
A 21st Century work program for the multilateral trading system



Featuring:

**Analysis of WTO-consistent approaches to
plurilateral and non-MFN trade agreements**

Prepared for the National Foreign Trade Council by:

Stuart Harbinson & Bart De Meester





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It is critical for the United States and other global economies to pursue an active and results-oriented multilateral trade agenda. Such an agenda must include enforcement of existing rules, settlement of disputes, and advancing trade liberalization that reflects the reality of how businesses, workers and citizens operate in the 21st Century global economy. Regardless of how negotiators choose to address the stalled Doha Round of trade negotiations, countries must develop new ideas and pathways for advancing an ambitious and achievable multilateral agenda to support broad-based economic growth, development, and jobs. Continuing to place the Doha Round at the heart of the global trade agenda threatens to marginalize the World Trade Organization as a forum for modernizing trade rules.

For the WTO to remain at the core of the global trading system, it must be flexible enough to accommodate agreement on issues that matter to businesses and individuals through processes that constrain the ability of a few member countries to block progress on trade liberalization, which is critical to economic growth and development. While multilateral discussions are stalled, negotiators around the world are pursuing new market access via other mechanisms outside of the WTO. Efforts to open markets will continue, and it is important for world leaders to find the will and flexibility to permit that liberalization to take place under the auspices of the WTO to the extent possible.

NFTC and its member companies would prefer an ambitious, comprehensive and unanimous agreement among WTO member countries – and have strongly supported such an outcome for more than a decade through dozens of trips to Geneva and sustained advocacy in Washington and foreign capitals – but it is clear that approach has stalled. The purpose of this document is to suggest alternative ways forward. Below is a basket of trade issues that we believe could reasonably be addressed multilaterally, as well as an analysis of a variety of WTO-consistent pathways through which progress could be achieved.

While NFTC has long supported the single undertaking that began in Qatar in 2001, it is time to pursue fresh ideas to move beyond the stalemate that has characterized the Doha Round for the past several years and which shows no signs of abating. We believe the proposals below offer a compelling vision that will contribute to broad-based economic growth in least-developed, emerging and developed economies alike. The American business community is eager to help drive an ambitious multilateral agenda.

Updating the multilateral trade agenda

Until a consensus emerges on how to proceed multilaterally, a new focus among ambitious and growth-oriented economies on a handful of key initiatives would shape meaningful work programs around which negotiators could coalesce. Over the past several years, a number of issues have emerged which increasingly require urgent attention and could most usefully be addressed through the WTO. Undertaking the following initiatives under the WTO umbrella



would strengthen the institution by demonstrating its flexibility in the face of changing trade patterns:

- **Conclude a trade facilitation agreement.** An agreement to promote trade facilitation is among the most advanced of the components of the Doha Round negotiations and enjoys widespread support among developed and developing countries as well as businesses around the world. Rapidly concluding a stand-alone deal on trade facilitation with broad support would demonstrate the value of the WTO as a negotiating body and would produce an agreement that would advance economic development and create jobs.
- **Negotiate a services agreement.** Businesses and governments have expressed interest in pursuing negotiations towards a services agreement. As NFTC Senior Advisor Ambassador Stuart Harbinson and Bart De Meester of Sidley Austin LLP note in the analysis below, the “collective request” mechanism used in the Doha Round services negotiations could serve as a starting point for new efforts to assess sectors where a critical mass may be viable, and the framework under the General Agreement on Trade in Services (GATS) provides “a life which could be considered to be independent of the overall Doha Round mandate.” They conclude that, “there are...good grounds for pursuing plurilateral or ‘collective request’ negotiations under the GATS, without predetermining at the outset how the results of such negotiations might be implemented.” Negotiators should ensure that such an agreement will cover services that will be developed in the future by advancing talks on a “negative list” basis, whereby all service sectors -- including those yet-to-be-developed -- are covered unless participants specifically agree to exclude them.
- **Address 21st Century global challenges.** Countries have an opportunity to adapt the WTO framework to respond to changes to how trade is conducted and to address urgent collective challenges through the WTO committee system. “These bodies flourished in the period between 1995 and 2001,” Ambassador Harbinson has noted, but, since Doha, “the regular machinery of the organization has to a significant extent faded into the background.” Establishing robust work programs under key WTO committees and councils could build trust between member economies, foster better understanding of emerging issues and eventually lead to new reference documents or codes of good practices that would improve the global rules-based framework for the 21st Century in areas including:
 - **Optimizing the digital economy and movement of information across borders.** Using the WTO e-commerce work program to craft a modern framework to support the digital economy and ensure the secure, predictable and open flow of information across borders would be valuable to businesses, individuals and governments whose growth relies increasingly on the Internet and networked technologies. Members should discuss these critical issues with the aim of developing new understandings at the WTO and modernizing existing



commitments on rules related to the digital economy, including governing e-commerce, regulatory transparency, investment, and cross-border information flows. Members should also urgently pursue an ambitious new tariff-reduction initiative to expand product coverage of the Information Technology Agreement, which would bring immediate, substantial benefits by removing tariffs on a vast array of tech products not currently covered by the agreement and reducing uncertainty that arises from convergence of technologies.

- **Improving global health outcomes.** Health is the largest sector of the global economy and encompasses goods, services, intellectual property and investment issues across a variety of disciplines including insurance, information technology, standards, facility construction and management, care providers, pharmacy and distribution, biotechnology, devices and diagnostics, and pharmaceuticals. Officials should prioritize discussions in appropriate WTO forums to address commercial issues – for example eliminating tariffs and reducing other nontariff barriers to medicines and devices, providing market access for providers and payers, encouraging non-discriminatory investment opportunities, promoting transparent and effective legal and regulatory environments, and addressing trade in counterfeits – to drive innovation and improve health outcomes.
- **Lowering obstacles to the development and adoption of clean technologies.** Significant work has already taken place in the WTO Committee on the Environment to advance an agenda to lower tariffs and other barriers to environmental goods and services. Governments should address trade barriers to environmental goods and services through the Committee’s processes.
- **Consolidate trade liberalization under the WTO framework.** For some time, academics and trade economists have been pressing for member economies to capture under the WTO’s auspices trade liberalization that has taken place on a regional or bilateral basis. NFTC and its members are strongly supportive of the WTO as the central body dealing with global trade rules, and would like to explore ways to capture trade liberalization under the WTO that has taken place through regional or bilateral trade agreements, in settings such as the Asia Pacific Economic Cooperation Forum, and via mechanisms such as the Anti-Counterfeiting Trade Agreement.

New multilateral pathways

Conceptually, there is little to prevent all WTO members from embracing elements of the above agenda. From addressing climate change by facilitating the development and deployment of clean technologies to taking steps to improve trade at and behind the border to encouraging innovation and investment through new understandings on the digital economy, all countries have a stake in improving the trade frameworks surrounding these issues. Political or other considerations, however, may prevent consensus among all WTO members to support such an agenda in the near term.



For that reason, NFTC asked Sidley Austin to research what can be accomplished legally under WTO rules by a coalition of countries through agreements that would either condition additional commitments on the participation of a “critical mass” of countries or which would not confer the benefits of new commitments on countries which declined to participate in such agreements. To follow is a detailed “Analysis of WTO-consistent approaches to plurilateral and non-MFN trade agreements” prepared by Ambassador Stuart Harbinson, who serves as Senior Advisor to NFTC’s WTO Project, and Bart De Meester of Sidley Austin’s Geneva office.

Sidley Austin has offered an opinion on the compatibility of a variety of approaches to agreements on goods, services and intellectual property with WTO rules. Their analysis underscores the latitude that countries have for negotiating new commitments on market access and rules across goods, services and intellectual property disciplines and points out that such agreements do not necessarily have to take place within the confines of the WTO to be compatible with WTO rules. We believe that housing new trade liberalization initiatives under the WTO is the first best solution, and hope that countries will be willing to take the steps necessary to bring new and existing trade initiatives under the WTO architecture.

Finally, Sidley Austin’s analysis alludes to the fact that a group of negotiators do not necessarily have to determine in advance how an agreement might be implemented or where it might be housed. For too long, politics and procedure have dominated conversations in Geneva and have prevented countries from achieving substantive progress on increasingly urgent issues. It is time for negotiators to come together and make headway on issues that matter to economic growth and development. This analysis provides a solid legal road map for countries seeking to negotiate new agreements, including on the issues we raise above.

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Analysis of WTO-consistent approaches to plurilateral and non-MFN trade agreements

Prepared for the National Foreign Trade Council by:
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Executive Summary

1. This memorandum analyses possible approaches to plurilateral trade agreements that would apply on a non-most-favored-nation (“MFN”) basis. These agreements would seek to achieve ambitious trade commitments in the areas of goods, services or intellectual property and would be negotiated among a subset of WTO Members sharing a similar vision.

2. After a brief introduction discussing the role of the MFN obligation (Section I), we analyze the possibilities for plurilateral agreements covering trade in goods (Section II), trade in services (Section III) and trade-related intellectual property rights (Section IVIV). We finally discuss plurilateral agreements under Annex 4 to the *WTO Agreement* (Section V).

3. We reach the following conclusions with respect to subjects covered by the WTO framework:

- The GATT 1994 and the GATS include provisions permitting the conclusion of agreements leading to free-trade areas or customs unions that escape the MFN obligation. However, a number of specific conditions in these provisions must be fulfilled. Moreover, such agreements will not be part of the WTO framework.
- It is possible to conclude plurilateral agreements, such as the Agreement on Trade in Civil Aircraft, but such agreements will only be part of the WTO framework (and therefore benefit from WTO dispute settlement procedures) when they are included in Annex 4. This requires a decision by consensus in the Ministerial Conference or General Council. Members who join Annex 4 agreements would not necessarily avoid their WTO MFN commitments.
- It is also possible to negotiate ambitious agreements amongst a subset of WTO Members and include these in the WTO framework by means of a reference in the WTO Members’ tariff schedules or schedules of specific GATS commitments. Here too, the benefits under such agreement would need to be extended on an MFN basis to all WTO Members. To avoid the so-called “free rider” issue, such agreement may specify that it only enters into force following the achievement of a “critical mass” of participants.
- A specific opportunity exists to pursue plurilateral negotiations under the GATS, without at this stage predetermining how the outcome of such negotiations might be implemented.

I. INTRODUCTION

A. The obligation of most-favoured-nation treatment

4. In principle, a WTO Member is not permitted to agree upon trade liberalization commitments to the benefit of some Members and to the exclusion of other WTO Members. All benefits must be extended on an MFN-basis. The MFN obligation is contained in Article I:1 of the GATT 1994, Article II:1 of the GATS and Article 4 of the TRIPS Agreement.

These provisions read as follows:

- Article I:1 of the GATT 1994:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,[] any advantage, favour, privilege or immunity granted by any [Member] to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other [Members].
- Article II:1 of the GATS:

With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
- Article 4 of the TRIPS Agreement:

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. []

5. The MFN obligation requires that any favor a WTO Member grants to any good, service or service supplier, or (in the case of intellectual property rights) national of one country is extended to the “like” goods, “like” services or service suppliers, or nationals of all other WTO Members. The benefit must be extended “immediately” (*i.e.* as soon as it is granted) and “unconditionally” (*i.e.* not limited by or subject to any conditions¹).

¹ See Panel Report, *EC – Tariff Preferences*, para. 7.59 (footnote 288). This finding was not appealed.

6. This implies, except as described below, that the benefit of any market access commitments (e.g. tariff concession) or of any commitments with regard to trade rules (e.g. subsidies disciplines), beyond those currently existing under the WTO Agreements, in an agreement that is concluded among a limited number of WTO Members, must be extended to all other WTO Members. As a consequence, because of the MFN obligation, WTO Members that did not undertake any commitments under the new agreement will still benefit from the new market access commitments or other commitments with regard to trade rules. Those Members might thus “free ride” on the efforts made by the parties to the new agreement.²

7. For the MFN obligation to be applicable, it is necessary that the subject-matter of the new agreement covers trade in goods, services or the trade-related aspects of intellectual property rights. With regard to measures not covered by the respective agreements, WTO Members that are not parties to the new agreement cannot benefit from the MFN obligation.

8. There exist nevertheless a number of exceptions to the MFN obligation that would allow WTO Members to grant preferential treatment only to the parties to the new agreement, even where the subject matter is within the purview of the WTO. In order to benefit from these exceptions, a number of conditions must be fulfilled. We discuss these possibilities in the next sections.

B. Waivers

9. However, before turning to these specific exceptions, we discuss a provision in the *WTO Agreement* that provides the possibility to obtain a “waiver” for the obligations under the covered agreements, including the MFN obligation in the GATT 1994, the GATS and the TRIPS Agreement. Article IX:3 of the *WTO Agreement* reads in relevant part:

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths [] of the Members unless otherwise provided for in this paragraph.

(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration

² For a discussion of the “free-rider” issue, see Sydney Key, Financial Services, in 1 *The World Trade Organization: Legal, Economic and Political Analysis* 955, 959 (P. Macrory, A. Appleton & M. Plummer eds, 2005).

pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths of the Members.

(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

10. In principle, it is thus possible to obtain a temporary waiver from the MFN obligation. However, obtaining a waiver is subject to specific conditions. *First*, such a waiver requires a decision by the Ministerial Conference³ by consensus to be reached within 90 days. If, after the expiry of this time period, no consensus is reached, the decision shall be taken by three fourths of the Members. *Second*, the waiver will only be granted in “exceptional circumstances”. *Third*, the waiver only applies for a limited period of time. Stressing the exceptional nature of waivers, the Appellate Body in *EC – Bananas (Article 21.5 II)* has found:

In our view, the function of a waiver is to relieve a Member, for a specified period of time, from a particular obligation provided for in the covered agreements, subject to the terms, conditions, justifying exceptional circumstances or policy objectives described in the waiver decision. Its purpose is not to modify existing provisions in the agreements, let alone create new law

³ It should be noted however that, in the intervals between meetings of the Ministerial Conference, its functions are carried out by the General Council. *See* Article IV:2 of the *WTO Agreement*.

or add to or amend the obligations under a covered agreement or Schedule. Therefore, waivers are exceptional in nature, subject to strict disciplines and should be interpreted with great care.⁴

11. Waivers may be of limited use for concluding ambitious trade agreements among a subset of WTO Members. Depending on the circumstances, it may be difficult to obtain the required majority for the decision in the Ministerial Conference or General Council. In any case a waiver would only apply for a limited period of time.

II. AGREEMENTS RELATING TO TRADE IN GOODS

12. With regard to trade in goods, we first focus on the use of a “critical mass” approach to conclude agreements among a subset of WTO Members. Second, we discuss the possibility to rely on Article XXIV of the GATT 1994 to conclude preferential trade agreements for goods. Finally, we discuss a number of sectoral approaches taken during the Doha negotiations.

A. “Critical mass” approach

1. Description

13. The so-called “critical mass” approach involves decision-making in the WTO whereby a sufficient number of parties that do not represent the entire membership but nonetheless conduct a very high proportion of the international trade in a particular good agree upon a common course of cooperative action to be taken under the auspices of the WTO.⁵

14. With regard to trade in goods, such an approach was notably used when negotiating the *Information Technology Agreement* (“ITA”).⁶ The ITA was a Ministerial Declaration signed in 1996 by 29 WTO Members, who agreed to cut and bind tariffs on information technology products covered by the Declaration to zero and to bind all other duties and charges for these products at zero. The ITA did not foresee an exception to the MFN obligation and the benefits of Declaration were extended on an MFN basis to all other WTO Members.

⁴ Appellate Body Report, *EC – Bananas (Article 21.5 II – Ecuador)* and *EC – Bananas (Article 21.5 II – US)*, para. 382.

⁵ See P. Low, ‘WTO Decision-Making for the Future’, *WTO Staff Working Paper ERSD-2011-05*, page 6.

⁶ See Ministerial Declaration on Trade in Information Technology Products, done at Singapore on 13 December 1996, WT/MIN(96)/16.

15. To address the problem of “free riding” by other WTO Members that did not cut their tariffs and other duties and charges according to the ITA, it was ensured that all important Members trading in information technology products would participate. The ITA provided that it would only enter into force when the participants that notified their acceptance of the ITA would represent approximately 90 per cent of world trade in information technology products.⁷ This threshold was met by 1 July 1997, when the ITA entered into force.

2. Evaluation

16. The “critical mass” approach used with regard to trade in goods facilitated the conclusion of an agreement among a subset of WTO Members. The additional obligations in the agreement can be incorporated in the WTO framework for those Members accepting them by making a reference to the new agreement in these Members’ tariff schedules. Hence, such inclusion does not need a decision by consensus in the Ministerial Conference or General Council, contrary to the inclusion of plurilateral agreements in Annex 4 to the *WTO Agreement* (see below at paragraph 82).

17. The benefit of such agreements must be extended, by virtue of Article I:1 of the GATT 1994, on an MFN basis to all WTO Members. Therefore, in order to avoid “free riding” by important WTO Members, agreements using the “critical mass” approach might provide that they only enter into force when the WTO Members that together represent a significant part of the trade in goods at stake would accept the agreement.

18. If the parties to such agreement nevertheless wanted to avoid the extension of such benefits to others on an MFN basis, there would be a need for a waiver decision by the Ministerial Conference or General Council (as discussed above at paragraphs 9-11). An alternative would be the conclusion of a preferential trade agreement outside the WTO that would comply with the conditions in Article XXIV of the GATT 1994 (discussed in the next subsection).

19. It might also be noted in passing that the achievement of “critical mass” in a product or products (or indeed in services sectors (see below, at paragraphs 31-53)) would possibly be more difficult today than it has been in the past due to globalization, diversification in the world economy and the increased number of “players”.

⁷ Annex to the Ministerial Declaration on Trade in Information Technology Products, Para. 4.

B. Article XXIV of the GATT 1994

1. Description

20. Article XXIV of the GATT 1994 provides an exception to the MFN obligation in Article I of the GATT 1994 for the conclusion of customs unions and free trade areas. The Appellate Body stated in *Turkey – Textiles* that “Article XXIV may, under certain conditions, justify the adoption of a measure which is inconsistent with certain other GATT provisions, and may be invoked as a possible ‘defence’ to a finding of inconsistency”.⁸

21. Article XXIV:8(a) of the GATT 1994 provides that a “customs union” is formed by means of an agreement where duties and other restrictive regulations of commerce are eliminated with respect to “substantially all the trade” between the constituent territories of the union, or at least with respect to substantially all the trade in products originating in such territories. In addition, under the agreement, substantially the same duties and other regulations of commerce must be applied by each of the members of the union to the trade of territories not included in the union. It is unlikely that the envisaged agreements will also include the harmonization of duties and other regulations with regard to trade of Members not included in the agreement.

22. The agreement might indeed rather take the form of a free-trade area. Article XXIV:8(b) of the GATT 1994 provides that a “free-trade area” means a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on “substantially all the trade” between the constituent territories in products originating in such territories.

23. In order to benefit from the exception in Article XXIV, it is thus required that the new agreements at least involve an elimination of the duties and other restrictive regulation of commerce with respect to “substantially all the trade” between the constituent territories. Neither the WTO agreements nor WTO jurisprudence contain a definition of this concept. The Appellate Body in *Turkey – Textiles* merely stated that “[i]t is clear ... that ‘substantially all the trade’ is not the same as all the trade, and also that ‘substantially all the trade’ is something considerably more than merely some of the trade”.⁹ Discussions with regard to

⁸ Appellate Body Report, *Turkey -- Textiles*, para. 45.

⁹ Appellate Body Report, *Turkey – Textiles*, para. 48.

this condition have also been undertaken in the Doha Negotiations in the *Negotiation Group on Rules*. However, until now, no definition has been agreed upon.

24. Were the agreement to meet the “substantially all the trade” criterion, it is further required by Article XXIV:5(a) and (b) that, as a consequence of the agreement, the duties and other trade regulations on trade with non-parties are not “on the whole” higher or more trade restrictive than prior to the formation of the customs union or free trade area. Any commitments in the agreement must thus not raise the barriers to the trade of the WTO Members that are not parties to the agreement.

2. Evaluation

25. If new agreements would be concluded among a subset of WTO Members that comply with the conditions in Article XXIV of the GATT 1994, the benefits under these agreements would not need to be extended on an MFN basis to other WTO Members.

26. Indeed there has been a strong trend among WTO Members in recent years to follow the Article XXIV route. According to the WTO, there has been a rapid acceleration in the growth of Preferential Trade Agreements, the number now in force being close to 300¹⁰, with many more in the process of being implemented or negotiated. The quality of such agreements in terms of the depth of commitments and the breadth of coverage is variable.

27. However, from a legal point of view, such agreements still need to be comprehensive and involve “substantially all the trade” among the participants. Moreover, such agreements will not be part of the *WTO Agreement* and will thus not benefit from the institutional structure of the WTO, including the WTO dispute settlement mechanism.

III. AGREEMENTS RELATING TO TRADE IN SERVICES

28. The liberalization of trade in services in the GATS is based on a flexible approach, permitting the WTO Members to decide, to a large extent, which liberalization commitments they are ready to undertake. Member-specific commitments for market access (Article XVI) and national treatment (*Article XVII*) are reflected in Members’ schedules of commitments. Members can also make “additional commitments” (with regard to measures that are not market access restrictions in the sense of Article XVI and do not violate the obligations of

¹⁰ World Trade Report 2011. It should be noted that the term “Preferential Trade Agreement” covers not only GATT Article XXIV agreements but also GATS Article V agreements and agreements between developing countries notified under the “Enabling Clause”.

national treatment) in their schedules of commitments. However, the benefit of these commitments extends to the entire membership of the WTO, on an MFN basis.

29. Negotiations in services have made use of a “critical mass” approach. In specific sectors (notably telecommunications and financial services), a subset of WTO Members negotiated commitments that went beyond what is included in the GATS framework agreement. However, the benefits of these agreements were each time extended on an MFN basis. If a subset of WTO Members would want to conclude agreements for which the benefits are not extended to other WTO Members, they would need to conclude preferential trade agreements that comply with the conditions in Article V of the GATS or conclude recognition agreements that comply with the conditions in Article VII of the GATS.

30. Before discussing these approaches for negotiating ambitious agreements on trade in services among a subset of WTO Members, we point to a specific characteristic of the MFN obligation in Article II of the GATS. The *GATS Annex on Article II Exemptions* specifies that upon accession to the WTO, WTO Members are given an opportunity to specify conditions under which the WTO Member is exempted under Article II:1 of the GATS. The Annex provides further that such exemptions “should not exceed a period of 10 years” and “shall be subject to negotiations in subsequent trade-liberalizing rounds”. Many WTO Members have indeed specified such exemptions. The negotiations in the Doha Round with regard to the expiry of these exemptions have until now not produced any definitive results. These exemptions thus still apply. Because such exemptions could only be made on the moment of accession to the WTO, it is not possible to add new exemptions.

A. “Critical mass” approach

1. Description

31. With regard to two specific services sectors, financial services and telecoms, agreements exist that contain commitments undertaken by only a subset of WTO Members.¹¹ These commitments were incorporated in the WTO framework by including them, in some

¹¹ For completeness, it can be noted that with regard to one specific mode of supply, the movement of natural persons (“mode 4”), negotiations after the end of the Uruguay Round resulted in further commitments, reflected in a *Third Protocol on Movement of Natural Persons*. (See *Third Protocol on Movement of Natural Persons*, S/L/12, 24 July 1995.) These further commitments were rather modest and only involved six WTO Members (Australia, Canada, the EU and its Member States, India, Norway and Switzerland). It is therefore difficult to describe this protocol as taking a “critical mass” approach.

cases by reference, in the Members' schedules of specific commitments. The benefits of such agreements extend nevertheless to all WTO Members on an MFN basis.

32. With regard to financial services, an *Understanding on Commitments in Financial Services* was negotiated during the Uruguay Round. Negotiations in this sector continued after the end of the Round and further commitments were made in two *Protocols* that only entered into force when a "critical mass" of WTO Members participated.

33. With regard to basic telecommunication services, negotiations after the end of the Uruguay Round resulted in a *Reference Paper on Basic Telecommunications*. A *Protocol* ensured again that the *Reference Paper* did not enter into force (in this case, by Members including a version of the *Reference Paper* as "additional commitments" in their respective schedules) before a "critical mass" of WTO Members participated.

a. *Understanding on Commitments in Financial Services*

34. With regard to financial services, when it became clear that not all the commitments in the proposed *Annex on Financial Services* (which in the end became an integral part of the GATS and thus applies to all WTO Members) were acceptable to all negotiators, it was decided to place some of these liberalization commitments in the *Understanding on Commitments in Financial Services*. This *Understanding* contains a number of model commitments for financial services, going beyond what WTO Members committed to in the GATS. A WTO Member that is ready to make such commitments will specify in its schedule of commitments that it relied on the *Understanding*. The model commitments in the *Understanding* then apply to this Member unless further limitations would be specified.

35. The introductory paragraph of the *Understanding* specifies that the "resulting specific commitments shall apply on a most-favoured-nation basis". The benefit of these commitments thus extends to all WTO Members. Because this *Understanding* was negotiated during the Uruguay Round, the Members that wished to undertake specific commitments on that basis did so in their schedules of specific commitments attached to the GATS. If a Member would have felt there was insufficient reciprocity for its commitments, it could refrain from making these commitments.

36. The approach taken in the *Understanding* made it possible for a subset of WTO Members to undertake commitments with regard to services that went beyond what was

undertaken by all Members of the WTO, without the need for all WTO Members to agree to do so. However, these commitments were extended to all WTO Members on an MFN basis.

b. “Protocol” approach

37. In past services negotiations, the adoption of protocols specified that certain further-going commitments, negotiated among a subset of Members would only enter into force if a “critical mass” of WTO Members had accepted them. Moreover, such protocols were often preceded by an annex to the GATS that enabled WTO Members to list, after the end of the Uruguay Round, exemptions to their MFN obligation. Such exemptions could for instance specify that certain commitments only applied on the basis of reciprocity. The latter arguably worked as an incentive for other WTO Members to undertake the same further-going commitments.

i. Financial services

38. In the sector of financial services, protocols were used to ensure that any further-going liberalization commitments in that sector would only enter into force if a “critical mass” of WTO Members had made such commitments.

39. Negotiations in this sector could continue after the end of the Uruguay Round on the basis of a *Decision on Financial Services*,¹² which extended the negotiations for six months after the date of entry into force of the WTO Agreements. The *Second Annex on Trade in Financial Services* indicated that during the additional six-month period, WTO Members were allowed to list additional MFN exemptions relating to financial services. Furthermore, WTO Members could “improve, modify or withdraw” commitments without the obligation to provide compensatory adjustment, as normally required under Article XXI:1 of the GATS. Because the negotiations were still not finalized within these additional six months, the Council for Trade in Services adopted a *Decision on the Application of the Second Annex on Financial Services*,¹³ which further extended the period for notifying changes to the specific commitments and the MFN exemptions from 30 June 1995 to 28 July 1995. On 24 July 1995, the *Second Protocol* was adopted.

¹² Decision on Financial Services, LT/UR/D-5/2, 15 April 1994.

¹³ Council for Trade in Services, Decision on the Application of the Second Annex on Financial Services, S/L/6, 30 June 1995.

40. The *Second Protocol* resulted in an amendment of the schedules of specific commitments of the WTO Members that were parties to this protocol. This amendment improved their commitments with regard to financial services.

41. The *Second Protocol to the GATS* specified that it “shall enter into force on the 30th day following the date of its acceptance by all Members concerned”.¹⁴ It further provided that, “[i]f by 1 July 1996 it has not been accepted by all Members concerned, those Members which have accepted it before that date may, within a period of 30 days thereafter, decide on its entry into force”.¹⁵ The *Second Protocol* entered in force for all these Members on 1 September 1996.

42. A Decision by the Council for Trade in Services, adopted on the same date as the *Second Protocol*, also indicated that further negotiations on trade in financial services would take place from 1 November 1997. The *Fifth Protocol to the General Agreement on Trade in Services* was adopted on 14 November 1997.¹⁶ The *Fifth Protocol* had an annex with further liberalization commitments of 70 WTO Members.¹⁷ Members concerned could accept the *Fifth Protocol* until 29 January 1999. It would then enter into force on the 30th day after acceptance of all Members concerned. Nonetheless, by the deadline, only 52 of the 70 Members had accepted the *Protocol*. These Members agreed to let the *Protocol* enter into force from 1 March 1999.¹⁸

ii. *Telecommunication services*

43. With regard to telecommunication services, a number of Members¹⁹ felt during the Uruguay Round that effective market access for telecommunication service suppliers could be undermined through governmental measures not regulated by the GATS. Therefore, common regulatory principles and competition disciplines were developed in the Negotiating

¹⁴ Second Protocol to the General Agreement on Trade in Services, S/L/11, 24 July 1995, para. 3.

¹⁵ Second Protocol to the General Agreement on Trade in Services, S/L/11, 24 July 1995, para. 3. On that same date, two other decisions were adopted by the Council for Trade in Services. First, the Decision on Commitments in Financial Services, S/L/8, adopted 21 July 1995. This Decision indicated that if the Second Protocol would not be adopted, WTO Members had 60 days beginning 1 August 1996 to modify and withdraw commitments and to revise MFN exemptions. Second, the Decision on Financial Services, S/L/9, adopted 21 July 1995. This Decision indicated that if Second Protocol would be adopted, WTO Members concerned had 60 days beginning 1 November 1997 to modify or withdraw commitments and to revise MFN exemptions. Hence, a plan for further negotiations in the sector of financial services was already envisaged.

¹⁶ Committee on Trade in Financial Services, Fifth Protocol to the General Agreement on Trade in Services, S/L/45, S/L/44, 3 December 1997.

¹⁷ The negotiations on these modified commitments were finalized on 12 December 1997.

¹⁸ Two Members still have to accept the Fifth Protocol: Brazil and Jamaica.

¹⁹ See, e.g., Communication from the United States, S/NGBT/W/5, 9 February 1995.

Group on Basic Telecommunications and laid down in an informal *Reference Paper*.²⁰ A WTO Member that is ready to accept the commitments in the *Reference Paper* specifies this in the “additional commitments” column of the schedule of specific commitments and attaches the *Reference Paper* to its schedule. The commitments apply on an MFN basis.

44. Members’ *Reference Paper* commitments only entered into force after the end of the Uruguay Round. The *Fourth Protocol to the GATS* provided that the modification to schedules of specific commitments concerning basic telecommunications (which includes *Reference Paper* commitments) would only enter into force “provided it has been accepted by all Members concerned”²¹ (*i.e.* all Members that annexed their schedule of specific commitments to the *Protocol*). It was further specified that “[i]f by 1 December 1997 the *Protocol* has not been accepted by all Members concerned, those Members which have accepted it by that date may decide, prior to 1 January 1998, on its entry into force”.²²

45. The negotiations on basic telecommunication services could extend beyond the end of the Uruguay Round on the basis of a *Decision on Negotiations on Basic Telecommunications*. Moreover, an *Annex on Negotiations on Basis Telecommunications* specified that MFN treatment under Article II of the GATS would be suspended for basic telecommunications (except for those already in the schedules of specific commitments) until the implementation of the results of the negotiations. WTO Members could thus specify exemptions to the MFN obligation in case they would not have been satisfied with the expected outcome of the negotiations.

2. Evaluation

46. The benefits of the mentioned commitments made on the basis of negotiations among a subset of WTO Members were extended on an MFN basis. Nonetheless, the protocols sought to ensure that when a subset of Members concludes an agreement, this agreement would only enter into force when a “critical mass” of Members accepted the agreement.

47. The advantage of the approach used in the financial services and telecommunications sectors is that the further-going commitments became part of the WTO framework by incorporating them in the schedules of specific GATS commitments of the Members

²⁰ See Report of the Negotiating Group on Basic Telecommunications, S/NGBT/18, 30 April 1996.

²¹ Fourth Protocol to the General Agreement on Trade in Services, S/L/20, 30 April 1996, para. 3.

²² *Id.*

concerned. With regard to commitments that involved further liberalization (e.g. market access), this required that Members supplement or modify the commitments in their respective schedules. With regard to commitments that involved further trade rules, such as those in the *Understanding* and the *Reference Paper*, this was done by making a reference or by incorporation. This procedure is clearly easier than the incorporation of new plurilateral agreements in Annex 4 to the *WTO Agreement*, which requires a decision by consensus in the Ministerial Council or the General Council (*see* below at paragraph 82).

48. The “threat” to make new MFN exemptions, which was temporarily allowed, functioned as an “incentive” for other WTO Members to become party to the agreement with the further-going commitments. However, allowing WTO Members to deviate from the MFN obligation in Article II:1 of the GATS (as was done during the extended negotiations for telecommunications and financial services), would require the procedure for adoption of a “waiver” to be followed (*see* above at paragraphs 9-11). Paragraph 2 of the *GATS Annex on Article II Exemptions* provides that any new exemptions after the date of entry into force of the *WTO Agreement* “shall be dealt with under paragraph 3 of Article IX of [the *WTO Agreement*]”.

3. Current Doha Round

49. During the Doha Round, an attempt was made to engage in plurilateral negotiations in services. Paragraph 7 of Annex C to the *Hong Kong Ministerial Declaration* provided that “[i]n addition to bilateral negotiations, [the WTO Members] agree that the request-offer negotiations should also be pursued on a plurilateral basis”. It was felt that such approach would improve efficiency in the negotiations.

50. Under plurilateral negotiations, a group of members with a common interest made a joint request to individual members to improve specific commitments in a particular sector or mode of supply. Subsequently, they met collectively with the Members that received this request. It was up to each Member to respond individually to the collective request. Two rounds of such negotiations were held in early 2006. The idea was to create revised offers for making specific commitments. However, all Doha negotiations were suspended in 2006 before such revised offers were submitted. After resumption of the negotiations in February

2007, a number of further plurilaterals took place.²³ In any event, the commitments coming out of the offers would have been extended to all WTO Members on an MFN basis.

51. The “collective request” procedure employed in the Doha Round services negotiations has not so far produced meaningful results. However it did serve the purpose of identifying what might be considered a “critical mass” in the many services sectors covered by the process. This could constitute a useful starting point for further efforts with a view to assessing whether the achievement of “critical mass” is likely to be attainable and, if so, in which sectors.

52. It is also worth noting that negotiations under the GATS, with respect to both market access and rules, have a life which could be considered to be independent of the overall Doha Round mandate. Under Article XIX:1 of the GATS:

“In pursuance of the objectives of this Agreement, Members shall enter into successive rounds of negotiations, beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization. Such negotiations shall be directed to the reduction or elimination of the adverse effects on trade in services of measures as a means of providing effective market access...”

Furthermore, Article XIX:4 provides that:

“The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement.”

53. There are thus good grounds for pursuing plurilateral or “collective request” negotiations under the GATS, without predetermining at the outset how the results of such negotiations might be implemented.

²³ The “state of play” of these negotiations in April 2011 is described in paragraphs 7-66 of the Report by the Chairman of the Council for Trade in Services of 21 April 2011 (TN/S/36). (Available at http://www.wto.org/english/tratop_e/dda_e/chair_texts11_e/chair_texts11_e.htm.) This Report lists the status of the negotiations with regard to a number of sectors (accountancy, air transport, architecture, engineering and integrated engineering services, audiovisual services, computer-related services, construction services, distribution services, energy services, environmental services, financial services, legal services, logistics and related services, maritime transport services, postal and courier services, private education services, services related to agriculture, telecommunication services and tourism services) and with regard to modes of supply (modes 1, 3 and 4).

B. Article V of the GATS

1. Description

54. Article V of the GATS permits the conclusion of “an agreement liberalizing trade in services between or among the parties to such an agreement”. Similar to Article XXIV of the GATT 1994, Article V of the GATS provides an exception to the MFN obligation in Article II:1 of the GATS.²⁴

55. In order to be justified, such agreement must nevertheless meet the conditions specified in Article V of the GATS. *First*, Article V:1(a) provides that the agreement must have “substantial sectoral coverage”. The panel in *Canada – Autos* stressed that the level of liberalization must go beyond what is achieved in the GATS. In the panel’s view, “the purpose of Article V is to allow for ambitious liberalization to take place at a regional level, while at the same time guarding against undermining the MFN obligation by engaging in minor preferential trade agreements”.²⁵ Moreover, a footnote to the provision clarifies that “substantial sectoral coverage” must be “understood in terms of number of sectors, volume of trade affected and modes of supply” and adds that “agreements should not provide for the *a priori* exclusion of any mode of supply”.

56. *Second*, the agreement must provide for the “absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among parties, in the sectors covered”. This should happen through the “(i) elimination of existing discriminatory measures and/or (ii) the prohibition of new or more discriminatory measures”. The panel in *Canada – Autos* pointed out that the elimination and/or prohibition of discrimination must apply to all parties to the agreement. According to the panel, “it would be inconsistent with this provision if a party to an economic integration agreement were to extend more favourable treatment to service suppliers of one party than that which it extended to service suppliers of another party to that agreement”.²⁶

57. *Third*, Article V:4 of the GATS adds that any agreement justified under Article V of the GATS “shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement”. The conclusion of such an agreement may

²⁴ Panel Report, *Canada – Autos*, para. 10.271.

²⁵ *Id.*

²⁶ Panel Report, *Canada – Autos*, para. 10.270.

require the withdrawal or modification of the specific commitments of a party to the agreement. In that situation, the procedures for modification of schedules, set out in Article XXI of the GATS, must be followed.

2. Evaluation

58. As with agreements justified under Article XXIV of the GATT 1994, agreements among a subset of WTO Members involving preferential liberalization of trade in services can escape the MFN obligation. Nonetheless, such agreement must meet the conditions in Article V of the GATS. Most significantly, such an agreement will necessarily need to have “substantial sectoral coverage”.

59. Agreements justified under Article V of the GATS are not part of the WTO framework and thus do not benefit from WTO dispute settlement.

C. Article VII of the GATS

1. Description

60. Article VII of the GATS provides a specific possibility to conclude recognition agreements among two or more WTO Members. Such agreements would for instance involve a recognition of the licensing requirements for the provision of certain services in the territory of the parties to the recognition agreement. An example (which was notified to the WTO in 2010) is a mutual recognition agreement between the Texas Board of Professional Engineers and the Institution of Engineers Australia permitting registered and licensed engineers to operate in the two jurisdictions.

61. The recognition under such a specific agreement does not have to be extended on an MFN basis to other WTO Members. Article VII:2 of the GATS specifies that Members that are a party to such an agreement must nevertheless “afford adequate opportunity for other interested Members to negotiate their accession to such an agreement ... or to negotiate comparable ones with it”. The parties to the agreement are in control of letting other Members participate since they decide, after giving “adequate opportunity” to other Members, whether these other Members have regulations, e.g. licensing requirements, that are equivalent according to the criteria set in the agreement.

62. Article VII:3 specifies nevertheless that the recognition must not be accorded “in a manner which would constitute a means of discrimination between countries in the

application of standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services”. This provision has never been interpreted in WTO jurisprudence and it is difficult to speculate on its meaning.

63. Recognition agreements must be notified to the Council for Trade in Services as far in advance as possible of the opening of negotiations. This would enable other Members to indicate their interest in participating.²⁷

2. Evaluation

64. In sum, Article VII provides a limited option for agreements among a subset of WTO Members that would seek to conclude recognition agreements for trade in services (for example professional services and financial services).

IV. AGREEMENTS RELATING TO INTELLECTUAL PROPERTY RIGHTS

A. Description

65. The TRIPS Agreement constitutes a different type of trade agreement when compared to the GATT 1994 and the GATS. While the GATT 1994 and the GATS mainly include obligations that *prohibit* WTO Members to undertake certain actions that hamper trade, the TRIPS Agreement mainly sets *minimum requirements* for intellectual property protection of WTO Members. Article 1.1 of the TRIPS Agreement provides in relevant part:

... 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. ...

66. Hence, in principle, the TRIPS Agreement does not prevent a subset of WTO Members from concluding agreements involving more extensive protection of intellectual property rights than the minimum requirements contained in the TRIPS Agreement. Indeed provisions in some Regional Trade Agreements have gone beyond TRIPS and could provide a basis for future WTO negotiations.

67. Having said this, the TRIPS Agreement itself imposes some limits. As mentioned above, Article 1.1 adds that such more extensive protection may “not contravene the provisions of [the TRIPS Agreement]”. The final sentence of Article 41.1 provides that

²⁷ Article VII:4(b) of the GATS.

enforcement procedures of intellectual property rights “shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse”. Further, Article 52 provides that any intellectual property right holder that lodges an application for the suspension of the release in free circulation of a good suspected to be counterfeited or pirated must provide adequate evidence, under the laws of the country of importation, of *prima facie* infringement of the intellectual property right.

68. It is clear from the Preamble to the TRIPS Agreement that a balance must be sought between the need “to promote effective and adequate protection of intellectual property rights”, on the one hand, and the need “to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade”, on the other hand. In this respect, Article 7 of the TRIPS Agreement provides that the “protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations”.

B. Evaluation

69. Article 1.1 of the TRIPS clearly provides WTO Members the possibility to agree to more extensive protection. Whether individual provisions of a plurilateral agreement on intellectual property right protection may conflict with specific TRIPS obligations will depend on the content of these specific provisions. It must be noted that such agreement will not be part of the WTO framework and will therefore not be subject to WTO dispute settlement.

V. PLURILATERAL TRADE AGREEMENTS AND ANNEX 4 OF THE WTO AGREEMENT

A. Description

70. We finally turn to the plurilateral agreements included in Annex 4 to the *WTO Agreement*. At present, two plurilateral agreements are in force. These are the *Agreement on Trade in Civil Aircraft* and the *Agreement on Government Procurement*.²⁸

²⁸ Two other plurilateral agreements, the *International Dairy Agreement* and the *International Bovine Meat Agreement* were terminated in 1997 and deleted from Annex 4.

71. Thirty WTO Members are party to the *Agreement on Trade in Civil Aircraft*, in which Signatories agreed to eliminate (on an MFN basis) import duties on all aircraft, other than military aircraft, and other products covered by the agreement, and to extend some procedural benefits to the products of other Signatories.

72. Forty-two WTO Members are parties to the *Agreement on Government Procurement*, which imposes a number of obligations to ensure open, transparent and non-discriminatory government procurement. Certain procedures are set out governing the way in which tendering exercises are to be conducted. This agreement allows parties flexibility to specify the extent of its application to government procurement in their territory. The parties specify the procuring entities that are affected by the obligations in the Agreement, by listing these entities in Annexes to the Agreement. Parties can specify threshold values of procurement contracts. Only when the value of a contract surpasses the threshold specified, the agreement will apply. Parties may also include general notes further specifying the application of the agreement to their procurement. Finally, specifically with regard to services, the parties can specify those services sectors that will be covered by the Agreement.

73. Article II:3 of the *WTO Agreement* provides with regard to these plurilateral agreements:

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.

74. The plurilateral agreements in Annex 4 are thus an integral part of the WTO legal framework. This implies that parties to the plurilateral trade agreements can challenge another party’s failure to comply with the obligations under the agreement by using the WTO dispute settlement system.

75. However, these agreements only impose obligations on the WTO Members that are parties to these agreements. They do not create “either obligations or rights” for Members that have not accepted them. WTO Members that are not party to the plurilateral agreements in Annex 4 cannot claim directly the benefit of the commitments in these agreements. Such Members might or might not be able to benefit indirectly from those commitments on the

basis of the MFN obligation in the GATT 1994, the GATS, or the TRIPS Agreement, depending upon the nature of the commitments in the plurilateral agreement.²⁹

76. For example, the MFN obligation of the GATT 1994 would not apply to measures taken by a Party to the *Agreement on Government Procurement* because government procurement activities are carved out from basic GATT obligations pursuant to GATT 1994 Article III:8. Similarly, Article XIII of the GATS provides that the GATS MFN obligation does not apply to government procurement. In contrast, the GATT 1994 MFN obligation might apply to measures that Signatories might take pursuant to their commitments under the *Agreement on Trade in Civil Aircraft*.

77. It is worth noting the origins of these two WTO plurilateral agreements in the “Tokyo Round” of negotiations (1973-1979). The *Agreement on Trade in Civil Aircraft* was one of three sectoral agreements negotiated during this period (the other two having been terminated as noted above in 1997). The *Agreement on Government Procurement* was one of six “codes” negotiated at the same time, the others relating to Technical Barriers to Trade, Subsidies, Anti-dumping, Customs Valuation and Import Licensing.

78. These six Tokyo Round codes were negotiated among a limited number of parties and membership varied from one to another. However at the end of the Round a number of developing countries would not agree to bring the Round to a conclusion, stating that they would not allow the GATT to service agreements to which they were not parties. In order to overcome this objection, a decision was taken by the GATT CONTRACTING PARTIES which noted that the “existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by

²⁹ In a Background Paper, the Advisory Centre on WTO Law argued that the MFN obligation also applies to plurilateral agreements in Annex 4. It is argued in the paper that Article II:3 of the *WTO Agreement* “deals only with rights conferred by *plurilateral agreements* and does not deal with rights conferred by the *multilateral trade agreements* (including the rights conferred under the most-favoured-nation clauses in the GATT, the GATS and the TRIPS Agreement)”. It is further argued that “it would seem extremely risky for a Member to accept a plurilateral agreement on the assumption that Article II:3 authorises it to withhold the advantages resulting from the application of that agreement from Members that have not accepted it”. (See “Giving Legal Effect to the Results of the Doha Round: An Analysis of the Methods of Changing WTO Law”, Background Paper for ACWL Members and LDCs, Geneva, June 2006, <http://www.acwl.ch/e/news/news-00022.html>, page 35 (footnote 121) (original emphasis)). Article II:3 of the *WTO Agreement* clearly states that the plurilateral trade agreements do not create rights for Members that have not accepted them. Although Members that have not accepted the plurilateral agreements cannot derive rights from those agreements, such Members could invoke the relevant WTO MFN obligation to claim these rights indirectly.

these Agreements”³⁰. In other words, the codes should not undermine the basic MFN obligation under the GATT.

79. There were nevertheless certain instances of “non-MFN” treatment. In particular the *Agreement on Government Procurement* was not implemented on an MFN basis because, as explained above, government procurement activities were already carved out from basic GATT obligations. Therefore its implementation on a “non-MFN” basis did not infringe any existing GATT rights. The code relating to Technical Barriers to Trade was implemented in such a way that only parties to the agreement received notifications of new or changed standards. Under U.S. implementation of the Subsidies code, only parties to the code were given the injury test in U.S. countervailing duty actions.³¹

80. These codes, other than that on government procurement, were all turned into fully fledged multilateral agreements through the subsequent Uruguay Round.

B. Evaluation

81. A plurilateral trade agreement under Annex 4 could achieve exactly what a subset of WTO Members that share the same vision seek to realize: *first*, such an agreement is part of the WTO framework and is subject to WTO dispute settlement system; *second*, the benefits of such agreement might not need to be extended on an MFN basis to WTO Members that are not parties to the agreement.

82. However, Article X:9 of the *WTO Agreement* provides that in order to include new agreements in Annex 4 a decision by consensus in the Ministerial Conference (or General Council) is required. It is also necessary to include such a new agreement in the list of plurilateral trade agreements in Appendix I of the DSU. This requires, according to Article X:8 of the *WTO Agreement*, a decision to amend by consensus in the Ministerial Conference (or General Council). Such a decision shall take effect for all Members upon approval by the Ministerial Conference. In contrast to the situation where an amendment is made to Annex 1 to the *WTO Agreement*, there exists no two-thirds majority fall-back option when consensus is not achieved.

³⁰ See Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations’, L/4905, Decision of 28 November 1979, BISD 26S/201 (1980), para. 3.

³¹ This was challenged by India but a bilateral solution was reached and the dispute settlement panel never concluded its work.