

Winters notes that coalitions rooted in formal preferential trade agreements are here to stay, so that if the multilateral processes fail, the blocs remain.[44] A reason to keep plurilaterals within the WTO regime is because WTO Members include 157 nation states. This means that if WTO Members remain engaged in the WTO as a central structural body, the WTO has significant scope and power to reduce fragmentation of international trade law. Conversely, if Members drift away from the WTO and start negotiating plurilateral trade liberalisation outside of the WTO framework, there is a risk creating alternative pathways or reference points to the WTO, around which the recalcitrant states can coalesce, creating fragmentation.

An example of this can be seen in the interface between trade and environment. The WTO has been slow to address the interface between trade and environment treaties.[45] In the Doha Declaration, Ministers agreed to launch negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements.[46] These negotiations were to address how WTO rules are to apply to WTO Members that are parties to environmental agreements, in particular to clarify the relationship between WTO rules and trade measures taken under the environmental agreements. To date, this has resulted in a transparency exercise to examine the appearance of trade issues in Multilateral Environmental Treaties (MEAs). MEAs on the other hand, which have been negotiated by significant numbers of WTO Members, have sometimes been far quicker to agree to commitments in the gray area between the two areas of international law.[47]

The same plurilateral agreement management framework that could monitor plurilateral trade agreements born of the Doha Round could also allow for more meaningful future interaction between plurilateral environmental agreements and the highly functional and developed legal institutional framework of the WTO. Thus, a collateral benefit of the WTO improving its capacity to link plurilateral trade agreements to its structure, is that the WTO could take a meaningful step towards its Doha Declaration goal, by making it simultaneously easier and beneficial to link the MEAs into the WTO structure. Where two thirds of WTO Members are signatories to an MEA,

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44 L Alan Winters "Preferential Trading Agreements: Friend or Foe?" in K Bagwell and P Mavroidis (eds) *Preferential Trade Agreements A Law and Economic Analysis* (Cambridge University Press, Cambridge (UK), 2011) 7 at 27.

45 Sustainable fishing and governance is another example where the international trade and environment law regimes require coordination to address a common environmental problem.

46 *Doha Ministerial Declaration*, above n 2, at [31(i)].

47 For example, through the inclusion of trade-related enforcement provisions in regional fisheries agreements. This is not to suggest that Multilateral Environmental Treaties [MEAs] are without negotiating difficulties, but simply to note that MEAs seem to be increasingly approaching issues that might be considered to sit at the interface of international trade and environment law.

those Members could pass a vote (if the amendment suggested above were adopted) to include the MEA with other plurilateral agreements in Annex 4 of the Marrakesh Agreement.

This sort of statement instantly engenders fear that the WTO is trying to hijack issues outside its trade purview and impose its rigorous dispute settlement regime on areas outside its mandate. Plurilateral agreements annexed to the Marrakesh Agreement would not be subject to dispute settlement if the signatories to that agreement prevent such recourse under the plurilateral agreement. Such annexure may or may not want to harness WTO dispute settlement for some of the trade-related aspects of the treaties. But even without a link to WTO dispute settlement, including an MEA as a plurilateral agreement to the WTO Agreements may still be beneficial. WTO Members to MEAs must still comply with their WTO obligations, so why not facilitate a harmonised interpretive approach to the two sources of trade obligations (in WTO Agreements and in the enforcement and remedies sections of MEAs) by linking the agreements within the same international law framework?

Adaptation of an international institution as successful as the WTO should be approached with caution; but if the WTO could successfully develop a structure for developing and managing high quality plurilateral agreements that operates within its multilateral structure, it could potentially achieve some degree of conclusion to the Doha Round; exert itself as a stabilising influence on proliferating regional trade agreements, plurilateral discrete-subject trade agreements and other trade-related agreements such as MEAs; and be structurally poised to significantly contribute to the development of the global trading system in the 21st century.

VIII CONCLUSION

The very strength of the multilateral trading system – its democratic legitimacy and its MFN rule, which have been at the heart of its success at achieving widespread, meaningful trade liberalisation – may also be its downfall. Any amendments to the WTO Agreements, even more liberalising ones, must be approved by a minimum of two thirds of Members. In today's WTO, that would require 105 Members – more than comprised the entire WTO Membership when the Uruguay Round negotiations commenced. Amendments that seek to limit the benefits reciprocally are unlikely to be able to be approved without consensus, as they would otherwise probably violate the MFN obligations under the Agreements. Plurilateral amendments that apply multilaterally will be harder to reach agreement on. There are three important lessons to take from this situation.

First, while the strictness of the WTO rules reduces the number of issues that could realistically be agreed upon plurilaterally, they should still be attempted. A single undertaking agreement on Doha may not be possible, but even if it is possible, it will leave many issues farmed off to ongoing working groups. Among those issues are a small but important few that are ripe for plurilateral agreement in a manner consistent with the WTO Agreements. The Tokyo Round demonstrates that these small, incremental, plurilateral steps can build momentum towards substantive multilateral change. The plurilateral services negotiations are a positive step in this direction.

Secondly, the positive feature of this amendment difficulty is that if the WTO's oversight and enforcement powers are used effectively, it is almost impossible for plurilateral agreements to damage the multilateral trading system. Director-General of the WTO, Pascal Lamy's fear of a "return to the law of the jungle" cannot be realised if the WTO utilises its enforcement provisions to prevent regional and plurilateral agreements from breaching the MFN obligations (or abusing the MFN exceptions) under the WTO Agreements.[48] The MFN obligations and the high thresholds for amending the WTO Agreements mean that plurilateral agreements can only fragment the multilateral system if the WTO and its Members allow it. The Marrakesh Agreement only allows alteration of the existing obligations under the WTO Agreements if they are amendments agreed by two thirds of the Membership, and they can only alter the MFN obligations of the WTO if they are agreed upon by consensus or form part of a GATT article XXIV consistent RTA. If WTO committees such as the Committee on Regional Trade Agreements actually wield their oversight powers and Members utilise the dispute settlement system to enforce the obligations, plurilateral agreements cannot easily damage the multilateral system.

Thirdly, as the proliferation of RTAs demonstrates, plurilateral agreements on trade liberalisation will continue to occur alongside WTO's multilateral agreements as these agreements are easier to conclude and are often more ambitious than multilateral agreements. The longer Doha takes and the less it includes, the more likely it is that areas of liberalisation that remain unresolved in the multilateral negotiations will become fodder for plurilateral agreements made outside of the WTO. However, the WTO does not have to be sidelined by that progress; the WTO could provide a harmonising framework for those plurilateral agreements if the WTO refocused its attention on its underutilised oversight and enforcement powers. If the WTO Members could agree to make it easier to annex plurilateral agreements and develop the transparency activities of the Committee on Regional Trade Agreements, the WTO could become a mustering point for plurilateral agreements, thus increasing opportunities for harmonisation of plurilateral agreements and, in turn, building momentum for multilateral agreement.

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48 "Members confront Doha Round deadlock with pledge to seek meaningful way out", above n 3.