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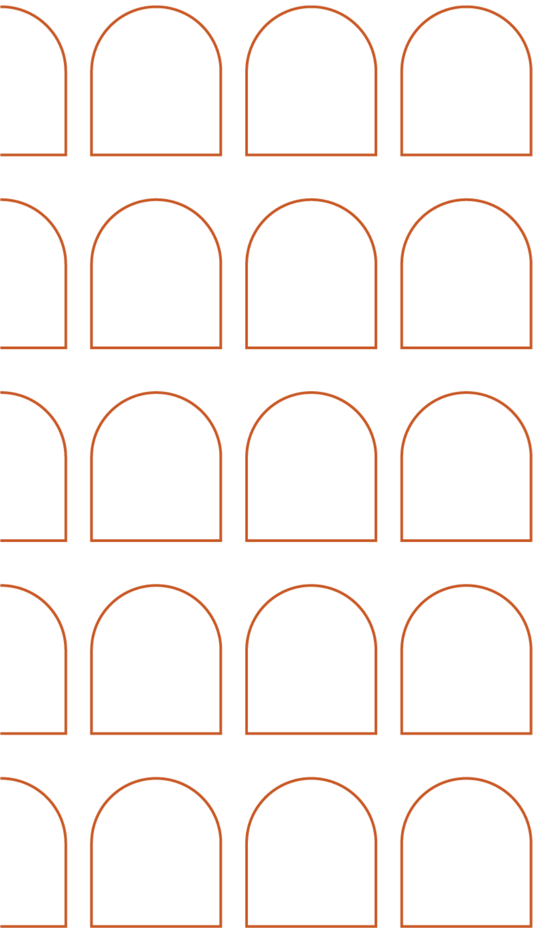

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WORKING PAPER

# Plurilateral Agreements, Multilateralism and Economic Development

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European University Institute
**Robert Schuman Centre for Advanced Studies**
Global Governance Programme

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## Abstract

Plurilateral agreements among sub-sets of economies have a long history within the multilateral trading system. Plurilaterals may appear superficially less attractive than a set of non-discriminatory multilateral rules that apply to all WTO members but may, both in theory and in practice, be better suited to accommodate diversity across countries in the desire and ability to regulate certain aspects of economic activity. As long as such differences between countries do not lead to discrimination or encroachment on other countries' rights under WTO rules, it is potentially beneficial for the trading system to permit groups of countries to pursue regulatory cooperation, even if other countries do not wish to follow suit. The alternatives to greater accommodation of plurilateral cooperation in the WTO are more preferential (discriminatory) trade agreements and club-based initiatives outside the WTO. Both options are arguably worse for non-participating developing countries than incorporating open, transparent plurilateral agreements into the WTO. Opponents of plurilateral initiatives operating under WTO auspices run the risk of inducing further erosion of the multilateral trading system.



## JEL Classification

F13, F15, K40

## Keywords

Developing countries; WTO; plurilateral agreements; multilateral trade

## Introduction[1]

In principle, the various agreements and specific national trade policy commitments embodied in the World Trade Organization (WTO) apply on a multilateral basis. Negotiated policy disciplines apply to all WTO members, subject to differentiation to account for differences in levels of economic development.[2] Because decision making in the WTO is consensus-based, it is difficult to (re-)negotiate multilateral disciplines that apply to all WTO members. Plurilateral agreements among sub-sets of economies that are members of the WTO are one response to this difficulty. Perhaps even more importantly, plurilateral cooperation can accommodate diversity in preferences and priorities across countries and differences in the desire and ability to regulate certain aspects of economic activity.

Plurilateral agreements among a sub-set of the WTO membership do not represent a new feature in the multilateral trading system,[3] nor is it the case that plurilateral initiatives outside the WTO are a recent phenomenon (Dimitropoulos, Chen and Chaisse, 2024). During the Tokyo Round, several plurilateral agreements were negotiated, mainly between Organization of Economic Cooperation and Development (OECD) countries. There are numerous examples of plurilateral cooperation on regulatory matters.[4] There are also instances of plurilateral market access liberalizing agreements that were negotiated outside the WTO. An example is the agreement liberalizing trade in environmental goods concluded among a subset of Asia-Pacific Economic Cooperation (APEC) members that is applied on a nondiscriminatory basis, i.e., consistent with the WTO MFN rule (Mavroidis, and Neven 2022).

This article asks one question: to what extent can plurilateral agreements be of help (or not) to developing countries? Developing countries have viewed them with some skepticism, although this attitude has been changing. As discussed further below, many developing countries participate in plurilateral initiatives launched under the umbrella of the WTO since 2017. However, some developing nations, including India and South Africa, are opposed to plurilateral forms of cooperation in the WTO as a matter of principle and WTO law (WTO 2021), partly because of concerns that such agreements will result in a two- or multi-tier WTO to the detriment of developing countries. We believe that this is not the case, but whether plurilaterals violate the WTO agreement is ultimately a matter for dispute settlement.

The article proceeds as follows. Section 1 explores the arguments in favor of plurilaterals within the WTO. Section 2 turns to some legal issues surrounding plurilateral agreements, and the constraints imposed in this regard. Section 3 discusses current practice. Section 4 considers pros and cons of pursuing plurilateral initiatives for developing countries. Section 5 concludes with a brief recap the main argument.

1 This paper is forthcoming in J. Chaisse, R. Chen and G. Dimitropoulos (eds.) Plurilateralism: A New Form of International Economic Ordering? *Journal of World Investment & Trade*. We are indebted to Julien Chaisse, Richard Chen, Evelyne Clerc, Georgios Dimitropoulos, Merit Janow, Simon Lester, Cecilia Malmström, André Sapir, Sunayana Sasmal, Alan O. Sykes, and Paul Tucker for helpful comments.

2 See, e.g., Hoekman and Kostecki (2009; Mavroidis (2016).

3 See https://wtoplurilaterals.info/

4 Some of these are discussed in Hoekman and Sabel (2019).

# 1. The Case for Plurilaterals

Article II of the Agreement Establishing the WTO states:

1. The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as "Multilateral Trade Agreements") are integral parts of this Agreement, binding on all Members.

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.[5]

Although Art. II.3 makes clear that plurilateral agreements do not create rights or obligations for non-signatories, it leaves open the nature or scope of such agreements. This is not defined. In accordance with the framing paper for this special issue (Dimitropoulos, Chen and Chaisse, 2024), we exclude preferential trade agreements (PTAs) and cooperation among informal groups of countries such as the G7 and G20 from our definition of plurilateral trade agreements. We differ from Dimitropoulos et al. in that we do not understand plurilaterals as multi-party, sector-specific agreements adopted in the framework of an international organization or a broader multilateral agreement by a subset of the overall membership. Instead, we conceptualize plurilateral agreements as issue- or domain-specific cooperation[6] among a group of countries (economies) that does not take the form of a traditional trade agreement, i.e., a package of binding market access commitments that are enforceable through a dispute settlement mechanism. We also do not consider plurilateralism to occur under the umbrella of the broader multilateral framework. Thus, in our conception, plurilateral agreements are distinct from discriminatory trade agreements, may be stand alone, and may encompass "soft law" arrangements (because they do not encompass market access commitments) that aim to reduce trade costs associated with domestic regulatory regimes (regulatory heterogeneity).

Plurilateral agreements may apply on a discriminatory or nondiscriminatory basis. If discriminatory and if the agreement addresses matters covered by a WTO multilateral agreement, it will need to be accepted by consensus as an Annex 4 agreement if it is to be WTO legal.[7] If it applies on a nondiscriminatory basis, it is not necessary to include it as a new Annex 4 agreement. Instead, signatories can choose to simply schedule the agreement (Hoekman and Mavroidis 2017). Some plurilaterals may take the form of product-specific, critical mass agreements liberalizing market access on a nondiscriminatory basis. As noted by Dimitropoulos et al (2024), examples of such critical mass plurilateral market access agreements include the Information Technology Agreement (ITA) and the Agreement on Basic Telecommunications.[8] Both are offshoots (continuations) of negotiations that commenced under the Uruguay Round.

5 There are only two examples of plurilateral agreements in the WTO: the Agreement on Government Procurement and an Agreement on Civil Aircraft. A third may be put forward by signatories of the 2023 Agreement on Investment Facilitation for Development. See https://www.wto.org/english/news_e/news23_e/infac_13oct23_e.htm. One should not confuse variable geometry à la Annex 4 Agreements with critical mass agreements like the Information Technology Agreement (ITA). The ITA signatories observe MFN, as non-signatories as well can profit from its content. The instigators had agreed to extend MFN rights to all, if a certain high percentage of world production of IT material agreed to abide by the negotiated disciplines. See Conconi and Howse. (2012) and Gnutzmann-Mkrtchyan and Henn (2018).

6 The characterization that such agreements must be sector-specific is too constraining in our view.

7 See, for example, Hoekman and Mavroidis (2015 for further discussion.

8 What constitutes a critical mass will be determined by the extent to which parties are concerned about free riding. Practice dating back to the Kennedy and Tokyo rounds suggests that an internalization ratio of 80-90 percent will apply; see, for example, Finger (1974).

Building on our prior research, in what follows, we make the case that plurilateral agreements represent a potentially important path for preserving and extending the liberal trading order that has brought so much prosperity to the modern world. With the legislative function of the WTO half past dead and the US-China feud permeating international economic relations beyond and above trade, there is no point in seeking to restrict cooperation efforts to only the multilateral avenue.[9] Plurilateral agreements can complement the existing multilateral regime and go beyond it. Many scholars, including ourselves, have pointed out that given large differences in preferences, common rules that apply to all countries equally may be inappropriate. The traditional approach to recognizing this in trade agreements – exemptions, both time-bound and open-ended – is not efficient if social preferences differ substantially across states. This suggests a case for flexibility and a 'horses for courses' approach, as opposed to a binary choice between a multilateral deal or no agreement. Plurilaterals can complement or substitute multilateral cooperation.

The attraction of plurilaterals lies in part in the limited prospects for new multilateral agreements. Progressing on a multilateral basis has become very difficult given the WTO convention of proceeding only by consensus. Even setting aside geopolitical issues, WTO members are deeply divided on many trade policy issues. While multilateral agreement is not impossible, as illustrated in 2022 with the conclusion of a new Agreement on Fisheries Subsidies and in 2013 with the Agreement of Trade Facilitation, major updating of the 27-year-old WTO Agreement has proved impossible. In many areas, agreements among like-minded nations may be the only way forward. The Uruguay Round of GATT negotiations, which concluded with the creation of the WTO, was underpinned by the so-called Single Undertaking. This required that all GATT Contracting Parties subscribe to all the rules embodied in the various agreements of the WTO and its component parts – all of which were subject to a single dispute-settlement process. These rules were differentiated in some cases – the main example being the principle of Special and Differential Treatment for developing countries – but could not, except in a small number of cases, be entirely evaded. This was 'issue-linkage' writ large, and it deliberately turned the creation of the WTO into a take-it-or-leave-it choice that every active GATT party chose to take. As such, Single Undertaking extended the reach of trade liberalization commitments and the strength of enforcement of the WTO considerably relative to its precursor. This was widely held to be a success at the time, but it contributed substantially to the subsequent lack of progress in negotiations.

Many developing countries that chose to accept the Uruguay Round Single Undertaking and thereby acceded to the new WTO found that it contained several features that they found uncomfortable or difficult (Finger and Schuler, 1999). In some cases, these issues were not recognized at the time, but in others, developing countries disliked elements of what they had to sign right from the start, and this was compounded over time by the uneven delivery of the commitments that developed countries undertook. Moreover, with the threat of strong enforcement via dispute settlement hanging over them, developing countries felt that they could not ignore the parts of the agreement they disliked. This has substantially eroded developing countries' trust in the system (Narlikar, 2019). If a Single Undertaking is part of the fundamental ethos of the WTO, as suggested by Dimitropoulos et al. (2024),[10] it must apply to future developments of the WTO, which – as we have noted – must be agreed by consensus. An implication is that any area in which advancement is sought must come in a form that is indisputably Pareto-improving – i.e., ensuring that no party loses and some parties gain. Constructing such packages would need to address concerns of developing countries. Perceptions that such concerns are not being addressed is a major source of opposition by some developing countries to the prospect of adding more plurilateral agreements to the WTO. Matters are compounded by a sense that the WTO members that are pursuing plurilateral agreements are prioritizing issues that are important to them, while refusing to address long-standing issues that have been on the WTO negotiating table for many years and have yet to be resolved.

9 A comprehensive analysis of this issue is undertaken in Hoekman, Mavroidis and Nelson (2023a, 2023b).

10 As noted below, we disagree with this presumption.

Although the Doha Round failed in 2008, WTO members agreed to new disciplines that apply on a multilateral basis. As mentioned, there have been several successes since the formation of the WTO, including the Public Health Waiver in TRIPS (2001), the Services Waiver (2011), the Declaration on Export Competitiveness (banning agricultural export subsidies, 2015), the Trade Facilitation Agreement (2015) and most recently the Agreement on Fisheries Subsidies (2022). All of these were agreed by consensus but do not constitute package deals – i.e., were not part of a single undertaking. This reflects the reality that the single undertaking approach is simply a negotiating strategy. It is not – contra to frequent presumption, including Dimitropoulos et al. (2024) – a 'core feature of the WTO'. This confuses negotiation modalities with the institutional framework embodied in the WTO. This framework permits plurilateral agreements and does so in various ways, including critical mass agreements that are applied on an MFN basis and multi-party mutual recognition agreements on product regulations and conformity assessment regimes.

A framework that addresses developing country concerns regarding plurilateral agreements could break the negotiating logjam: given the security and ability to stand aside from new agreements, the nervous or indifferent might no longer feel the need to veto them. Although plurilaterals reduce the scope for bringing all WTO members along – that is, to encourage reluctant parties to accept new disciplines – they also reduce the ability of the unwilling to hold others back. More plurilaterals may imply a more fragmented and complex trading system; the counterfactual is one where 164 WTO members apply policies in areas not (yet) subject to multilateral rules in an idiosyncratic manner. If one thinks only in terms of barriers to trade, plurilateral agreements seem second-best compared to uniformity (multilateral rules that apply to all), but once one recognizes that countries have different preferences for and capacities to implement specific regulations, allowing for differentiation could well be first best (Hoekman and Sabel, 2019). Moreover, even if second-best, given that the alternatives at present appear to be no progress for anyone, a further proliferation of exclusionary preferential trading agreements or the demise of the WTO, even second-best is an improvement.

Plurilaterals give rise to concerns regarding their potential for discrimination and exclusion, and hence, their overall legitimacy. Arguments have been made that such cooperation: (i) is a mechanism for powerful states to set rules of interest to them; (ii) permits power asymmetries to result in issues of importance to developing countries and least-developing countries (LDCs) being kept off the table; (iii) gives rise to pressure on non-parties to join in the future without being given the chance to alter what was agreed by the incumbents; (iv) impedes the ability of developing countries to participate given government capacity constraints; and (v) reduces the ability of the WTO secretariat to serve all members equally.[11] While some of these arguments are less salient if plurilateral agreements are open to any country interested in joining, participation is voluntary, and benefits extend to non-signatories, such factors help explain why many developing countries have been hesitant to participate in plurilateral 'joint statement initiatives' launched in 2017 at the WTO ministerial meeting in Buenos Aires.

These concerns are important to address and point to the need for a strong governance framework to ensure that plurilateral cooperation on trade-related policies is consistent with multilateralism and the broad goals laid out in the preamble to the WTO treaty. While recognizing the great importance for the trading system of clarifying and agreeing to the conditions that must be satisfied for cooperation among sub-sets of WTO members to be appropriate and desirable, this article does not engage with the question of governance of plurilaterals as this has been addressed in previous research.[12]

11 See, e.g., Patrick (2015); Kelsey (2022).

12 Hoekman and Sabel (2021) propose principles for strengthening the extant governance framework, including that agreements be truly open to any country wishing to join, are fully transparent, and include mechanisms to assist countries not able to participate because of institutional capacity constraints; see Annex 1 to this article.

Some of the concerns that have been raised in the literature and summarized by Dimitropoulos et al. (2024) also apply to multilateral negotiations – capacity constraints will bind there as well. Although plurilaterals reduce the scope to use issue linkage, efforts to do so in multilateral negotiations have not been very successful and have been one reason for the Doha Round deadlock. Those who want to move forward may do so in any event through trade agreements or plurilateral cooperation outside the WTO. Insofar as a plurilateral initiative is not discriminatory, WTO members can proceed through concerted unilateral action. Often ignored in the debate is that the primary outside option – trade agreements – do not allow opting out, but instead provide developing country signatories with a transition period for implementation. Moreover, most trade agreements tend to be closed to accession.

In what follows, we first discuss the legal argument against plurilateral agreements, opportunities and challenges confronting developing countries, and LDC engagement in plurilateral cooperation. We then suggest options for the international community to better support developing countries in overcoming capacity constraints to enable more active participation in plurilateral arrangements and highlight the opportunities that plurilateral agreements offer to developing nations.

## 2. Addressing Legal Concerns

Abstracting from substantive policy-related concerns that may arise in the negotiation of plurilateral agreements and the ability (capacity) of developing country representatives to defend their interests, legal arguments have been raised regarding the consistency of JSIs (a form of plurilateral agreements) with the WTO. JSIs are open plurilateral agreements (OPAs), as participation is open to all WTO Members. Nevertheless, some stakeholders openly voiced their concerns regarding the legal consistency of JSIs with the WTO. Are the concerns valid? This issue is discussed in Section 2.

WTO agreements are ‘treaties’ within the meaning of Article 2.1.a of the Vienna Convention on the Law of Treaties (VCLT).[13] Article 41 the of VCLT envisages a scenario that is pertinent to plurilateral cooperation. It reads:

1. Two or more of the parties to a multilateral treaty may conclude an agreement tomodify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty; or (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

There is no disagreement among commentators that the provisions laid out in Article 41 are of customary status or, at the very least, that the main principles set out therein have attained such character.[14] So, what does international law have to say in simpler terms about inter se agreements? They are permissible, if three distinct conditions have been cumulatively met, namely:

1. A possibility for their conclusion is either contemplated in the multilateral treaty, or is not prohibited by it.
2. The inter se agreement does not affect other parties’ rights and obligations under the multilateral treaty.
3. The modification does not relate to a provision the derogation from which runs counter to the object and purpose of the multilateral treaty.

13 This Section draws on Beviglia-Zampetti, Low and Mavroidis (2022).
14 Villiger (2008) explains (pp. 538 et seq.) how this provision has acquired customary status.

One can understand why this test is reflected in prevailing legal culture. This provision strikes a very fine balance between contractual autonomy and lawful opposition to inter se agreements. The threshold condition is the contractual language: if the multilateral treaty disallows modifications (i.e., the inter se agreement), then that is the end of the matter. But if modifications are – explicitly or implicitly – permitted, this does not mean that anything goes. In a consensus-based system such as the WTO, the principals (signatories to the multilateral treaty) are the original 'gatekeepers'. However, in the WTO, they may object on spurious grounds, leaving the legality of inter se rulemaking unsettled.[15]

Assume a plurilateral agreement has been negotiated by a group of states on a matter falling under a multilateral treaty (for example, the WTO) and is challenged as being incompatible with this treaty. According to international law, the benchmark to judge consistency of inter se agreements with the multilateral treaty is twofold. First, adjudicators must ensure that the rights and obligations of non-participants will not be affected by the inter se contract; that there are no negative spillovers so to speak. The justification for this is the legitimate expectations of signatories when signing a multilateral treaty. Second, in order to cement this standard, an adjudicator must ensure that the inter se agreement does not pertain to and impinge upon a foundational element of the multilateral treaty. That is, an element that is integral to the object and purpose of the treaty and ultimately reflects the very aim(s) sought by the parties when entering into the contractual arrangement in the first place. What constitutes a foundational element depends on the treaty's subject matter. In the WTO, the MFN requirement qualifies as a foundation. OPAs that apply benefits on a nondiscriminatory basis and that leave the door open for all to participate do not undercut the foundational elements of the WTO.[16] Notice, however, that the VCLT says nothing about openness as a principle. Thus, discrimination is not constrained as long as there is no adverse effect. This standard is too limited and points to the need for WTO membership to agree on governance principles for plurilateral agreements.

The main point here is that leaving the decision on the legality of plurilaterals to WTO membership could lead to abuse, reflecting strategic behavior rather than principled arguments justified under the VCLT. International law possesses the tools to circumvent this scenario. Whether states would accept findings by adjudicators who apply public international law along the lines sketched out above is an open question. Pragmatism suggests a focus on the content and substance of a given plurilateral agreement – including good faith efforts to address the types of concerns that have been raised by developing nations; this is likely to be more effective. Insofar as WTO members believe a plurilateral agreement violates WTO disciplines and multilateral commitments of signatories, they should invoke WTO dispute settlement procedures and request a panel to determine if their arguments hold water.

## 3. Practice in Plurilaterals

The focus of plurilateral cooperation often centers on domestic regulatory policies that give rise to transactions costs – rather than on disciplining policies that explicitly discriminate against foreign goods and providers. Such regulatory policies may be associated with the implementation of trade agreements but need not be.[17] Plurilateral cooperation that is either non-discriminatory in its outcome or, if it is restricted, is 'open' in the sense of permitting participation (accession) by any country that meets certain conditions defined by the agreement is typically domain-specific and often will involve regulatory cooperation.[18] Examples include the identification of good regulatory practices, commitments to implement such practices, and mechanisms through which participants recognize the equivalence of (specific dimensions of) regulatory regimes to facilitate trade by lowering compliance

15 We discuss this scenario in Hoekman and Mavroidis (2015).

16 Article XXIV GATT does not observe MFN, but Article XXIV lays out ex ante conditions for MFN deviations to be judged lawful.

17 An example of a plurilateral arrangement that is linked to the implementation of a trade agreement is the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), under which signatories (26 as of May 2023, including China, the EU and Japan) agree to a process through which dispute settlement panel reports can be appealed while the Appellate Body is in abeyance.

18 The key point here is that incumbents and new members observe identical obligations. As long as this is the case, as long that is that no additional obligations are requested for new players to join in, then there is adherence to non-discrimination.

costs for firms. Mutual recognition agreements (MRAs) for certification of authorized economic operators (AEOs) are an example.[19] In 2021, there were 87 such MRAs worldwide. While most are bilateral, a plurilateral MRA for AEO certification was implemented by Chile, Colombia, Mexico and Peru in 2018. This was followed in 2022 by a plurilateral MRA spanning 11 Latin American states (WCO 2021).

There are several formal plurilateral agreements and ongoing plurilateral talks in the WTO. Recently, JSIs on Investment Facilitation and on Services Domestic Regulation have been negotiated between WTO Members, with participants agreeing to include the negotiated provisions into their GATS schedules as additional commitments. Talks on investment facilitation, spanning more than 100 participants, including many LDCs,[20] were concluded successfully in August 2023. The agreement centers on matters such as transparency and predictability of investment-related polices, administrative procedures, information sharing and monitoring and evaluation.

These agreements seek to reduce trade costs for business through adoption of good regulatory and administrative practices relating to licensing and qualification requirements for foreign service providers and associated technical standards, including through transparency, and due process commitments. Plurilateral negotiations on e-commerce are ongoing, as are dialogues on environmental issues such as fossil fuel subsidies and plastics pollution. The WTO e-commerce talks involve 80+ WTO members, including four LDCs: Benin, Burkina Faso, Lao PDR, and Myanmar. They focus on reducing trade-restrictive policies and digital trade facilitation, including the regulation of cross-border data flows, electronic signatures, e-invoicing, cross-border payments, and consumer protection.

In addition to activity under the auspices of the WTO, plurilateral initiatives motivated by trade-related objectives have also been negotiated outside the WTO. An example is the Digital Economy Partnership Agreement (DEPA) between Chile, New Zealand and Singapore.[21] This is open to accession by additional countries and is designed to be modular, permitting participation by countries in some of the areas covered, and not in others. Saluste notes that some states that have obtained data adequacy decisions from the EU are plurilateralizing these bilateral arrangements by recognizing each other's data protection regimes (Saluste, 2021). This has reportedly been done by Switzerland, Israel, Argentina, Uruguay, and the UK. Economic research has found evidence that a network of EU data adequacy agreements fosters trade among signatories (Ferracane et al., 2023).

Non-WTO talks that are explicitly plurilateral in nature include negotiations on an Agreement on Climate Change, Trade and Sustainability (ACCTS) between New Zealand, Costa Rica, Fiji, Iceland, Norway and Switzerland.[22] The aim of these countries is to agree on trade policy commitments to foster the greening of the economy. Other examples are the Indo-Pacific Economic Framework for Prosperity (IPEF),[23] an Americas Partnership for Economic Prosperity (APEP)[24] and the Global Cross-Border Privacy Rules Forum.[25] These US-led initiatives aim to define cooperation to achieve different types of objectives, both economic and noneconomic, on a club basis. They do not involve reciprocal negotiations on binding market access liberalization commitments and are not expected to include dispute settlement mechanisms. Thus, they require either that the benefits of participation are large enough to sustain cooperation and/or that a decision by a member not to fulfill what it agreed

19 Claussen (2022) discusses other examples.

20 These include Afghanistan, Benin, Burundi, Chad, Djibouti, Guinea, Guinea-Bissau, Lao PDR, Liberia, Mauretania, Myanmar, Solomon Islands, The Gambia, Togo, Uganda, Yemen and Zambia.

21 https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/digital-economy-partnership-agreement/.

22 https://www.mfat.govt.nz/en/trade/free-trade-agreements/trade-and-climate/agreement-on-climate-change-trade-and-sustainability-accts-negotiations/.

23 https://ustr.gov/ipef.

24 https://www.state.gov/americas-partnership-for-economic-prosperity/.

25 This aims to establish a certification regime to facilitate trade and data flows by helping firms demonstrate compliance with internationally recognized data privacy standards, while accepting differences in domestic preferences and regulation. https://www.commerce.gov/global-cross-border-privacy-rules-declaration.

to is separable – that is, it does not affect the incentives of other parties to continue to cooperate.

IPEF focuses on four policy areas (‘pillars’): (i) trade (with an emphasis on digital economy and e-commerce-related regulation, and labor, environment and corporate accountability standards for traded products); (ii) enhancing supply chain resilience through cooperation on early warning systems, mapping, and enhancing traceability in key sectors; (iii) measures to green the economy (renewable energy and decarbonization); and (iv) commitments to implement effective tax, anti-money laundering, and anti-bribery regimes. The approach is modular in that not all countries need to participate in all four pillars; for example, India is an observer in trade-related talks. A first agreement was reached in May 2023 on an IPEF Supply Chain Agreement.[26] This commits IPEF members to coordinate efforts to build a collective understanding of significant supply chain risks, based on identification and monitoring of critical sectors and key goods by each participant while protecting business confidential information; identify and work to address (potential) disruptions (where possible, collectively); improve supply chain logistics and infrastructure; identify opportunities for technical assistance to strengthen supply chains; and respect labor rights, market principles, and minimize market distortions, including unnecessary restrictions and impediments to trade.

To support these efforts, three bodies are envisaged: (i) a Supply Chain Council (in which parties will develop sector-specific action plans for critical sectors and key goods to enhance the resilience of supply chains); (ii) a Supply Chain Crisis Response Network (an emergency communications channel for participating economies to seek support during a supply chain disruption and to facilitate information sharing and collaboration during a crisis); and (iii) a Labor Rights Advisory Board (comprising government, worker, and employer representatives to promote labor rights in supply chains, sustainable trade and investment, and facilitate investment in businesses that respect labor rights).

Many observers question whether these types of approaches can work because they exclude China (Lovely, 2022), and do not involve market access commitments (Reinsch and Goodman, 2022). Neither IPEF nor APEP is enforceable in the sense that tariffs are an instrument that will be used to respond to instances where a member does not comply with agreed provisions. Instead, these frameworks assume participants will benefit from associated implementation mechanisms, such as access to a supply chain council that will act as a focal point for members to deal with supply chain issues, share data, evaluate supply chain weaknesses and address these. Non-compliance with agreed membership requirements will involve ceasing access to this mechanism and the associated benefits. This implies a need to design a process to identify when a signatory ceases to satisfy the terms of participation (Lester, 2023) – a matter that has yet to be determined. Each party is expected to follow its respective domestic processes for signature, ratification, acceptance, or approval of the agreement. In the case of the US, this will likely take the form of an Executive Order. As noted by Goodman (2023), this creates significant uncertainty regarding the credibility and durability of US engagement in IPEF agreements and participation in the proposed institutional mechanisms. Goodman suggests that putting IPEF under the umbrella of APEC could help address this issue. From a global (trading system) perspective, considering bringing IPEF-type club-based cooperation under the umbrella of the WTO would help to promote greater participations by states with similar interests, ensure transparency, and provide stronger institutional support for participants. Ideally, such initiatives would seem to lend themselves well to becoming open plurilateral agreements under WTO auspices.

26 https://www.commerce.gov/news/press-releases/2023/05/press-statement-substantial-conclusion-ipef-supply-chain-agreement

## 4. Opportunities and Challenges for Developing Countries and LDCs

Plurilateral agreements are potentially relevant to developing countries and LDCs, either because they set standards that firms must conform to in order to trade, or because implementation of whatever is agreed puts their firms and products at a competitive disadvantage compared to firms based in signatory nations, which would have lower costs of documenting compliance with specific regulatory norms when engaging in international trade or investment.

### *4.1 Why do many developing countries and LDCs abstain from negotiating plurilaterals?*

When examining JSIs membership, we observe that large developing countries are frequently present, but smaller developing countries and LDCs are almost always absent. Is this because JSIs do not embed provisions that would incentivize them to take a seat at the table? Is the subject matter of JSIs of insufficient interest (salience)? Or should we look elsewhere for the reasons explaining their absence?

Administrative capacity constraints affect the ability of many developing countries and LDCs to engage on an equal footing in the negotiation of plurilateral agreements. This is one reason why their participation in most plurilateral initiatives has been limited. Governments may find it difficult to determine the 'social return' of applying the proposed rule developed by participants in a plurilateral negotiation. More generally, limited engagement may reflect perceptions that an issue or regulatory domain that is the subject of plurilateral negotiation is not of sufficient interest to justify participation given limited personnel and scarce resources.[27] While resource and capacity constraints are clearly significant and highly salient, whether perceptions that the issues being discussed are not of sufficient interest to warrant engagement is an empirical question. As important is the question what might be done in the context of any given plurilateral initiative or negotiation to increase the relevance and potential benefits of an agreement, i.e., to identify measures and actions that would enhance the 'rate of return' for developing countries. This is distinct from issues such as assessing potential implementation costs, the feasibility of transitional arrangements such as gradual or stepwise application of agreed good practices, and provision of technical and financial assistance to developing countries. All these are important and should be a central element of open plurilateral agreements to assure inclusivity and consistency (coherence) with the Sustainable Development Goals. While this is not always given, plurilateral cooperation is an appropriate tool to move the trading regime in this direction.[28]

From the perspective of an LDC what matters is not only to ensure that plurilateral cooperation among groups of WTO members is not harmful to national interests; it is also important to increase the prospects of plurilateral agreements that are beneficial by addressing matters that improve the ability of firms located in developing countries to use trade as an instrument for sustainable development. In addition to identifying such factors and tabling them in plurilateral deliberations or negotiations, there is a need to identify more generally issues that are important to developing economies that could be put forward for plurilateral discussion and potential agreement. That is, rather than limiting the focus to extant or ongoing plurilateral initiatives, the question to ask is what issues could be the focus of new plurilateral agreements that directly address concerns that are important from a sustainable development perspective and particularly salient for developing countries.

27 Hoekman and Mavroidis (2015) and Patrick (2015) discuss this issue in greater depth.

28 To our knowledge this has not been attempted so far. An endeavour in this context could involve discussing legal principles such as special and differential treatment, and how they are (or could be) integrated into plurilateral agreements to ensure equitable benefits for all WTO members. Hoekman and Sabel (2021) discuss legal principles that should apply to ensure that development concerns are considered in the design of plurilateral agreements.

What we argue here is a change in the mindset: smaller players in the WTO should become agenda-makers instead of reducing their overall participation to that of agenda-takers. No one will better represent their interests in the multilateral forum than themselves. The point is that plurilateral cooperation could be an instrument through which to focus attention of government agencies, donors, and the private sector on a specific policy domain that is important from a competitiveness and supply capacity perspective. Identifying specific issue areas requires consultations with investors and business associations, and dialogue with potential partner countries to determine how cooperation can address specific constraints that impede the realization of trade and investment opportunities for developing countries and LDCs. What such opportunities include and the specific design of cooperation to help realize them are matters to be determined by (groups of) developing countries. There are many potential areas, ranging from initiatives to bolster cooperation at the regional level to implement measures to reduce trade and transactions costs (for example, in the context of regional integration agreements) to agreements that focus on adoption and effective implementation of good regulatory practices in a given area (for example, facilitating cross-border payments for MSMEs, data protection, investment facilitation).

Deliberations to assess a potential ‘menu’ of options must be informed by analysis as well as consultations with the private sector in developing nations. This requires resources that could be provided by donor countries; as noted in the subsequent section, this is an activity that could in itself be construed and designed as a plurilateral initiative.

### *4.2 Leveraging Plurilateral Opportunities for Sustainable Development*

Addressing differences in levels of economic development and institutional capacities calls for tailored and targeted measures in plurilateral agreements as opposed to general opt-outs and exemptions, which are the standard approach in the WTO to address differences in development levels and capacity. Inclusion of the ‘standard’ type of special and differential treatment (SDT) would defeat a major rationale for groups of WTO Members to consider plurilateral agreements: namely, to adopt what signatories agree are good regulatory or policy practices. Insofar as governments consider provisions of an agreement to be beneficial – for example, constitute good practice, they presumably will want to implement whatever standards and administrative procedures have been agreed. The focus should be on ensuring that these constitute good regulatory practices for participating countries independent of their levels of development, and that countries that cannot readily implement an agreement because of capacity constraints or institutional weaknesses are assisted to do so.

A commitment that parties to a plurilateral agreement assist non-signatories desiring to participate would address a key development-related factor that may impede participation and benefitting from a given agreement (Hoekman and Sabel, 2019). Doing so is important to assure inclusion and to increase the benefits of plurilateral cooperation by expanding the set of countries that (can) participate. Putting in place a mechanism through which members of plurilateral agreements and arrangements provide such assistance will enhance the credibility of commitments by proponents that this type of cooperation is consistent with, and supportive of, an open, rules-based, multilateral trade order.

Currently there is no system that makes available assistance on request in areas proposed for plurilateral cooperation, both to aid the technical aspects of their accession, or subsequent to signing an agreement to assist in implementing provisions that need not be enacted as a pre-condition for membership. Establishing such a mechanism to make plurilateral agreements effective and inclusive could be organized around domain-specific epistemic communities that have an interest in supporting plurilateral deliberations but not have the resources to do so. Calling on and resourcing existing international organizations may be an effective way of doing this, increasing the prospects for policy coherence by aligning support for implementation with work programmes and assistance strategies. Entities asked to provide expertise must be able to cover the associated costs. Even if international development organizations such as the World Bank, ITC, UNCTAD, or UN Regional

Commissions are tasked with gathering and analyzing information, this needs to be resourced. The same pertains to meeting technical assistance requests, whether for diagnostic assessments of the prevailing regulatory regime in a country or to address the need for reform or upgrading.

This has been done for specific policy domains in the past; one example is the program to support the epistemic community that prepared the ground for and informed the content of the Trade Facilitation Agreement (TFA). A multi-donor supported facility designed as a plurilateral agreement to support engagement by more developing nations, including LDCs, in plurilateral initiatives and agreements – both ex ante and ex post – would fill an important gap constraining their participation and informing the design of potential plurilateral initiatives. The terms of reference for such a facility must go beyond local capacity strengthening and span upstream research and analysis of the type that was done for the TFA negotiations to clarify the potential gains and (opportunity) costs of alternative options and the associated implications for participating – and non-participating – WTO Members. A facility could also play a valuable role in funding robust monitoring and evaluation of the implementation of plurilateral agreements to help guide efforts to improve the development impact of agreements over time.

There are many potential areas where support to domain-specific epistemic communities with strong interest in a policy area, as well as knowledge of the institutional setting and contexts prevailing in developing nations, could help to identify opportunities for using the trade regime more effectively for development. Supporting engagement by such communities could do much to help make both extant and future plurilateral agreements more inclusive and relevant from a sustainable development perspective. For example, informal working groups on micro, small, and medium-sized enterprises (MSMEs) have called for exchanges of good practices to help identify measures that can facilitate MSMEs' access to finance and cross-border payments. Operationalizing identified good practices as well as working with importing countries to address constraints that inhibit access to, or use of, cross-border payments will require expertise, analysis, and resources. Another example is the 2023 Investment Facilitation for Development agreement. A multi-donor facility to support the epistemic community with an interest in leveraging investment for development – research institutes, investment promotion agencies – could complement this agreement by supporting not only implementation but also analysis of foreign investment-related policies that are not included in the agreement such as, for example, investment incentives.

In our view, assistance – and associated resources – should be allocated to specialized agencies and nongovernmental organizations with a local presence and requisite expertise. Geneva-based institutions such the Enhanced Integrated Framework or the Advisory Center for International Law are not well placed to provide assistance in bolstering the regulatory institutions in developing countries that are affected by recent plurilateral agreements such as the those on Services Domestic Regulation (2022) and Investment Facilitation (2023). They do not have a country presence, nor do they have the domain expertise that is called for. Effective assistance is likely to require a multi-stakeholder approach that is anchored in the respective countries and regions. International economic law can help by considering how promises to provide assistance can be made more credible, such as for example processes to support the operationalization and delivery of funds to the agencies and entities that are asked to provide support in the field. Of particular importance in this regard is to build in monitoring and evaluation to assess the effectiveness of support provided as well as the responsiveness to requests and provisions that support review and learning from experience. At the end of the day, the effectiveness and impact of assistance matters. Embedding good practice clauses that provide the mandate and call on finance ministries to allocate the resources required could do much to address concerns of low-income countries in particular that plurilateral agreements are not beneficial to them.

## 5. Conclusion

Plurilateral agreements offer a dynamic path for reviving the WTO's legislative function. Plurilateral agreements represent a shift in international economic governance, but one that should not be exaggerated. Open plurilateral cooperation has long been feature of the GATT/WTO regime and outside the trading system international regulatory cooperation has also often taken plurilateral forms. The implications for the global economic order of a greater focus on plurilateral cooperation have yet to be assessed in comprehensive manner in part because they are recent and/or still being developed. But undeniably, there is a shift in this direction which reverts different forms: we observe single product initiatives like "re-shoring" semiconductor production (a consequence of re-dimensioning GVCs); we also observe the establishment of more "encompassing" initiatives, like the IPEF and/or the APEP. It is too soon to speak about the impact of such schemes which will depend importantly on how they evolve in terms of issue-area coverage and country participation. IPEF's impact will depend in part on whether its members succeed in concluding the trade component of their initiative (Barfield, 2024).

In this paper we focus on a narrower understanding of plurilateralism, namely plurilaterals as understood in the Agreement Establishing the WTO, and more specifically on the question whether they could be of help to developing countries. Although not by any means a panacea, plurilateral initiatives offer a mechanism for dialogue and a process for understanding the potential benefits of new rulemaking in a given policy area. Whether this leads to a negotiation process will depend on how large the set of WTO members is with an interest in a specific issue area. Participation, as well as the type of agreement to be pursued, plurilateral or multilateral, is endogenous; that is, these are matters that will be determined through the associated dialogue on defining good practice and analyzing the potential benefits and costs required to implement them.

The determination of whether a plurilateral is WTO-consistent should be entrusted to adjudicators, and not left to be determined by whether consensus exists that a plurilateral initiative should be permitted to be pursued and incorporated into the WTO. Developing countries and LDCs have a stake and interest in participating in plurilaterals and using such instruments to address issues that are of concern to them. This can include making special and differential treatment more effective. Negotiating plurilaterals that focus on doing so need not include the whole membership. A cross-section of WTO members willing to work together in pursuing concrete measures to address identified constraints and aspects of WTO agreements that are not supportive of attaining the SDGs could, for example, provide a potential path forward to making the WTO more relevant from a sustainable development perspective.

It is a fallacy to think that plurilaterals can only benefit OECD members. There are many areas of interest primarily to developing countries. While capacity constraints might have deterred them from engaging so far, this should not be the case in the future as well. Indeed, the current legislative inertia in the WTO makes developing countries collateral damage, as they cannot advance their own cause at the multilateral table. As things stand, with the current US-China stand-off looming large, there is not much hope for developing countries to expect tangible gains from multilateral negotiations. There is no reason why developing countries cannot utilize the plurilateral path to advance their own priorities. Having said that, we recognize that in today's world, with the stand-off between US and China going on unabated, it seems that, realistically, plurilaterals will emulate the tendency for 'friend-shoring' that we observe in the realm of global value chains.[29]

29 See Hoekman, Mavroidis and Nelson (2023a, 2023b).

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## Annex 1

Elements of a possible code of conduct for plurilateral agreement

- Membership is voluntary; WTO Members that decide not to participate initially will not be pressured to join subsequently.
- Openness to subsequent accession 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.
- 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.
- An obligation to provide reasons to accession-seeking countries for decisions to reject membership applications.
- The agreement must be implemented on a non-discriminatory basis, with benefits extending to non-signatories. Insofar as benefits are conditional on satisfying requirements pertaining to standards of regulation and regulatory enforcement in a jurisdiction, which should be clearly specified.
- A provision committing signatories to assist WTO Members that are not yet able to satisfy the institutional/regulatory preconditions for membership in terms of applying specific substantive provisions of the agreement but desire to do so.
- Wherever it is appropriate 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. Wherever possible, designing agreements to permit 'incremental' accession – adoption of specific disciplines that can be implemented on a separable basis, as is the case under the TFA – can help to encourage participation.
- Provisions ensuring that non-participants have full information on the implementation and operation of the agreement. These transparency-related requirements should include:
    - Compliance with WTO requirements pertaining to publication of information on measures covered by the OPA (along lines of Art. X GATT).
    - 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.
    - Creation of a body to oversee implementation of the OPA that is open to observation by non-signatories, including mechanisms to engage stakeholders in an ongoing conversation about how the agreement is working and future needs.
    - Annual reporting to the WTO General Council by the OPA on its activities.
    - 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.
- 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 code of conduct adopted by signatories.
- 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 – e.g., to assure arbitrators have the expertise required in the subject matter addressed by the agreement.

Source: Hoekman and Sabel (2019; 2021).

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