An Argument for More Plurilateral Agreements and Their Value for Developing Countries: Stemming the Tide of Preferential Trade Agreements, Post-Doha

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signed by candidate

J. Houston-McMillan

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TABLE OF CONTENTS

List of Abbreviations:

ACTA	Anti-Counterfeiting Trade Agreement
BRICS	Brazil, Russia, India, China and South Africa
CEPR	Centre for Economic Policy Research
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
DSM	Dispute settlement mechanism
EAC	East African Community
EGA	Environmental Goods Agreement
EU	European Union
EC	European Communities
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross domestic product
GPA	Government Procurement Agreement
ITA	Information Technology Agreement
IT	Information technology
MFN	Most favoured nation
PTA	Preferential trade agreement
RTA	Regional trade agreement

RTA-IS	Regional Trade Agreement Information System
SADC	Southern African Development Community
TBT	Technical barriers to trade
TiSA	Trade in Services Agreement
TPP	Trans-Pacific Partnership
TRIPs	Trade Related Aspects of Intellectual Property Rights
TTIP	Trans-Atlantic Trade and Investment Partnership
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organisation
WTO+	WTO plus
WTO-X	WTO Extra

Abstract

The latest round of multilateral trade negotiations at the WTO, the Doha Round, is deadlocked, and it is unlikely that any further significant rule-making progress will be made there. The system's faltering has resulted in an unprecedented move towards preferential trade agreements between WTO Members as alternative negotiating platforms. The result is an ever-expanding divergence of the global trading system, which gives rise to added complexity and wider discrimination than would follow from alternatives - specifically the increased use of plurilateral agreements. Preferential agreements, particularly worryingly, may also have serious consequences for developing and least-developed countries in particular.

This paper argues that, in light of the stalling of the Doha Round, greater effort should be made by WTO Members to pursue plurilateral agreements in specific policy areas and to move towards a system incorporating more 'variable geometry' which will result in progress in existing areas which have seen little movement since the Doha Round began. Given the recent proliferation of Preferential Trade Agreements and their potential negative effects on rule-making and the WTO, and on developing countries, it is vital that alternatives are explored in order to promote adaptability which would result in a more effective and relevant WTO.

Introduction

In 2016, two phenomena can be said to typify the world trading system: the deadlock of the Doha Round of trade negotiations, and the proliferation of preferential trade agreements (Nakagawa, 2015).

The Doha Round of negotiations, launched in 2001 at the WTO's Fourth Ministerial Conference, aimed to achieve major reform of the international trading system through wide scale revision of trade rules, covering nearly 20 areas of trade (WTO, 2001). The original aim of the negotiations was to reach agreement on all subjects of interest by 2005 (WTO, 2001: 45). 15 years on, negotiations have stalled indefinitely, and in fact have been deadlocked on most issues for the majority of the Round. While there have been small victories since - specifically at the Bali and Nairobi Ministerial Conferences (WTO, 2013; WTO, 2015a) - rulemaking in the multilateral trading system has faltered as a result of the failures of the Doha Round, and WTO Members are increasingly turning to regional trade agreements and other preferential trade agreements as alternative negotiating platforms (WTO, 2011a: 48). The result is an expanding divergence of the global trading system, which gives rise to added complexity and wider discrimination than would follow from alternatives - specifically the increased use of plurilateral agreements. Preferential agreements, particularly worryingly, may also have serious consequences for developing and least-developed countries in particular.

Could more issues-based plurilateral agreements contribute to achieving practical issue-specific results in the WTO, particularly in respect of the decision-making challenges faced in the Doha round? And can these types of agreements avoid the pitfalls that reliance on Preferential Trade Agreements hold for global trade, especially developing countries?

This paper argues that in light of the stalling of the Doha Round, greater effort should be made by WTO Members to pursue plurilateral agreements in specific policy areas and to move towards a system incorporating more 'variable geometry' which will result in progress in existing areas which have seen little movement since the Doha

Round began. Given the recent proliferation of Preferential Trade Agreements and their potential negative effects on rule-making and the WTO, it is vital that alternatives are explored in order to promote adaptability which would result in a more effective and relevant WTO. By making the plurilateral route within the WTO more attractive, Members would have access to a powerful mechanism through which to recognise diversity in the priorities of different Members, while also ensuring that cooperation between subdivisions of Members is pursued in line with the key principles of the multilateral trading system: transparency, openness, and inclusiveness (Hoekman & Mavroidis, 2015b: 103).

Chapter 1 of this paper looks at the history and some of the reasons behind the stalling of the Doha Round, including the processes of negotiation and decision-making utilised therein. Following this, in Chapter 2, the rise of preferential trade agreements (hereafter 'PTAs') will be discussed, along with an examination of their unsuitability as an alternative to the WTO's multilateral negotiation process. Chapter 3 will expand on the background of plurilateral agreements within the WTO context. This will entail an examination of the types of plurilateral agreements which are in place and those which are currently being negotiated. Chapter 4 discusses the value of using plurilateral agreements to move forward on issues of importance within the negotiating framework, and specifically demonstrates their value in respect of developing countries' negotiating capabilities. Finally, Chapter 5 critically examines the potential arguments against the use of plurilateral agreements and the problems which may arise in placing greater reliance on them, suggesting solutions to these arguments. Chapter 6 concludes.

Chapter 1

The Doha Round

1.1 Developing Countries and Their Place in the Doha Round

The Doha Round of negotiations, semi-formally referred to as the Doha Development Agenda, is the latest and most ambitious round of trade negotiations between WTO Members (Van den Bossche & Zdouc, 2013: 87). The aim of the negotiations was (and perhaps still is) to lower and remove barriers to trade, thus encouraging trade liberalisation, while placing economic development and poverty alleviation at the heart of the multilateral trading system (WTO, 2001: 2). While the round has been on-going since early 2001 - and was originally intended to be concluded by 2005 (WTO, 2001: 45) - negotiations are widely thought to have stalled indefinitely (Wolfe, 2015; Decreux & Fontagné, 2015; Woolcock, 2013; Stewart, 2015). The reasons for the impasses in talks are numerous, as are the countless missed deadlines throughout the duration of the round (Wolfe, 2015: 8). It is important here to recall the history of the Round and its underlying objectives in order to adequately understand the reasons for its downfall. Particularly important in this regard is the influence of developing countries within the Doha Development Agenda.

Previous to the creation of the WTO, developing country participation in the multilateral trade negotiations was either passive or defensive – on the whole they remained bystanders to the process of negotiations (Finger, 2007: 442). In addition, the obligations of developed countries in respect of developing countries were largely non-reciprocal – there was little expectation that developing countries would reciprocate obligations with similar commitments.[1] The global trading system under the General Agreement on Tariffs and Trade, 1947 (hereafter, the 'GATT') was based on a number of 'codes' – plurilateral agreements which countries could choose to sign on to, or not.

[1] As per Part IV of the GATT.

Developed at the Tokyo Round of negotiations in 1973, these agreements would not create obligations for those parties which did not sign up to them. The codes included the Agreement on Subsidies and Countervailing Measures (GATT, 1979a), the Anti-Dumping Agreement (GATT, 1979b), the Agreement on Technical Barriers to Trade (GATT, 1979c), the Agreement on Import Licensing Procedures (GATT, 1979d), and the Customs Valuation Agreement (GATT, 1979e), and were collectively known as the Tokyo Round Codes. Additionally, and specifically, these codes included the Agreement on Government Procurement (GATT, 1979f) and the Agreement on Trade in Civil Aircraft (GATT, 1979g), as well as the International Dairy Agreement (GATT, 1979h) and International Bovine Meat Agreement (GATT, 1979i). The system of 'variable geometry' established here allowed for dissimilar commitments between Members and accounted for the differences in interests and levels of capacities of countries at the time.

The Uruguay Round of negotiations, launched in 1986, sought to transform the previously fragmented system of the GATT, based on the Tokyo Codes, into a wide reaching organisation regulating a number of different areas (Khumalo, 2009: 8; Rolland, 2010: 69). As a result of these negotiations, most of the plurilateral Tokyo Codes were multilateralised and incorporated within the umbrella of the newly formed World Trade Organisation (Rolland, 2010: 69-72). In order to join the WTO, countries were required to accept the negotiated Uruguay Round package as a whole, as part of a Single Undertaking on a take-it-or-leave-it basis. As a result, developing countries would undertake significant commitments in areas such as intellectual property, health and safety regulation, and services, while developed countries would provide for more open access in areas such as agriculture and textiles, which were attractive markets to developing countries (Finger, 2007: 443; Finger 2002: 1098). Developing countries were afforded longer transition and implementation periods in order to effect compliance, but in order to become Members of the WTO they were required to agree to the Agreement as a whole, just as developed countries were (WTO, 2011a). In this context, two sub-groups of developing countries formed: those high-growth, industrialising countries which 'exhibited greater willingness to make extensive commitments under the Uruguay

Round in return for what they hoped would be improved access to developed country markets' (Trebilcock, 2014: 5), and less developed countries, particularly in Africa, which were 'largely marginalised in the decision-making process and were induced to sign on to the single undertaking through prospects of reduced tariffs on developed countries' manufacturing imports, and the beginnings of agricultural trade liberalisation.' (Trebilcock, 2014: 6).

Subsequently work has been done which shows that the costs to developing countries as a result of the commitments made when accepting the results of the Uruguay Round have been very high (Finger, 2007; Finger 2002). Specifically, the concessions in the areas of intellectual property and health and safety have caused them losses which exceeded the gains they had made from improved market access (Trebilcock, 2014: 6; Finger 2007: 444-445). The launch of the Doha Round represented a chance for these developing countries to reassert their status of requiring special treatment and, indeed, they wished to expand this status (Trebilcock, 2014: 6; Inside US Trade, 2002) Especially important was the notion that their concerns about implementation were included on the agenda for the round (Finger, 2001; WTO, 2003b). The goal for many here was to rebalance what they felt to be an unfair bargain imposed on them during the Uruguay Round (Wolfe, 2009: 844).

The Doha Round of negotiations did not proceed smoothly as key differences quickly emerged in a number of areas. For example, at the Cancún Ministerial Conference the EU wished to negotiate in the areas of investment, competition policy, government procurement transparency, and trade facilitation[2] stating that they were a key element of the Doha Development Agenda (WTO, 2003a). Several developing countries, in response, formally protested that their views on the (non-)inclusion of these issues on the agenda had been overlooked (WTO, 2003b). Specifically, the developing countries called for the Singapore Issues to be dropped and, importantly, announced their strong opposition

[2] These issues were collectively known as the 'Singapore issues' as they were placed onto the Agenda at the Singapore Ministerial in 1996. WTO, 1996.

towards any attempt to adopt a plurilateral approach for negotiating these issues (WTO, 2003c: 6-8). Ultimately, the Ministerial in Cancún broke down without reaching a consensus, following the opposing interests of developing and developed countries on these issues and on market access in agriculture (Warwick Commission, 2007: 15) Developing country opposition led to the abandonment of the Singapore Issues in the Framework Agreement of 2014, where the agenda for the Doha Round was formally decided (WTO, 2004: para 1(g)). The cracks formed during the Cancún Ministerial persisted, however, as did the differences in the negotiating focus of developed and developing Members, resulting in various breakdowns in talks and impasses in negotiations (Wolfe, 2015: 8; Sally, 2003: 3).

Differences in the level of interest expressed towards various issues are to be expected in multilateral negotiations which covers a broad agenda and involving so many Members of different economic strength. However, the failure to achieve any kind of significant resolution since the launch of the Round suggests that there are specific problems with the WTO negotiating mechanisms. The reasons for Doha negotiating failures are varied, with commentators expressing differing views as to the underlying sources of such failure, be they exogenous, such as changing trade flows over the period of the round (Wolfe, 2015: 10) or endogenous institutional factors. While many views have merit, there is a strong case to be made that, in particular, the WTO negotiating and decision-making principles, coupled with the vast scope of the Doha agenda that had developed over time, in some significant way contributed to its downfall.

Specifically, WTO negotiation and decision-making processes are governed by two rules or principles: the Single Undertaking principle and the consensus decision-making approach.

1.2 The Single Undertaking Principle

In regard to decisions on matters on the agenda, Members must agree to implement an entire set of rules as a whole, after these have been negotiated multilaterally (WTO, 2001: 47). It is now well-understood within the field of international trade law that in WTO

negotiations, “every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately”, and “nothing is agreed until everything is agreed” (WTO, 2017a; Angwenyi, 2016: 610; Wolfe, 2009: 835-836). Indeed, the principle is specifically included in both the 1986 Punta Del Este Declaration launching the Uruguay Round, (GATT, 1986: Part I. B(ii)) and the 2001 Doha Ministerial Declaration, in which it was stated that ‘… the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a Single Undertaking’ (WTO, 2001: 47). This principle is kept in mind throughout the negotiations by the negotiating members and is intended to shape the identity of the final outcome. [3] Its development has been influenced by a number of factors, and it may have been first incorporated into the WTO structure due to the ambitious objectives of the Uruguay Round - it was thought that these could only be concluded as a Single Undertaking (Wolfe, 2009: 840-841). In addition, there was the idea which had informed the Uruguay Round: that agreements should be integrated and multilateral in order to avoid the fragmented Tokyo Codes system. To achieve this unity would require a Single Undertaking (Wolfe, 2009: 839-840).

By 1991, when the goals of the Uruguay negotiations were clear, the Single Undertaking principle was seen as key to achieving the conclusion of the Round as a collection of inter-reliant agreements (Rolland, 2010: 70). Negotiation by way of a Single Undertaking presented difficulties, however, and created specific problems for developing countries: Accession to the newly formed WTO required that Members agree to all of the WTO Agreements and that they accept all of the obligations stemming from such agreement (WTO Agreement: Art XIV:1). Many experienced difficulties implementing the wide range of agreements which comprised the WTO, both financially and in terms of infrastructure (Inside US Trade, 2002a). The application of the Single Undertaking meant that developing countries shouldered additional burdens than they were previously used to, as they could no longer simply refuse to opt in to agreements which they would have

[3] For a detailed history of the principle, see Wolfe, 2009: 838-841.

trouble implementing. This translated into wariness within the Doha Round, where those developing countries became hesitant to agree to any suggestions which would be beyond their capacity to implement (Sutherland, *et al*., 2004: 62). Specifically, developing countries which harboured concerns regarding their obligations to implement previous Uruguay Round commitments wanted certainty that these implementation concerns would be considered part of the agenda for the Doha Round (Inside US Trade, 2002a). Tied to this was the analogous concern that they would not again be 'forced' to accept new rules which would place further legal and economic burdens on them (Finger, 2001; Harbinson, 2009: 3-4). This apprehension was linked to the strong opposition to negotiation by plurilateral agreement, as directly stated by 46 developing countries in 2003 (WTO, 2003c). Another reason for this opposition to plurilateral negotiations was the creation of a two-tiered system of membership, which these developing countries believed would be antithetical to the character of the WTO (WTO, 2003c: 8).

As a consequence of negotiating by Single Undertaking, Members on both sides of the negotiating table would no longer entertain discussions on issues that did not affect them if there was no guarantee of meaningful reciprocal talks regarding their favoured issues (Wolfe, 2009: 844). A system of issue-linkage was created, with many developed Members, particularly the EU, insisting on negotiations on services, industrial goods, and agriculture being undertaken simultaneously, because gains on the first two would be needed, it was argued, to balance concessions made on the third (Inside US Trade, 2002b).

The Single Undertaking's importance as a negotiation technique was highlighted midway through the negotiations by the Hong Kong Ministerial declaration of 2005: There, negotiators were instructed to "ensure that there is a comparably high level of ambition in market access for Agriculture and Non-Agricultural Market Access" (WTO, 2005: 24). In order to achieve this, approaches to these issues would have to be achieved simultaneously, and the level of ambition expressed for each would necessarily be dependent on the other (Wolfe, 2009: 845). The balancing act required to take into account different Member's competing interests was found to be a challenging one, for

various reasons. Developing and least-developed countries, for example, did not find the offers and reciprocal demands made by developed Members to be a fair trade-off (Harbinson, 2009: 4).[4] Giving effect to the differences in Member's interests, and the ensuing evaluation of the agenda based on this reciprocity, is the basis of one of the largest problems at the Doha Round. A failure to find common ground contributed greatly to the breakdown in talks at the July 2008 Ministerial, this time over trade-offs between geographic indications on food and more market access in agriculture, two otherwise unrelated issues (Low, 2011: 4). What is important to note is the way in which differences in ambition of different Members, for various sectors, resulted in gridlock on the whole Round of negotiations, with no significant rule-making progress being effected in any sector as a result.

While the introduction of the Single Undertaking principle during the Uruguay Round almost certainly had a coercive effect on developing countries which had previously not been willing or ready to agree to the GATS or the Agreement on Trade-related Intellectual Property Rights ('TRIPS Agreement') but did so regardless in order to become a Member of the WTO, for example, the system of negotiation has changed (Low, 2011: 4; Finger, 2007: 442). During the Doha Round, developing Members have come to appreciate the importance of the principle in negotiations and have successfully used it as a tool to block negotiations on issues counter to their interests (such as during the Cancún Ministerial) (Woolcock, 2003; WTO, 2003c). Members are aware that negotiations in certain areas and the possibility of a successful conclusion will be conditional on a single agreement. Contrast this with the previous plurilateral system, as an alternative: the opposition to the introduction of a particular topic for negotiation might not be as strong, as Members were aware that, unless they agreed to implement the agreement, no obligations would fall on them as a result of the negotiations, and that the conclusion of an agreement in that sector would not influence their ability to purse their interests in other areas. Rolland (2010: 72) thus describes the Single Undertaking as a

[4] See also, for example, Brazil's Foreign Minister's comments in ICTSD, 2007.

'double-edged sword', whereby any WTO Member or a coalition of Members can hold negotiations hostage. This has led to the situation where negotiators from developing countries now embrace the principle as a method of defending themselves against the erosion of their interests on the agenda by more formidable Members (Collier, 2005). Developing Members' resources were stretched thin by complex negotiations on such a wide range of topics and were being stretched thinner by the number of trade-offs which needed to be made to make progress in areas of importance to them (VanGrasstek, 2013: 551). Rolland (2010: 73-74) explains that the expansion of negotiations to areas where developing Members' capacity to make concessions was limited meant that they would have to make more costly concessions in areas of core value to them. Meanwhile, Members with more diverse economies could spread the cost of concessions across domains, therefore minimising the impact on strategic sectors of their economy. Developing Members therefore used the principle to their advantage, limiting the agenda to issues which were important to them.

1.3 Consensus Decision-Making

The second important WTO rule is the consensus decision-making approach. In the process of negotiating changes to existing trade rules, as well when as negotiating new rules, a consensus needs to be reached between every WTO member on an issue, as was the practice under the GATT 1947 (GATT: IX: 1). In this context, consensus means that "no Member, present at the meeting when the decision is taken, formally objects to the proposed decision".[5] Following an objection, legally the next step (under Article IX:1 of the WTO Agreement) is to decide the issue through a simple majority vote. However, this practice is rarely, if ever, followed. Instead, what usually follows the objection to a proposal by one or more Members is a protracted effort to reach consensus by finding a compromise (Khumalo, 2009: 5). If no compromise is reached, the matter is dropped or filed away for later negotiating – no vote is taken, despite its existence as a deadlock-breaking mechanism under Article IX (GATT). As a result, since any member can block

[5] Footnote 1 to the WTO Agreement (GATT Secretariat, 1994a).

an agreement from being reached, questions have been raised regarding the appropriateness of the approach by the WTO (Ehlermann and Ehring, 2005: 64, Hufbauer & Schott, 2012; Warwick Commission, 2007). While preventing a certain decision where vital interests are at stake may be entirely legitimate, such blocking may also lack legitimacy where its aim is primarily to prevent others from moving forward with an agenda. Thus, consensus-based decision-making can be burdensome where it enables minority Members, whether developed or developing, to prevent progress.

However, despite the potential downsides of the consensus approach, there are of course advantages, when the process runs smoothly. These include the fact that a decision taken by consensus will generally enjoy widespread support, since no member will actively oppose it. The majority can use the fact that there was consensus to ensure the minority parties will co-operate in the implementation of the decision, resulting in a higher chance that the decision is implemented effectively (Ehlermann & Ehring, 2005: 66-68). The unspoken purpose of requiring consensus is, therefore, to reach a compromise whereby all affected parties are at least partially satisfied with the outcome.

Despite its positives, the current process does threaten the effectiveness and legitimacy of the decision-making process of the WTO. Questions can be raised regarding decisions that were *not* taken, or perhaps not even pursued, due to the nature of the requirement of consensus, and the different outcomes which may have arisen if an alternative had been available. Indeed, even when the process functions well, outcomes are, as Ehlermann & Ehring (2005: 68) puts it, "bound to be the lowest common denominator, and the process can take an excessively long time." Included in this problem are the inherent dangers of paralysis in decision-making, and the subsequent loss of legitimacy and value of the WTO when it fails to produce outcomes on important matters, as we have seen in the Doha Round (Petersmann, 2014: 269). Some may argue that consensus decision-making is not overly problematic since there are few situations where a decision is actually blocked in this manner. However even without the blocking actually occurring, it is the fact that consensus is *known* to be the only avenue for acceptance of a proposal which may lead Members to refrain from even making an

attempt at the issue. Further, almost all potential decisions are prepared informally in advance, and usually there is no move to a formal proposal at the WTO if it is thought that they will not achieve consensus (Sutherland, *et al*., 2004: 63).

Finally, consensus is a requirement for adding a plurilateral agreement to Annex 4 of the WTO Agreement, (WTO Agreement: X:9) although this will be dealt with in Chapter 3, below.

1.4 The Effect of the Principles on the Doha Negotiations

Both of the above WTO principles have contributed greatly to the indefinite stalling of the Doha round. The Single Undertaking principle, coupled with the initially vast negotiating agenda and significant differences in expectations between developed and developing countries regarding the prospective outcomes of the negotiations have led to the grinding standstill that has currently taken hold of the Round. Naturally, the above-mentioned difficulties with consensus decision-making contributed to the problem in light of those same differences in expectation between Members, and the different needs and goals of developed and developing countries.

There is evidence that the Single Undertaking may not be beneficial to all WTO Members, and may have overly coercive effects, particularly on the developing and least developed Members (Low, 2011; Finger, 2007). Of course, the history and practice of the principle shows that it is largely antithetical to the idea of asymmetric commitments (Rolland, 2010: 94). Currently the idea of equality which promotes differentiated treatment in order to create a just system of law is influential in the WTO. In this regard, much has been written in favour of the notion that Members with different socio-economic capabilities should not be subject to the same level of commitments (Hoekman & Mavroidis, 2015a; Rolland, 2010; Warwick Commission, 2007; Jones, 2014). In fact, numerous proposals tabled by developing Members in the Doha Round are in favour of a re-evaluation of the relationship between multilateral trade liberalisation and Members' development constraints (Rolland, 2010: 94; WTO, 2003c; WTO, 2011b; 2011c; 2011d).

The problems with the Single Undertaking and the consensus decision-making approach are often not directly evident in that it is not always the case that they have been invoked by Members explicitly to suspended negotiations. To be sure, the deadlock of the Doha Round is *not* the result of a small number of developing countries holding the rest 'hostage', as it were, by withholding their consent. Rather the requirement of consensus itself has led to negotiations which proceed slowly and ultimately have not led to an outcome. In order to understand how the principles have affected the round and contributed to its demise, one must look at them as a whole: they operate not only in the direct sense of requiring consensus and a Single Undertaking, but as a negotiating technique, and as indicators of the fundamental principles of the WTO, informing how Members negotiate and interpret WTO law (Wolfe, 2009: 837). Throughout the Doha negotiations, the Single Undertaking principle has shaped the *results* of negotiations as well as *how* the negotiations themselves are conducted. The ultimate failure of the Doha Round lies in that many major participants were dissatisfied with the results of the negotiations to date, and could not see a satisfactory conclusion forthcoming; this is arguably a result of the adherence by the WTO to the two principles in so strict a manner. Members on both sides, developed and developing, were dissatisfied with the progress being made in the Round; adherence to the principles, instead of creating compromise as designed, helped create a deadlock.

There is also still a paradox within the Round: developing countries seem committed, mainly for bargaining reasons, to a negotiating structure which is detrimental to them and may leave them with obligations which they cannot meet, and implementation problems (Finger, 2001; WTO, 2010: paras 102-106; WTO, 2011b; 2011c). This has the effect of allowing developed countries to continue to enjoy greater influence in WTO rule-making, which usually leads to negotiation outcomes which are more suited to their particular economic circumstances, rather than those of developing countries (VanGrasstek & Suavé 2006: 852). Regardless, developing countries continue to advocate for the Single Undertaking approach, which translates into a particular aversion to the plurilateral route, advocated here (Wolfe, 2009: 845-846; WTO, 2003c; 2011b; 2011c;

2011d). However, a return to the Doha Round with the expectation of swift, effective progress seems far-fetched. There are options available to the WTO, and its Members, which would allow for progress to be made on regulation of trade issues within the Organisation. These are many and varied, ranging from the removal of the consensus principle or moving to negotiate outside of the WTO, to adapting and relaxing the Single Undertaking and consensus principles, to increasing the use of plurilateral agreements. While this paper does not explore each of these, it does look towards the current WTO landscape which is increasingly being populated by PTAs which are being used as an alternative to Doha negotiations. A system based on these types of agreements will have arguably worse effects on developing countries than one which utilises plurilateral agreements. This paper will argue that the increased use of plurilateral agreements on specific topics will allow progress to be made in the WTO, and will help to establish a system within which developing and least-developed countries can move to avoid the harm that the influx of PTAs will cause them.

The Various Ways in Which Agreements May be Formed

There are a number of ways in which a trade agreement may be created and implemented. The most important of these for the purposes of this paper is the creation of a plurilateral agreement and the including of that agreement into Annex 4 of the Marrakesh Agreement Establishing the WTO. Article X:9 of that Agreement allows for a new plurilateral agreement to be added to the existing Annex 4 Agreements by the Ministerial Conference "exclusively by consensus". Once incorporated in Annex 4, agreements, as per Article II:3 of the Marrakesh Agreement, are applied on a discriminatory basis – the obligations *and* benefits accrue only to parties to the agreement. The benefits of this are that it avoids the problem of 'free-riders' entirely (which is discussed below), and that it allows parties to create preferences only for other countries party to the agreement. The Government Procurement Agreement, mentioned above, is an example of this type of agreement. However, this type of agreement inevitably creates a distinction in the obligations and treatment between parties and non-parties to these agreements, which is in conflict with the purposes of the Single Undertaking. This is not necessarily a negative, however, as it will allow for more variable geometry within the WTO. This conflict will be dealt with below, in Chapter 5.

The requirement of consensus for adding an agreement to Annex 4 is often considered too strict and a hurdle to their implementation (Hufbauer & Schott, 2012; Hoekman & Mavroidis, 2015a). A discussion on the merits of this argument will be carried out below in Chapter 3.2). Accordingly, it is possible for members to conclude plurilateral agreements which are *not* included in Annex 4, and which may be negotiated and concluded outside of the WTO. Needless to say, any plurilateral agreement to which a WTO member is a party must be WTO-consistent, even if it is negotiated and concluded outside of the Organisation (Nakatomi, 2013: 13). This means that, save for a few strict (and for our purposes, mostly irrelevant) exceptions, the benefits contained within the agreements must be extended to all WTO members on an MFN basis, as per

Article I of the GATT (Draper & Dube, 2013: 2).[6] However, it also means that these types of agreements do not require the consensus of the WTO membership, but may be adopted as a WTO Ministerial Declaration,[7] or simply agreed between the parties themselves.[8]

Agreements applied on an MFN basis are usually structured around the requirement of a 'critical mass' of participants before they come into effect (The ITA, and Environmental Goods Agreement ('EGA') are of this type). This means that in order to be implemented, participants' global trade in the sector concerned must collectively amount to a specified percentage (usually 90% of all trade in the sector, worldwide) (Hufbauer & Schott, 2012: 7). This is done to counter the problem of 'free-riders': since the agreement's benefits accrue to all WTO Members, whether they sign up or not, there is the potential that certain Members may choose not to sign up (and thus not accrue obligations), knowing that they will still receive the same benefits as parties to the agreement which do have reciprocal obligations. Critical mass agreements counter this problem by minimising the number of countries which will benefit without reciprocating, as the vast majority of trade in the sector is accounted for by parties to the agreement.

It is useful here to adopt the distinctions employed by Horn, Mavroidis and Sapir (2010: 4) regarding the content of different types of agreements. Certain agreements may be classified as 'WTO-plus' (hereafter 'WTO+'). These regulate areas which are covered by WTO agreements but which impose further regulation in these areas than is required by the WTO. A plurilateral example is the Anti-Counterfeiting Trade Agreement (hereafter the 'ACTA'), which aims to regulate intellectual property issues covered by the TRIPS Agreement, but which goes further in its obligations for signatories. Alternately, there are

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[6] GATT, 1947, which relevant portion reads:

> "[W]ith respect to customs duties … imposed on or in connection with importation or exportation … any advantage, favour, privilege or immunity granted by any contracting party to any product originating in … any other country shall be accorded immediately and unconditionally to the like product originating in … the territories of all other contracting parties".

[7] As was the case with the Information Technology Agreement ('ITA'), discussed below.

[8] As was the intention of the parties to the ACTA.

those agreements which can be classified as WTO-extra (hereafter 'WTO-X'). These regulate areas not yet covered by the WTO. An example here would be the proposed Environmental Goods Agreement (hereafter, the 'EGA'), which aims to eliminate tariffs on a number of environment-related products, an area not covered by any WTO Agreement.

Whether to conclude an agreement on the basis of critical mass, by addition to Annex 4, within, or without the WTO will largely depend on the nature of the agreement and the intentions of the negotiating parties. For example, the critical mass approach cannot be applied in all cases: how could critical mass be defined, for instance, in regard to potential rules on trade and climate change? Quantifiable values, regarding trade volumes and the like, are required for implementation of a critical mass approach (Mendoza, 2012: 30). A discussion on the various types of agreements and the suitability of each for different purposes is included below, in Chapter 3. The alternative that will be discussed directly below, however, is the conclusion of a preferential trade agreement.

Chapter 2

Preferential Trade Agreements

The current stalling of the Doha Round means that meaningful progress in updating key WTO rules is not being made, while Members are increasingly turning to alternatives for trade liberalisation. Currently, the most popular alternatives being employed in this regard are regional trade agreements (Hilpold, 2003: 219-260; Draper, Lacey & Ramkolowan, 2014: 7; Gantz, 2013: 9; Petersmann, 2014).[9] While regional trade agreements are compatible with WTO rules, increasing recourse to these in the context of stagnating multilateral rule-making mechanisms constitutes a growing existential crisis for the WTO (Draper & Dube, 2013: 1). In addition, there has an unprecedented move towards mega-regional agreements, which are theorised to have a significant impact on developing countries, especially those in Africa (Mevel & Mathieu, 2016).

This chapter will focus on the rise of preferential trade agreements, such as free trade areas ('FTAs'), regional trade agreements ('RTAs') and the possibility of the conclusion of 'mega-regionals'.

The value of these PTAs as a mechanism for effective rule-making within the WTO context will thus be examined. Their place within the WTO negotiating framework will be assessed, alongside a discussion of the weaknesses of the PTA route, particularly those related to their impact on developing and least developed countries. These weaknesses include the growing complexity of the global trade landscape as a result of increased recourse to PTAs, the exclusion of smaller, more vulnerable countries from effective participation in global trade due to the nature of these PTAs, inadequate rules and enforcement of those rules in governing PTAs, and a lack of transparency within the creation and implementation of PTAs.

[9] Additionally, the WTO's Regional Trade Agreements Information System (WTO, 2017d), describes the increase in the number of RTAs being notified since the creation of the WTO.

2.1 Definitions

Preferential trade arrangements in the strict sense refer to unilaterally granted trade preferences (WTO, 2017c). These include schemes conceived under the Generalized System of Preferences (through which developed countries grant preferential tariffs to imports from developing countries) as well as other non-reciprocal preferential schemes such as the grant of a waiver by the General Council (WTO, 2017c). In this paper however, along with the majority of the literature dealing with plurilateral agreements, the term 'PTA' is used to refer to any agreement which is concluded on a preferential - that is, non-MFN – basis (*inter alia* Draper & Dube, 2013; Ghibutiu, 2015; WTO, 2011a; Warwick Commission, 2007; Hoekman & Mavroidis, 2015a). The term 'PTA', as it is used here, thus also encompasses free trade agreements and customs unions (in the case of goods specifically) which are usually collectively referred to as regional trade agreements or RTAs. Article XXIV of the GATT.[10] outlines the rules for free trade areas and customs unions, while Article V of the GATS sets out conditions for economic integration agreements in the area of services. Together these Articles set out the guidelines for the creation and operation of these types of agreements, as well as requiring that their formation is notified to the WTO General Council. Within this paper, the term PTA is used as an umbrella term to refer to any preferential agreement including, but not limited to, free trade areas and customs unions, between two or more partners. The term RTA will only be used in a narrower sense, to refer specifically to free trade areas and customs unions notified in terms of the GATT or economic integration agreements in the GATS.

The term '*mega-regional*' is often used rather loosely. This paper adopts the restrictive definition of a mega-regional put forward by Draper, Lacey & Ramkolowan (2014: 8):

> '[A] mega-regional [is] a trade agreement that:
> 1. Is negotiated by three or more countries or regional groupings;

[10] Supplemented by the Understanding on The Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, WTO.

2. Whose members collectively account for twenty five per cent or more of world trade; and
3. The substance of which goes beyond current WTO disciplines'

When using the term, therefore, what is meant are multi-country, globally significant in terms of trade impact, and regulation-intensive agreements. (Draper, Lacey & Ramkolowan, 2014: 8). These often involve, in the case of the TPP for example, consolidating already existing bilateral agreements between the negotiating members, into one large 'mega-regional' agreement (Meléndez-Ortiz, 2014: 13).

2.2 The Proliferation of PTAs

Particularly over the past 20 years there has been a rapid expansion of PTA activity, with the notified number of agreements in force reaching 270 as of September, 2016 (WTO, 2017d).[11] The majority of these were concluded and duly notified after the creation of the WTO in 1994 (WTO, 2017d). Naturally, this has raised questions regarding the causes and effects of PTAs on world trade, and what their increased prevalence means for the WTO and for the multilateral negotiating rounds, such as Doha (Ghibutiu, 2015; Warwick Commission, 2007). On one hand, it has been argued that the increase signals a deterioration in the international commitment to multilateralism, leading to a system of more fragmented world trade (Woolcock, 2013: 3; Khumalo, 2009: 1). The growing recourse to these types of agreements is seen as an inferior policy choice, undermining multilateralism and to be avoided if possible (Warwick Commission, 2007: 45). Most commentators agree that a consistent approach to trade relations is largely preferable to the fragmentation that results from the wide-ranging and extensive PTA landscape that is currently before us (Hoekman & Mavroidis, 2015a; Warwick Commission, 2007). Serious doubts have been raised regarding the effectiveness of PTAs in general, and the mega-regionals in particular, with detractors claiming that the surge in PTAs reduces transparency in the global trading system while increasing transaction and administration

[11] Some 430 PTAs have been notified in total, when following the WTO's method of counting each notification (for goods and services) separately, even when they are contained within one agreement.

costs, particularly for developing countries (Ghibutiu, 2015: 429; Bhagwati, 2012; Bhagwati, 2008).[12] On the other hand, it is suggested that PTAs are not a new phenomenon, and that their increase is part of the global pattern in world trade which has been observed since World War II (Palmeter & Mavroidis, 1998: 410; Warwick Commission, 2007: 48). Following that period, bilateral and regional agreements provided an expedited, more meaningful method of creating trade rules than the more comprehensive WTO (Palmeter & Mavroidis, 1998: 410). Proponents of PTAs would argue that they act to stimulate progress in the multilateral system, offering a complementary approach to the multilateral system, rather than a conflicting one (WTO, 2011a: 48; see also Kolsky Lewis, 2013).

The truth, it is argued here, lies somewhere between these two extremes. PTAs need not be completely antithetical to a multilateral trading agenda, but that is not to say that they are without problems. Regardless, PTAs are currently an inescapable part of the trading landscape, and seem poised to become more so in the future (WTO, 2011a; Warwick Commission, 2007). It is in light of this fact that this paper undertakes the examination of these types of agreement, with the purpose of determining whether there is a more inclusive, transparent and more effective alternative which may be exercised in rule-making within the WTO.

Particularly within the last 15 years, a rise in the number of 'deeper' PTAs has also been seen (Blanchard, 2015: 94-96; Hoekman & Mavroidis, 2015b: 115). PTAs are not only becoming more numerous, but are regulating trade rules going beyond traditional tariffs and existing WTO agreements, addressing measures which are not covered by WTO rules (Blanchard, 2015: 96). Most RTAs being notified today make deeper and more extensive commitments, and have moved beyond commitments based only on market access in goods. (United Nations Conference on Trade and Development. Secretariat [UNCTAD], 2013: 18).

[12] Bhagwati has repeatedly criticised PTAs as being a 'pox' on the multilateral trading system.

2.3 Mega-Regional Trade Agreements

The two major mega-regional agreements negotiated within the last decade have been the Trans-Pacific Partnership ('TPP') and the Transatlantic Trade and Investment Partnership ('TTIP'). These mammoth agreements aimed to liberalise trade and create rules through the negotiation of PTAs as well as by combining existing RTAs between signatories into one large agreement (Saner, 2012: 20-23; Hufbauer & Cimino-Isaacs, 2015; Draper, Lacey & Ramkolowan, 2014). However, following the United Kingdom's decision to withdraw from the European Union and US President Trump's ascent to power and subsequent withdrawal of the US from the TPP (Diamond & Bash, 2017), the future of these mega-regional agreements is uncertain (VanGrasstek, 2017; Kawasaki, 2017). Representatives of numerous countries have come forward stating that they wish to continue negotiating these agreements, specifically the TPP, and there is talk of including China as a participant in the TPP to 'replace' the United States (Chacko & Jayasuriya, 2017; Scott, 2017). Alternatively, another agreement may be concluded in a similar vein and on a similar scale, such as the Regional Comprehensive Economic Partnership. The TPP may not ever be concluded, or it may take many years to be revived. Regardless, it is unlikely that this move away from mega-regionals for the moment will result in renewed negotiations and the successful conclusion of the Doha Round. The problems with PTAs being used as an alternative to the multilateral trading system still persist, and the impacts of potential mega-regionals will still be felt by excluded countries if and when they are concluded. These problems will be discussed below, and it is still imperative that an alternative to the proliferation of PTAs is adopted.

2.4 Complexity of RTAs

The complex network of bilateral relationships and trading rules between various partners has been referred to as a "spaghetti bowl" (Bhagwati, 1995: 4), due to its tangled, complicated nature. As of June 2016, every WTO Member is party to at least one RTA. (WTO, 2016b). In particular, what is at issue when referring to this 'spaghetti bowl' are differing preferential rules of origin contained within various PTAs. Different countries

party to different PTAs have different rules of origin, and these are often created without regard to relevant foreign rules (Bhagwati, 1995: 4-5). The lack of consistency in the underlying Rules of Origin across different products and different agreements is problematic. While the term 'spaghetti bowl' was initially used to refer to the complexity of rules of origin, the concept is no longer limited to these rules specifically, but can be used to refer to the rules of global trade generally (Baldwin, 2006: 1152). There is wide scale fragmentation of trade rules, particularly rules of origin, mainly due to the large number of different PTAs which have been concluded, and this has negative consequences for global supply chains (Baldwin, 2006: 1151-1152). As put by Nakatomi (2013: 6.): "while a spaghetti bowl of rules of origin could possibly be tolerated, … a spaghetti bowl of global trade rules is intolerable." Large transnational firms with long supply chains would suffer most from the effects of the spaghetti bowl of tangled agreements and their disjointed rules of origin (Blanchard, 2015: 94). The global trade landscape would be complicated even if there were consistent regulations in place governing rules of origin - the current confusion and inconsistencies in these rules and the potential for further disorder would result in a frighteningly complicated global trade landscape which businesses and nations would have to navigate.

There are two separate but related issues here which impact on global trade. First, individual exporters are required to understand the rules of origin, for example, of their particular products and whether the rules differ across agreements by country (Crawford & Fiorentino, 2005: 17-19). These rules must then be complied with, including different production methods where varying rules require them. Secondly, even where the specifications of the rules for a product are harmonised between agreements, each agreement will apply to a different set of members. The materials that are required to qualify a product's 'origin' under one agreement may not be the same as those required under another agreement. For example, a South African company exporting a specific product will have different origin requirements, along with different administrative procedures, depending on whether it is exporting the product to the United States, Europe or countries in the SADC area (WTO, 2011a: 84; Schiff & Winters, 2003: 75-78).

The differences in rules across PTAs translates into higher transaction costs for exporters in countries which are party to two or more PTAs, as a result of higher administrative and production costs for these exporters, and these costs increase along with the number of PTAs a country belongs to (Estevadeordal & Suominen, 2005: 64-65, 81-86). African countries are, on average, party to three PTAs, with some party to a minimum of seven (WTO, 2017d). There can be no doubt that this mixing pot of rules is hindering global trade and increasing transaction costs for firms (see Kimura, Kuna & Hayakawa, 2006; and Kim, Park & Park, 2012, for detailed quantitative analyses to this effect). Indeed, complicated rules of origin themselves take considerable effort and resources to negotiate – NAFTA contains nearly 200 pages in its rules of origin section (Schiff & Winters, 2003: 75-78). Additionally, Herin (1986, cited in Schiff & Winters, 2003: 80) writing in 1986, estimated that administrative costs associated with compliance with rules of origin constituted 3-5% of the trade price of goods for intra-European free trade, a significant amount. It is likely that given the rise in PTAs and the confusion they cause in this regard, this number has risen. The creation of further PTAs outside of the multilateral trading regime, in a manner which is less than transparent,[13] can only serve to further confuse and add to the spaghetti bowl effect leading to trade diversion, whereby trade is diverted from non-PTA countries to countries within a particular PTA.

2.5 Exclusion of Small Countries from RTAs

Given the definition of a regional trade agreement, it is natural that many countries will be excluded from their ambit (Hoekman, 2014: 33). RTAs are not required to include all countries as parties and nor do they. What is worrying, however, is that those countries which are excluded are generally small ones, which offer only limited value to the parties to an RTA in terms of their market size (Kose & Riezman, 2000: 4, Krugman, 1991). RTAs, used in this way, can produce inequity in the global system which results in further costs for the most vulnerable Members (Warwick Commission, 2007: 49). Krugman (1991: 5) explains this as 'the innocent bystander problem', finding that an excluded country may

[13] See the discussion on the lack of transparency below, in this Chapter 2.8.

suffer significant economic losses. Particularly, he observes that "… inward turning [PTAs] can easily inflict much more harm on economically smaller players that for one reason or another are not part of any of the big blocks." (Krugman 1991: 20).

The fact that small, developing countries are often excluded was recognised by WTO Director-General Azevêdo in 2014, which he classed as a major source of concern (WTO, 2014a). Given the Doha Round's designation as the 'development agenda', the rise of RTAs which often exclude smaller, more vulnerable countries, this point seems critical. In the same address, Azevêdo stated that RTAs and their rules of origin may be detrimental to global value chains, making them inevitably exclusionary for some (WTO, 2014a). These are likely to be those producers from smaller countries who have been excluded from certain RTAs and who cannot reap the benefits thereof (Krugman, 1991). Additionally, it is the case that a number of smaller countries have granted major concessions to larger nations in order to become members of PTAs. An example here would be the requirement that a number of smaller countries were to accept measures which aimed to protect certain sectors of EU members, in order to conclude PTAs with the EU (Kose & Riezman, 2000: 4).

The exclusion of smaller countries from RTAs results in detrimental effects on them in a number of ways. The first of these is evident: if a country is not party to an important RTA which reduces tariffs or otherwise creates preferential trading arrangements for members, this country will be at a detriment. The countries within an RTA have tariff advantages in other RTA markets, in relation to RTA non-members. The harm that will result from this situation for non-members is apparent, in that they are subject to relatively higher tariffs or must otherwise pay more than RTA members in international trade deals with those members (Draper, Lacey & Ramkolowan, 2014: 9; Cheong, 2013). They will consequently be at a competitive disadvantage relative to member countries, and may face market losses as a direct result. This market loss due to the preferences (or lack thereof depending on one's viewpoint) is known as 'trade diversion' (Hoekman & Mavroidis, 2015a: 330). While the most obvious harm, this is likely not the most significant, given the declining prevalence of tariffs as measures to

restrict trade (Draper, Lacey & Ramkolowan, 2014: 9). The major exception, however, is agriculture, a point which is particularly relevant to developing countries (Newfarmer, 2006: 253). Harm caused in this way, while *prima facie* impacting all non-members equally, will in fact be felt harder by developing countries, due to their relatively lower scope for trading in different markets and their lack of ability to diversify their trade, as larger nations can (Schiff & Winters, 2003: 114-115).

The second factor which impacts on non-member countries is related to the increasing importance and prevalence of non-tariff barriers to trade, as a result of the lower reliance on tariffs. Depending on the extent to which PTAs result in the development of common regulations applicable to members, the impact and costs of adhering to non-tariff measures and standards may be too much for developing countries who were excluded from the PTA (Draper, Lacey & Ramkolowan, 2014: 15). Non-members which find it hard to comply with any non-tariff requirements created by the PTA will face increased pressure and competition from exporters within the regional agreement. (Draper, Lacey & Ramkolowan, 2014: 15-16). They will also face higher compliance costs, and thus trade costs, throughout all countries which are members of the PTA as a result, leading to increased trade diversion (Draper, Lacey & Ramkolowan, 2014: 16; Baldwin, 2012: 16-17).

PTAs are able to regulate issues not covered by the WTO, and indeed many do include these kinds of WTO-X commitments (Chase *et al*., 2013: 8). Horn, Mavroidis and Sapir (2010: 46-59) review a vast number of PTAs concluded between the United States and the EU between 1992 and 2008, identifying more than fifty areas which dealt with in at least one PTA. These range from anti-corruption regulations to environmental protection and anti-trust policies. PTAs thus certainly represent an opportunity to negotiate new rules on these issues and to regulate in areas which are currently less than adequately regulated, which may help with trade liberalisation. Conversely, these PTAs may discriminate against WTO Members who are not party to them, in two ways. First, lack of inclusion will mean that excluded countries will not be able to participate meaningfully in rule-making in these areas. Developing countries regard a plurilateral

approach to negotiation as 'contrary to the principles of multilateralism and inclusiveness', and have rejected the approach on those grounds (WTO, 2011c). However, the same is true of PTAs, with the result that excluded Members will not be able to participate meaningfully in the rules created by important PTAs. Additionally, these outsiders to the agreements are also likely to face *de facto* discrimination from the measures implemented following the conclusion of the agreements. For example, the prospects for reducing tariffs on environmental goods and standards under the TPP might have resulted in discrimination against outsiders even if the tariffs implemented were low, in practice (Meléndez-Ortiz, 2014: 23).

One result of the exclusionary and fragmented way in which PTAs are concluded will be that negotiations on certain subjects will proceed down separate tracks and at dissimilar rates, as rules for a certain topic are developed separately by different agreements (Ghibutiu, 2015: 429). This will undoubtedly hinder trade for these affected Members, but will also have a net detriment to global trade in the long run, by adding to the spaghetti bowl effect, and also by fragmenting markets which will have trade diverting effects (Ghibutiu, 2015: 429). While PTAs often do create trade for both members and non-members, this trade and its benefits are weighted heavily in favour of members, and thus non-members are put at a disadvantage. These problems of complexity and fragmentation of rules and markets are only compounded when one begins to look at the potential mega-regional agreements. Naturally, as with any PTA, a significant number of countries are excluded from their coverage. This will be the case with any mega-regional which is negotiated – certainly some developing countries will be included, but the conclusion of a PTA is necessarily limited to specific parties. While developing Asian countries may be included in the Regional Comprehensive Economic Partnership, for example, developing African countries will almost certainly be excluded, caused them economic losses due to trade diversion (Baldwin, 2012). This exclusion may happen to the most dynamic emerging economies (such as the BRICS) as well as the smallest and most vulnerable developing countries (Ghibutiu, 2015: 429). The difference here is that the negative effects on excluded countries are likely to be felt more strongly

in the case of mega-regionals than would be the case under a standard PTA (Meléndez-Ortiz, 2014: 23; Baldwin, 2014: 22-25). These agreements will cover a major percentage of world trade and will be the source of new rules and regulations within world trade. There were a number of different estimations in 2013 regarding the impact of the establishment of either the TPP or the TTIP on the global economy. These estimations include a 0.07% reduction in the rest of the world's GDP, (Cheong, 2013) to a difference of 0.5% to -7.4% in per capita income for individual developing countries (Felbermeyr *et al.*, 2013). These decreases in incomes were predicted to largely be the result of preference erosion and trade diversion away from developing countries. (Draper, Lacey & Ramkolowan, 2014: 13) Non-tariff standards were to be set between members which non-member developing countries may find hard to match, aggravating the effects of exclusion (Draper, Lacey & Ramkolowan, 2014: 13). Considering the changing landscape of the mega-regionals following President Trump's withdrawal of the US from the TPP, these estimations are likely no longer accurate, but there is little reason to believe that the general trend of a harmful impact on smaller players will be any less significant under a revised TPP featuring China, for example, or any other similarly sized PTA.

Unfortunately, these excluded countries consider that the solution to exclusion is to conclude further PTAs with other countries, to attempt to offset the detriment from non-participation (Schiff & Winters, 2003: 78; Dadush, 2014: 28). For sure, the conclusion of a PTA with a neighbour will have trade creation effects between the two countries, but the effectiveness of these types of PTAs in addressing the effects of exclusion has not been demonstrated, however, especially if they mainly include other smaller nations. Indeed, the fear of being marginalised itself has led many developing countries to redouble their efforts regarding South-South regional integration initiatives (Ghibutiu, 2015: 429). This has resulted in a particularly prevalent problem in Sub-Saharan Africa, where many PTAs overlap and a number of countries belong to PTAs with

contradictory obligations.[14] Regardless, the large number of PTAs is unlikely to provide a significant increase in trade liberalisation for the countries in this region, as the majority of their trade is with northern hemisphere developed countries (Schiff & Winters, 2003: 78). The result is that scarce resources are being used to negotiate and manage multiple complex PTAs, which is costly in itself, while the potential benefits of being party to these PTAs are perhaps not as beneficial as developing countries may have first thought.

2.6 Enforcement of PTA Rules Within the WTO

This problem is linked with the non-notification concern mentioned previously. As outlined above, the three fundamental provisions which allow for departures from the principle of non-discrimination in respect of regional integration are found in Article XXIV of the GATT and the "Enabling Clause"[15] for agreements dealing with goods; and in Article V of the GATS for services agreements. Art XXIV provides for the formation of customs unions and free trade areas, requiring that they should be designed "to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories." (GATT: Art XXIV: 4). The requisite level of responsibility is to liberalise 'substantially all trade among the parties', to have and have 'substantial sectoral coverage' (GATS: Art V) and not to raise additional barriers against outsiders. Importantly, these agreements may be implemented on an interim basis initially, but are required to fully comply with WTO rules within 10 years (GATT: Art XXIV: 5(c)).

It is in light of these rules that a major, well-known criticism of the PTA system in the WTO is considered. This criticism is the lack of adequate enforcement of WTO rules

[14] For example, Namibia and Swaziland belong to the Common Market for Eastern and Southern Africa while also belonging to the *Southern African Customs Union*, a customs union including South Africa and Botswana. Tanzania belongs to both the SADC and to the EAC, a further customs union.

[15] Formally known as the Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, Decision 28 of 1979.

regarding PTAs (Warwick Commission, 2007: 51; WTO, 2002: 7-9).[16] Since the inception of the GATT and the setting out of the requirements for FTAs and customs unions, a PTA presented to be examined by the membership has virtually never been found to be in conformity with the rules, and further still, the membership has not called for any modification to bring such an agreement into conformity (Warwick Commission, 2007: 51). During the lifetime of the GATT, a total of 98 PTAs had been notified under Article XXIV and working parties were established to examine virtually all of these. Only six out of the final sixty-nine submitted reports were considered to be in conformity with Article XXIV (WTO, 1995). As a solution to the evident problem, the WTO Committee on Regional Trade Agreements ('CRTA') was established by the WTO in 1996, (WTO, 1996c) one of its aims being the examination of notified RTAs to determine their consistency with WTO rules. Despite this, no examination report has been finalised by the CRTA since 1995 due to lack of consensus – the examination of RTAs had resulted in stalemate (WTO, 2011a: 185-186). The large volume of RTAs being notified is of course one problem for the process of review (Gantz, 2013: 189). A more serious cause for this stalemate, however, is that the rules governing PTAs themselves are vague and incomplete. Article XXIV is worded vaguely, and in particular there is no precise meaning of the phrase 'substantially all trade', a critical term in this context. Despite efforts towards re-examination of the rules over the years, virtually no success has been achieved, with the Appellate Body reluctant to address any Article XXIV concerns directly (WTO Appellate Body, 1999).[17] The rules are still imprecise and their reach is not clearly delineated. Reasons for the failures in this regard are most probably the same as those that result in a substandard PTA examination process (Warwick Commission, 2007: 51.) These vague rules are in fact one of the potential reasons for such a high level non-notification. For example, the use of the phrase "prompt notification" in Article XXIV of the GATT is

[16] While the figures used in this WTO background note are out of date, it is interesting to note the concerns raised by the Secretariat regarding enforcement of PTA rules have still not been adequately addressed in the past 15 years.

[17] The Appellate Body only did so in this dispute.

insufficiently specific, and does not clarify the consequences of non-compliance, which may contribute to the problems of non-notification. Regardless of the reasons, non-notification and insufficient examination occur frequently, and as such many, if not the majority, of PTAs concluded since creation of the WTO have not been adequately examined and tested for compliance with WTO rules. This is worrying, especially in the face of legitimacy and existential issues facing the WTO following the stalling of the Doha Round and given the sharp rise in the amount of these PTAs (Draper & Dube, 2013: 1; Khumalo, 2009: 5). PTAs are more numerous than ever, and there less certainty that they comply with WTO rules – can it really be said for certain that these types of agreements are complementing the multilateral system?

2.7 PTAs and Dispute Settlement Mechanisms

A further problem with the increased use of PTAs lies in the way these types of agreements are permitted to deal with disputes, and how their dispute settlement mechanisms interact with the WTO's (Jo & Namgung, 2012). Legally, there is nothing in Article XXIV of the GATT which serves to prohibit parties to a PTA from including their own dispute settlement mechanisms within that agreement. It follows that, in WTO-compatible PTAs, dispute proceedings regarding issues covered by the PTA can be brought before the PTA's designated forum *or* the WTO's DSB (if the matter at hand is subject to WTO disciplines). Much has been written on the subject of dispute settlement in the context of PTAs (*inter alia* Jo & Namgung, 2012; Koremenos, 2007; Davey, 2006; Bown, 2005; Hillman, 2009; Kwak & Marceau, 2002), with many of these authors expressing concern over situations where these PTA mechanisms overlap with those of the WTO.

Article 23 of the DSU provides that when a dispute concerns a WTO-regulated matter which falls under one of the covered agreements in Appendix I of the DSU, the WTO's DSB will have exclusive jurisdiction over the matter. This, in theory, would exclude the competence of any other dispute settlement mechanism to make a determination on WTO law violation claims. In practice, however, many PTAs take

matters into their own hands, so to speak (Kwak & Marceau, 2002: 2; Koremenos, 2007: 194). For example, the NAFTA provides that a forum can be chosen at the discretion of a complaining party, but gives preference to the NAFTA forum in certain circumstances (NAFTA Secretariat, 1993: Art 2005). This provision also requires that if a party has already initiated WTO procedures on the matter, these must be withdrawn, and the dispute shall be initiated in the NAFTA forum. The issue of conflicting decisions and overlap was an important factor in *Brazil – Retreaded Tyres* (WTO Appellate Body, 2007) where it was Brazil's contention that it was permitted to adopt an exemption from a ban on the import of retreaded tyres as a result of a ruling by a MERCOSUR tribunal.[18] The Appellate Body held there that following the PTA tribunal's decision was not a sufficient justification for Brazil not to meet its GATT obligations (WTO Appellate Body, 2007: para 258(b)).

Further problems arise when one tries to reconcile the provisions of the PTA, or the decisions of its tribunals with Article 23 of the DSU, which grants exclusive jurisdiction to the WTO. As it stands, there appears to be no legal solution to the problem of overlapping and potentially conflicting jurisdictions (Jo & Namgung, 2012). The legal uncertainty caused by this situation serves to confuse the jurisprudence of the WTO, and negatively impacts the relevance of the DSB over time.

As the coverage of PTAs extends beyond the scope of the WTO, it seems increasingly likely that parties to a PTA will turn to that agreement's dispute settlement forum - either by their own choice, as they gradually view the WTO as less relevant in regulating trade rules; or by necessity, as their dispute concerns a matter not under the scope of the WTO Agreements (Jo & Namgung, 2012: 1050). These PTA forums are often less open and particularly, less public, that the WTO DSB (Maggi, 1999). Increased recourse to PTA mechanisms will ultimately result in the decline of benefits such as information sharing and the value of deterrence (Jo & Namgung, 2012: 1061-1062;

[18] MERCOSUR stands for the 'Mercado Comun del Sur' and is a regional trade agreement between Brazil, Argentina, Uruguay, and Paraguay, founded in 1991.

Hoekman & Mavroidis, 2015a: 330). In addition, it will likely lead to fragmentation of case law as well as more fragmentation in the interpretation of provisions than would arise if all disputes were addressed through a common dispute settlement mechanism.

2.8 Transparency

Another issue, linked with those above, is the lack of transparency in PTAs. This includes a lack of transparency in the negotiation stage, as well as a similar lack of transparency following their implementation in regard to dispute settlement. This can be contrasted with the multilateral approach where, as mentioned in Chapter 1, the Single Undertaking functions as a method of bringing transparency to a complex process of negotiation (Wolfe, 2009: 846). The negotiation of PTAs, in contrast, as well as how they are implemented in the WTO, is in many ways not transparent (Hoekman & Mavroidis, 2015a: 328-329; Crawford & Fiorentino, 2005). As a result, negotiation on issues by way of a PTA undermines the multilateral system and the transparency which results from negotiating by way of a Single Undertaking or otherwise within the WTO.

WTO-X or WTO+ PTAs may totally or partially escape the multilateral regime, and this means that WTO Members may not be aware of all developments made on issues covered by PTAs, given the number being concluded. Negotiations are not subject to scrutiny in the same way multilateral talks are, and mostly take place behind closed doors (Warwick Commission, 2007: 51). In addition, RTAs which fall under the scope of GATT Article XXIV are to be notified to the Council for Trade in Goods, which transfers the agreement to the Committee on Regional Trade Agreements for examination (GATT: Art XXIV: 7(a)). This examination serves to ensure the transparency of RTAs and allows members to evaluate an agreement's consistency with WTO rules. In practice, however, there are significant problems with non-notification of PTAs. As of 31 October 2016, 83 RTAs had not been notified to the required body, while implementation reports were due for 129 different RTAs (WTO, 2017d). Moreover, there are currently 34 RTAs (counting goods and services separately) involving only WTO members (as well as an additional 33 RTAs involving non-members) which require a factual presentation (WTO, 2017d).

Agreements which have impacts on tariff treatment, as a result, are being concluded and implemented without being subject to evaluation nor any form of the possibility of objection. This leads to even further confusion in the global market, resulting in added costs and wasted time (Kose & Riezman, 2000).

A new Transparency Mechanism for RTAs was introduced in 2006 on a provisional basis (WTO, 2006), and while it does enhance the access to information available to WTO members, its impact on the review of PTAs has been minimal (Crawford & Fiorentino, 2005: 19).[19] It is worth noting that the wording of the Transparency Mechanism mentions "consideration" rather than an "examination" of RTAs, suggesting that the mechanism was never intended to exert greater pressure on countries to follow the rules (Hoekman & Mavroidis, 2015a: 328). It is illuminating that the Transparency Mechanism for RTAs is one of the only decisions from the Doha Round which has been allowed to be implemented independently of the full negotiation package (WTO, 2011a: 189), indicating Member's realisation that PTAs may be problematic.

Agreed explicitly at the Nairobi Ministerial in 2015, Members are looking to push forward with the process of discussing the "systemic implications of RTAs for the multilateral trading system and their relationship with WTO rules" (WTO, 2015a: 28). This is in addition to working towards transforming the above-mentioned transparency mechanism into a permanent one, in order to enhance transparency in, and understanding of, RTAs and their effects (WTO, 2016a). Both of these moves indicate the depth of the potential problem PTAs pose, and the realisation by many members that greater transparency and understanding is required of specific PTAs (WTO, 2011a: 189). It is clear that Members are concerned with the impact that RTAs will have on the multilateral trading system, given their rapid growth and the lack of clear rules regulating their use. This impact will continue to develop, given the stalling of the Doha Round and the potential move towards mega-regionals.

[19] As mentioned above, no examination report has been finalised by the CRTA since 1995.

2.9 Conclusion

As mentioned, a number of developing countries are opposed to the idea of plurilaterals, though in the near future this opposition may have to give way. With no major progress in the Doha Round, the proliferation of PTAs at an accelerated rate means that developing countries may soon be excluded from the market share in many signatory countries. PTAs are being negotiated outside the scope of the multilateral trading system, and thus, developing countries are further precluded from negotiating rules for the trading system as a whole (Draper & Dube, 2013: 2). Additionally, the rules being negotiated are adding to the confusing spaghetti bowl of global trade rules, rather than creating coherence amongst WTO Members, which is damaging to exporters from an economic standpoint. In light of this, it is argued that plurilateral agreements have more latitude in strengthening the multilateral trading system than would occur under PTAs, and especially mega-regionals. Plurilaterals offer an alternative for countries to advance trade rules in a way that complements the multilateral system, rather than these countries having to rely on the creation of further, confusing PTAs, which are pulling away from multilateral ideal, undermining the WTO as a negotiating forum, and harming developing countries directly and indirectly.

Chapter 3

Plurilateral Agreements

Plurilateral agreements within the WTO context operate between certain sub-sets of countries, allowing them to agree to policy-specific commitments which only apply to signatories. The scope of this paper will be limited to trade-related plurilateral agreements on specific issues and their contribution to rulemaking within the WTO. Plurilateral agreements within this context are considered to be between three or more countries. It is useful here to outline that this paper is distinguishing between these and country-based plurilateral agreements such as regional trade agreements ('RTAs') and free trade areas ('FTAs') dealt with in the previous chapter as 'PTAs'. Specific to this paper are issue-based plurilateral agreements, examples of which will be outlined below.

3.1 Plurilateral Agreements Within the WTO Context

As mentioned previously, the agreements which are analogous to the type advocated for in this paper are the Tokyo Codes. These included the Agreement on Subsidies and Countervailing Measures, the Anti-Dumping Agreement, and the Agreement on Technical Barriers to Trade, as well as the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft. During the time of the Codes, trade liberalisation commitments were diversified through the above agreements, with Members able to decide on an individual basis whether to subscribe to each or not. (Rolland, 2010: 70).

As explained in Chapter 1, it was during the Uruguay Round of Negotiations that most of the Tokyo Codes were transformed into multilateral agreements as part of the Single Undertaking principle. Contrasting with the previous GATT regime, Members of the WTO would have to accept the negotiation package as a whole, meaning that the Agreements would apply to all Members on a Most Favoured Nation basis.

While the shift towards an all-inclusive package of agreements was a specific objective of many negotiators in the round, (Hoekman & Mavroidis, 2015a: 321) four of

the Codes were left as plurilateral agreements which applied only to those countries which were signatories to them. These Agreements were included in Annex 4 to the Marrakesh Agreement (and will thus be referred to as 'Annex 4 Agreements'), though only the Civil Aircraft Agreement and the Agreement on Government Procurement (hereafter, the 'GPA') remain today. Particularly important to this paper is the GPA, which focused on an area which was explicitly excluded from coverage by the GATT, (Art III:8(a)) and was thus kept separate from the other multilateral agreements. Inclusion on Annex 4 means that the agreement in question may be applied on a discriminatory basis to signatories only. WTO Members who are not signatories receive no benefits, but importantly, incur no obligations towards other WTO Members, even if these Members are signatories to the Annex 4 agreement (WTO Agreement: Art II:3). Finally, the WTO does not judge the content of an Annex 4 Agreement, and there are no rules restricting the areas which may be regulated therein.

In addition to the Annex 4 Agreements still in place, a number of other plurilateral initiatives have been undertaken, with varying levels of success. Chapter 1 described a number of ways that a preferential agreement may be negotiated and concluded. One of the most common suggestions, and perhaps the most easily implemented (assuming the right parties are willing) is a critical mass agreement. The Information Technology Agreement ('ITA') is an example of this type of agreement within the WTO setting. The ITA (a potential precedent for future tariff reduction or elimination agreements) is an inclusive, 'critical mass' agreement dealing with tarrification of computers, telecommunication equipment and other electronic equipment. Though the ITA did not originally develop within the WTO (VanGrasstek, 2013: 347), it was negotiated partly at the Singapore Ministerial Conference and initially concluded by 29 signatory countries (WTO, 1996b). The criteria for the entry into force of the ITA were, firstly, that participants representing approximately 90 per cent of world trade in the covered products must have notified their acceptance of the agreement and, secondly that the "staging of tariff reductions has been agreed upon to the participants' satisfaction." (WTO, 1996b: Annex 1). Both of these requirements were met by the

relevant date and thus the ITA entered into force as the first major plurilateral agreement undertaken in the newly formed WTO, in July 1997. The ITA was unique in its construction as an agreement open to all to join, where signatories agreed to eliminate tariffs on a minimum list of products (WTO, 1996b: Art 2). These commitments were incorporated into members' schedules of concessions which were submitted to the WTO (WTO, 2017e). These benefits are extended to all Members of the WTO, including those who are not signatories of the agreement, according to the WTO's MFN principle (Vickers, 2013: 3). Hence, no consensus is required for the conclusion of the agreement or implementation of its obligations, contrary to the inclusion of plurilateral agreements in Annex 4 (Saner, 2012: 17; Harbinson & De Meester, 2012).

An agreement in a similar vein is the Anti-Counterfeiting Trade Agreement, though it can now be considered a failure. The ACTA is (or perhaps 'was') an agreement designed to complement the WTO TRIPS Agreement (Nakatomi, 2012: 25). Initial negotiations were put forward in 2005 by Japan at the G8 Summit in Scotland (Nakatomi, 2012: 25). Negotiations and discussions took place *outside* the scope of the WTO, between 10 countries and the EU, with the purpose of creating a WTO+ agreement with obligations which went beyond those currently mandated by the TRIPS, while a new governing body was envisaged to monitor and enforce the agreement. These obligations would be accepted by participating countries and would extend to non-member countries on an MFN basis, as the TRIPS has no provisions for MFN exceptions (Nakatomi, 2012: 34). To date only Japan has ratified the agreement, and the EU has ultimately rejected it (Floridi, 2012: 4). To discuss the agreement in detail and set out complete reasons for its ineffectiveness so far, would be beyond the scope of this paper. Suffice it to say that the creation of the agreement and the way in which it avoided the WTO have led to many of the same problems which arise in the case of PTAs, including a lack of transparency and lack of involvement with developing countries (Floridi, 2012: 4-6). In addition, the negotiations taking place outside of the WTO, as well as the creation of a new governing body separate from it, are theorised to have contributed to its failure (Floridi, 2012: 6-7).

What should be noted with regard to the existing plurilateral agreements is the level of success they have achieved. The product coverage of the ITA, for example, was recently expanded, following a steep increase in participants (WTO, 2015b). Originally signed by 29 participants (including the 15 member states of the EC), most of which were developed countries, the ITA has seen an increase in participants to a total of 82 in 2016, accounting for approximately 97 per cent of world trade in IT products (WTO 2012: 44). Importantly, many of the participants to the Agreement are developing Members. At the Nairobi Ministerial Conference, the scope of the coverage of the ITA was expanded to cover an additional 201 products for a number of participants (WTO, 2015b). The WTO (2012: 44) found a positive correlation between increased trade in IT products and the elimination of tariffs resulting from the agreement. Importantly, many WTO members who are now party to the ITA have benefited from the agreement, particularly developed countries such as Mexico and Brazil (Dupuy, 2015: 51). Non-ITA WTO Members import over 14 per cent more from WTO Members if it joins the ITA, especially if the Member is a developing country, demonstrating trade creation effects even for countries which are traditionally not associated with IT products (Mann & Liu, 2007).

The GPA, similarly, has seen its participants and coverage expand since its creation. In 2012 the Agreement was renegotiated, and this revised version entered into force in 2014 (WTO, 2014c). The 43 WTO Members, including the EU, who are parties to this version of the GPA are expected to see gains in market access of $80 to 100 billion annually (WTO, 2014d). This is in addition to the estimated value of $1 700 billion resulting from the opening of procurement activities to international competition (Dupuy, 2015: 50). As the GPA is an Annex 4 Agreement, and is thus applied on a discriminatory basis, only the signatories enjoy the benefits of the agreement. Moreover, the GPA has 'helped to enhance the transparency of government procurement and has strengthened competition in these markets, leading to lower prices and higher quality products' (Saner, 2012: 10-15)Strong economic growth as a result has stimulated trade by all members of the GPA by allowing for increases in their imports (Chen & Whalley, 2011 in Dupuy, 2015: 50-51; Saner, 2012: 14).

Both of these are examples of agreements which have not only been beneficial in the areas which they concern, but in boosting trade and economic development in all areas for signatories. Their success, each an example of a different type of plurilateral agreement, should be used as a model for the creation and implementation of further plurilateral agreements in other areas of interest to countries.

Other plurilateral agreements of importance which are being negotiated or considered are the Environmental Goods Agreement ('EGA') and the Trade in Services Agreement ('TiSA').

The EGA is the most recent example of plurilateral negotiations in the WTO which may result in non-discriminatory trade liberalisation. Negotiations of the EGA launched in 2014, when 14 WTO Members (including the EU) began talks on an Agreement aiming liberalise trade in environmental goods (WTO, 2014e). Currently, the number of participants has reached 46 WTO Members, which account nearly 90 per cent of global environmental goods trade (WTO, 2017f). The negotiations are open to all WTO Members and the results of the agreement will be implemented on an MFN basis once a critical mass of participants has been reached, the benefits then accruing even to non-signatories (EU, *et al.*, 2014).

Finally, the Trade in Services Agreement. This agreement has been negotiated since 2013 outside the scope of the WTO between 23 WTO Members, including the EU. The Agreement aims to advance market access in the area of services. Collectively, the participants account for almost 70 per cent of trade in services globally. The agreement is based on the architecture of the WTO's General Agreement on Trade in Services ('GATS') and can thus be considered WTO+. Its stated objective is to eventually become a multilateralised agreement, though secrecy surrounding the negotiations as well as questions regarding its extent and coverage may make this difficult (Sauvé, 2014: 4-5; Kolsky Lewis, 2013: 2). The TiSA is, in fact, being negotiated as a non-MFN PTA, rather than a plurilateral agreement and this, coupled with the fact that the negotiations proceed without the formal assent of the WTO Membership and without allowing for

WTO Members to freely join or observe the negotiations, has worrying implications for any attempt to later multilateralise the agreement (Sauvé, 2014: 4-5, Bosworth, 2014: 30-33). In this, and many other respects, such as the overall transparency of the agreement, the TiSA has potentially troubling consequences for the WTO and the multilateral trading system as a whole (Bosworth, 2014: 33).

Negotiating to accommodate the diversity of interests and to promote greater variable geometry within the WTO through wider use of critical mass agreements which will apply on an MFN basis was recommended by the Warwick Commission in 2007, an independent commission set up to examine the challenges global trading system and make recommendations as to its future direction. The critical mass approach has also been advanced by a number of authors, including Lawrence (2006) and Draper and Dube (2013). While a critical mass agreement would allow a relatively small number of countries to negotiate an agreement and make progress despite the deadlocked Doha Round, critical mass may not be appropriate for all types of agreements, and will usually be limited to liberalisation indicatives, restricting its usefulness for rule-making. Quantifiable values will usually be required (Mendoza, 2012: 30).

Agreements negotiated outside the scope of the WTO such as the ACTA (or the TiSA), have the greatest potential to harm and undermine the WTO system, and should be avoided if at all possible.

As will be demonstrated below, plurilateral agreements which are negotiated within the ambit of the WTO with the aim of incorporating them within Annex 4 have the greatest potential to create rules for signatory Members which are effective and enforceable, and which complement the multilateral trading system. Negotiating these kinds of agreements by way of open talks which are conducted in a transparent manner will allow for the creation of agreements which are able to meet the needs of signatories, and potentially later signatories, without undermining the principles of the WTO or eroding its relevancy. Agreements undertaken in this manner will be more easily multilateralised at a later date, if appropriate. For these reasons, and those which are

discussed below in Chapter 4, these are the types of agreements advocated for within this paper.

What we can take from the above is that while issue-based plurilateral agreements exist within the WTO framework, and in specific cases have been very successful, they are not presently well-utilised. The disparity between the number of plurilateral agreements and PTAs is staggeringly large. The following paragraphs will briefly examine WTO rules relating to plurilateral agreements within the WTO, in order to ascertain whether any aspects therein contribute to the underutilisation of plurilaterals.

3.2 The Consensus Constraint

The interaction between the requirement of consensus and the freedom to choose which issues to regulate may come into conflict. In the case of potential new Annex 4 Agreements, consensus by the WTO membership is required in order to approve the agreement (WTO Agreement: Art X:9). This requirement is aimed at preventing Members from concluding agreements to lower tariffs in specific sectors between themselves which may be applied on a discriminatory basis, to the detriment of other WTO Members, undermining the MFN principle (Crawford & Fiorentino, 2005). In this way, consensus operates to prevent Members from concluding unfairly discriminatory agreements which are harmful to the greater WTO Membership. However, strict adherence to the requirement of consensus may dissuade, or may already have dissuaded Members from concluding Agreements which may be beneficial and not in violation of the principles of the WTO (Tijimes-Lhl, 2009: 429-435).

While consensus is not a rule which has any direct bearing on the content of a plurilateral agreement, it nevertheless indirectly influences the negotiations regarding such content: If any single member may reject a fully negotiated agreement, the likelihood is that members would consider the risks of non-acceptance too high to spend time and resources on negotiating such an agreement. This is especially true being aware of the developing country rejection of plurilateral negotiations (WTO, 2011b; 2011c;

2011d). If they negotiate regardless, they may be induced (by the knowledge that complete consensus is required) to negotiate a toothless, conservative agreement which will be certain not to offend any one member. Alternatively, they could negotiate an agreement of a different character, either on the basis of critical mass (though not all topics lend themselves to this type of agreement) or through a PTA. The TiSA is an example of this. As explained by Nakatomi (2015: 4), the TiSA could not have been negotiated to be incorporated into Annex 4, as the requirement of consensus would make this avenue 'unrealistic'. Further evidence is the large number of PTAs which have been concluded recently, compared to no Annex 4 Agreements.[20] These cannot be prevented by developing country members, however strong their commitment to the multilateral process.

By maintaining the strong consensus rule, there is a greater risk that decision-making within the WTO is undermined, or that parties move away from the WTO as a rule-making body. The rule in Article X:9 of the WTO Agreement was likely intended to ensure that plurilateral agreements are consistent with the multilateral agenda, but this is arguably too strong a constraint, and too cumbersome, in light of the benefits that plurilaterals pose in the form of variable geometry (Tijimes-Lhl, 2009: 431). It is submitted here, however, that this strong form of consensus is not required to provide a guarantee against plurilaterals which are only vaguely trade-related or otherwise unsuitable. To achieve a greater use of plurilateral agreements, it is likely that the consensus rule will need to be relaxed (Hoekman & Mavroidis, 2015a: 340; Hufbauer & Schott, 2012; Trebilcock, 2014: 14; Draper & Dube, 2013: 3; Tijimes-Lhl, 2009: 430-432). This could be done through agreement that 'substantial coverage' of world trade is sufficient for the implementation of the agreement or changing the level of acceptance required for inclusion on Annex 4 through voting to a two-thirds, or perhaps three-quarter, majority (Hufbauer & Schott, 2012: 20). This would mean that controversial

[20] Of course, other reasons may be at play here, but it is likely that the requirement of consensus also plays a part in this disparity.

issues could still be easily rejected but would remove the ability of a small number of countries to block the agreement on potentially insignificant or strategic grounds, though the specifics should be discussed in detail by the Members. This is an argument promoting the idea that as long as a large part of the WTO membership consents with the plurilateral agreement, it should be allowed to proceed and enter into force as an Annex 4 Agreement.

Hoekman & Mavroidis (2015a: 341) also propose the simple, yet compelling idea that Members who oppose a plurilateral agreement should be required to explain the reasons for their opposition, as a procedural obligation. This change aims to reduce the potential for tactical blocking aimed at obtaining concessions or 'payments' in other areas, which may be detrimental to the trading system.

Finally, and perhaps most ambitiously, there is the argument for setting up a 'code of conduct' for the negotiation and conclusion of plurilateral agreements in order to address certain concerns of WTO Members (Lawrence, 2006: 828; Draper & Dube, 2013: 4). First proposed by the World Economic Forum's global agenda council on the global trade system in 2010, this code would aim to address issues that Members have with the increased use of plurilaterals, especially those concerns held by developing countries. This code will be discussed in Chapter 5.6 below.

While some may make the argument for a strong consensus constraint - as a requirement which acts as a check on the creation of unwelcome plurilaterals - it is not necessarily always true that using consensus to block the creation of certain plurilaterals will be in the interest of non-signatories to the agreement. As Hoekman & Mavroidis (2015a: 340) argue, this is because the alternative is not the conclusion of a multilateral MFN agreement under the Single Undertaking, but more likely that the Members which were prevented from proceeding with a plurilateral agreement will turn to the conclusion of further PTAs or deeper PTAs; or to agreements outside of the WTO, such as the ACTA (Hoekman & Mavroidis, 2015a: 340; Nakatomi, 2013: 4). In each of these scenarios, the result will be the slow reduction of the WTO rules to a set of 'minimum standards' while

rule-making in key areas is done outside the ambit of the organisation, a particularly unwelcome scenario.

3.3 Accession

It is noteworthy that within WTO rules there are no provisions relating to the number of participants needed to create a plurilateral agreement. Similarly, there are no overarching provisions which set out requirements for accession to a plurilateral agreement, and indeed, each plurilateral agreement will set out its own provisions for accession (WTO Agreement: Art XII:3). The lack of requirements for accession has the effect that those aiming to accede to a plurilateral agreement may do so through negotiation with the current parties to that agreement, on the terms specified in the agreement itself (Saner, 2012). This allows for more flexibility in terms of participants as well as the beneficial possibility of allowing participants to sign on only when all participants are able to both benefit from and implement the framework to perform the necessary obligations, or to allow those members who were precluded from negotiating the agreement by capacity constraints to later join (Lawrence, 2006). Terms of accession may vary, depending on the negotiations, but the *potential* for any Member of the WTO to accede to the agreement exists. It should be noted that this is markedly distinct from the situation regarding PTAs, many of which are 'closed-off' to non-members by design as they do not contain accession provisions or such accession is limited to certain countries from a given geographic area (VanGrasstek, 2013: 234). However, the fact that a plurilateral agreement may specify its own conditions for accession means that there is the possibility of *de facto* proscription of later accessions by imposing prohibitively high costs on new signatories, for example, or by increasing the price of entry *ex post facto*. Article X:9 does not explicitly require that a plurilateral agreement must allow for accession by any WTO Member. The conditions governing accession to the Tokyo Codes for countries which wished to join later were a source of disagreements among GATT member countries (Cornford, 2004: 8-9). The application of the Code on Subsidies and Countervailing Duties specifically is an example here, as the US refused to apply the Code to India (a

signatory) on the basis that India had not met its obligations to the US' satisfaction. This is an example of the problems which may arise in the context of accessions when their conditions are not made clear (Cornford, 2004: 8-9).

Clarity and certainty of accession provisions are therefore important to maintain the fairness and openness of a plurilateral agreement. Thus, it would be wise to amend certain of the rules relating to accession to help prevent, or at least minimise, the possibility of effective exclusion of late signatories. It has been suggested that to ensure openness and inclusiveness within plurilateral agreements, 'open access' after implementation should be a precondition for the approval of any agreement by the Membership (in the case of Annex 4 Agreements. Critical mass agreements would usually be based on open accession by their nature) (Hoekman & Mavroidis, 2015a: 338; VanGrasstek, 2013: 212-215). Certain other conditions ensuring effective access may also be put forward, though these will be examined in more detail in Chapter 5 below, as part of the solutions to potential problems with implementing plurilateral agreements.

Chapter 4

Arguments for Greater Use of Plurilateral Agreements

As has been stated throughout, there are numerous benefits to pursuing a plurilateral approach. These benefits include advancing a more progress-oriented and responsive WTO agenda, providing more efficient differentiation in the levels of rights and obligations among the diverse WTO membership and reducing the harmful effects of increased reliance on PTAs (Low, 2011: 1). One of the foremost factors to be kept in mind here is that plurilateral agreements should operate as a complement to the WTO: they are not aiming to replace the multilateral system, but rather to work alongside it. The benefits are not limited only to signatories of plurilateral agreements either. They will have an overall more positive effect on global trade in terms of rule-making, as they help to untangle the steadily intertwining spaghetti bowl caused by PTAs. Additionally, they aim to work in tandem with the multilateral system, by providing platforms from which to build future multilateral agreements. For example, the GPA allows non-signatories, such as China, to steadily negotiate their access and commitments, providing a "building block" for later multilateralism (Vickers, 2013: 2).

Importantly, the plurilateral route has many specific advantages over the PTA route, and over the current impasse in multilateral negotiations. These include the provision for choice of issues; choice of participants; adaptability; access to the WTO's dispute settlement body; and in a more general sense, advantages to developing countries.

4.1 Choice of issues

The most prominent feature of issue-based plurilateral agreements is that participating parties are able to freely identify issues which they feel require regulation.[21] While

[21] The WTO does not prejudge the content of plurilateral agreements, it merely provides the framework for their implementation, under Article III:1 of the Marrakesh Agreement (GATT Secretariat, 1994a).

perhaps self-evident, this feature requires special recognition, especially in contrast with the stalemate of the Doha Round. Recall that the WTO negotiating rounds proceed by way of the Single Undertaking, and do not allow for variation from the agenda. There is little latitude here for countries to negotiate specifically on issues of concern to them, at least not without resulting in a deadlock as was the case in the Doha Round. Indeed, in the case of the Singapore Issues, their rejection from becoming part of the Single Undertaking made it very difficult to include them on a separate agenda as plurilateral agreements (Lawrence, 2006: 825). This was not the case with the original Tokyo Round Codes, which were negotiated and implemented in an earlier round, and later incorporated into the agenda during the Uruguay Round (Lawrence, 2006: 826). The fact that the agenda for a multilateral round is decided at the outset, and is based on negotiating trade-offs between members, points to a lack of flexibility built in to the Single Undertaking which is not necessarily a fault, but which has become problematic in recent times. Additionally, the Doha is entering its 16th year of negotiations, and adding a new initiative to the still substantial remaining agenda of the Round is virtually impossible. It would be difficult to imagine any Member even attempting to bring in new issues for negotiation at the Doha Round, especially given the results of the Round so far. Recourse to PTAs for rule-making on specific issues is a poor alternative to address the deadlock of the Doha Round, as PTAs are required to liberalise 'substantially all trade' and have 'substantial sectoral coverage' (GATT: Art XXIV; GATS; Art V). They are thus not suited to regulating *specific* issues and creating rules particularly for these areas. Rule-making on specific issues, in order to make progress in key areas, seems to be a function for which plurilateral agreements are tailor-made.

As explained above, plurilateral agreements do not entail a complex linkage of issues, and are thus able to allow progress to be made in areas which are either not included on the agenda, or which have seen little progress due to parties being unwilling to negotiate unless reciprocal trade-offs in other areas are made (Hoekman, 2013: 34). A plurilateral approach would allow progress to be made in specific areas amongst countries concerned, with the resulting negotiations having a higher chance of reaching a

meaningful conclusion than if they were to be reintroduced into the Single Undertaking (Hoekman, 2013: 34-36).

As discussed above in Chapter 1, the trade-offs which are a feature of negotiating under the Single Undertaking are not as beneficial for developing countries as they are for developed countries, and nor have they contributed to successful negotiations (Rolland, 2010: 72-73). Thus, an alternative should be sought which provides for more balanced negotiating practises. By allowing these countries to initiate negotiations on areas which concern them without *requiring* concessions to be made in other areas in which they may not have the capacity to agree to deep changes, plurilateral agreements serve to facilitate negotiation in areas where progress may have been prohibited. In addition, the narrow scope afforded by plurilateral negotiations on one area allow negotiators to focus on one negotiating objective. This allows them to strive, all other things being equal, towards addressing their country's substantive issues in that area, and achieving gains there (Hoekman & Mavroidis, 2015a: 336).

The likely alternatives, assuming that the plurilateral route is not adopted, are that WTO Members will conclude further PTAs which will be less inclusive than plurilateral agreements, or that they will engage in negotiations outside of the WTO, as was the case with the failed ACTA. Neither of these routes, following the discussions above, can be considered conducive to (re-)legitimising the WTO nor to complementing multilateral trade negotiations.

4.2 Freedom of Participation

Negotiations of plurilateral agreements are not required to involve all 159 WTO Members and thus progress in specific areas can be made more quickly than under multilateral negotiations (Nakatomi, 2014: 43). Smaller negotiating groups formed between interested parties, along with a narrower and more focused agenda will allow for progress on certain issues to be made more rapidly. An example of this particular benefit is the ITA, which was initially proposed in 1995 following calls from the United States' Information Technology Industry Council, and which entered into force in 1997 (Nakatomi, 2012: 6-

24). The parties to the agreement all have a direct interest in concluding it (else they would not have entered into the negotiations) and thus, it is logical that they will seek to do so in a sufficiently timeous manner.

The freedom to participate allows for smaller members to take an active part in negotiations, with the added potential of allowing group formation. These groups may comprise other traditionally weaker members, allowing these countries to order to magnify their negotiating power (Odell, 2015: 126). Moreover, any country which perceives that membership and the implementation of resulting features of the plurilateral would be to its benefit may join the negotiations, or later sign on the agreement, at any time. This allows for a variable timeframe for negotiations as well as allowing for changing circumstances of countries in relation to the subjects of the agreement. Vitally, this feature also allows that developing countries, which will have difficulty implementing the agreements straight away, may join the negotiations with the intention to ratify them at a later date (VanGrasstek, 2013: 350-352). The above is, of course, not the case with PTAs. PTAs are created with the choice of participants as the priority, before issues are discussed, and are generally closed to non-participants (Hoekman, 2013: 3; Saner, 2012: 26).

4.3 Adaptability

Plurilateral agreements also allow for negotiations to respond adaptively to the changing needs of industry. Negotiations on rules, as well as on trade liberalisation initiatives, are based in part on the needs of corporate actors within member countries (WTO, 'WTO Business Survey', n.d.). As mentioned above, it was the calls from the U.S. Information Technology Industry Council which prompted initiation of the ITA. Similarly, the ACTA was proposed by Japan at the G8 Summit in response to mounting calls from the business sector to act on the increased prevalence of counterfeit goods (Nakatomi, 2012: 25). Progress in the multilateral Doha Round has been slow, to say the least, and the requirement for consensus between all members only adds to that sluggishness. In a similar vein, PTAs have a wide scope and as a result the negotiations and conclusion of

large agreements, such as the mega-regionals, take many years. Plurilaterals pose a solution to this by allowing only countries which have an interest in an issue to negotiate on it, free from reciprocal negotiations on issues which are unrelated. Theoretically, negotiations under these circumstances will be quicker and more focussed on achieving results. Plurilaterals also have value for businesses and industries around the world, who make serious decisions on issues on a much faster basis than the WTO. Allowing WTO rules to fall behind even further would result in these multinational companies losing patience and faith in the WTO, undermining its credibility and value on a global scale (Nakatomi, 2012: 43). This would not be insignificant as, for example, 65 per cent of the civic organizations accredited to attend the Singapore Ministerial Conference represented business interests (Scholte, O'Brien & Williams, 1998: 17). Efficient progress which is certain and responds to the changing needs of industries would serve to bring back business confidence in the WTO. This is achievable through increased use of plurilateral agreements.

Vitally, plurilateral agreements pursued within the ambit of the WTO will contribute enormously to untangling the spaghetti bowl of trade rules that comes with the proliferation of PTAs (Petersmann, 2014). The number of overlapping PTAs which have different rules on product origin particularly, but also in a general sense regarding other aspects of production, contribute directly to higher costs for producers, as explained in Chapter 2.4 (Ghibutiu, 2015: 429; Draper, Lacey & Ramkolowan, 2014: 16). A comprehensive, binding, set of rules in the form of a plurilateral agreement in a particular area of trade will serve to provide certainty to participants over their obligations, and will provide coherence to the rules to which producers and exporters must comply in those countries (Sutherland, *et al*., 2004: 19-20).

4.4 Access to the WTO's Dispute Settlement Mechanism

One of the most important benefits of placing greater reliance on plurilateral agreements is the ability to access the WTO's Dispute Settlement Mechanism when disputes arise. It is more correct, in fact, to say that disputes involving plurilateral agreements, such as the

GPA, *must* be submitted to the DSB for adjudication, rather than any other adjudicating body. The dispute settlement system is widely considered to be the "jewel in the crown" of the WTO; it functions well and serves the interests of its Members effectively (Warwick Commission, 2007: 32; Hufbauer & Cimino-Isaacs, 2015: 3). As Hudec (1999: 8) has observed, "the best measure of the success of the GATT disputes procedure … was the increasing number of complaints governments chose to bring before it." If this was true in 1999, it is even more so today.

The WTO's dispute settlement body is one of the most prolific and successful mechanisms of its kind in international law, and it has produced notable successes (Warwick Commission, 2007: 32; Davey, 2006: 8). Since the inception of the WTO, over 500 complaints have been initiated in the WTO, proving its popularity as a forum for resolving disputes (WTO, 2017g). The applicability of the DSB to disputes concerning plurilateral agreements, and the ability to enforce the rules contained therein, makes them an attractive option and provides a motivation for negotiating a plurilateral agreement. Indeed, any new trade agreement, in order to have any tangible value, must be enforceable in one way or another – in this regard, there is no comparably successful body analogous to the WTO's DSB (Bacchus, 2012: 7). In cases where the plurilateral is intended to be added to Annex 4 of the WTO Agreement, the agreement itself would specify that its parties will be subject to the DSU, and set out the terms thereof (DSU: Appendix 1). Addition of the agreement to Appendix 1 of the DSU, stating that the DSU will apply to the agreement, requires a consensus decision at a Ministerial Conference (WTO Agreement: Art IX:1). In critical mass MFN agreements, such as the ITA: once the liberalisation schedules are lodged with the WTO, the DSU would apply to any disputes regarding those schedules.

As mentioned in Chapter 2.8, given the wider and deeper scope of new PTAs and mega-regionals, the option to settle disputes outside of the WTO will become more attractive to parties to those types of agreements, and will in fact be required in cases of wide-coverage PTAs which go beyond WTO disciplines (Jo & Namgung, 2012: 1061-1062). This will inevitably lead to fragmentation in case law on varying subjects, resulting in a

lack of legal certainty in future disputes. Additionally, there would be less transparency in the dispute settlement process and the resulting rules and interpretation which arise from decisions (Hoekman & Mavroidis, 2015a). In terms of a global system of rules, this is clearly undesirable.

By resolving disputes through the DSB, plurilateral agreements avoid the problem of fragmented case law entirely. The creation of plurilaterals which exclusively utilise the dispute settlement mechanisms of the WTO, where appropriate, will result in greater predictability as well as consistent interpretation of rules over time (Hufbauer & Schott, 2012: 20). Complaining parties wanting to bring a dispute under the DSU in respect of plurilateral agreements will also have the benefit of being able to examine and rely on prior DSB rulings, as will the dispute panels themselves, which may work to save time and resources. Case law regarding plurilateral agreements will develop harmoniously with the multilateral agreements already in place, and those which may be concluded in the future.

The question of the value, to developing countries in particular, of accessing WTO dispute settlement, is one that goes beyond the scope of this paper. There is a general understanding that many developing countries do not utilise the WTO dispute settlement mechanisms, especially those in Africa (Marongwe, 2004; Hudec, 2002).[22] The reasons for this are varied and are mainly thought to involve costs and a lack of expertise (Marongwe, 2004). Having said this, there is no reason to believe that developing and least-developed countries will be any more inclined or able to utilise PTA-mandated dispute settlement mechanisms. In fact, depending on the size of the PTA and its composition, a PTA dispute settlement mechanism may be more costly and prohibitive to developing members if, for instance, it was created with developed members in mind (Chase, *et al*., 2013: 37). There is no regulation on how a PTA's DSM should operate, and thus the possibility exists that developing countries may not benefit from the

[22] As evidenced by the statistics found at WTO, 2017f, regarding disputes: No African Member has brought a dispute to the DSU as a complainant.

mechanisms put in place. Within the WTO plurilateral context, technical assistance is offered to developing countries by, for example, the Advisory Centre on WTO law (ACWL, 2017). While there are arguments that this is insufficient (which, again, goes beyond the scope of this paper (see Hoekman & Mavroidis, 2000; Bown & Hoekman, 2005), the fact remains that assistance is already available to developing countries in regard to WTO law, which would include future plurilaterals, and there is the possibility that this assistance could be expanded in the future. Therefore, while one may argue that the value of the WTO's DSM is low to developing countries, the counterfactual is increased reliance on a system which is less transparent and results in less legal certainty and predictability, which they also may not utilise. Continued and expanded use of the WTO's system in order to resolve disputes in future plurilateral agreements increases the likelihood of more assistance being made available to WTO Members who require it.

4.5 Transparency

As discussed above, one of the major faults with PTAs is their lack of transparency. Plurilateral agreements, in contrast, have their transparency guaranteed by a number of mechanisms. In the most evident instance, the transparency of is ensured by the fact that Annex 4 plurilateral agreements must be first notified to the General Council, and then approved by the Council, in order to come into effect (WTO Agreement: Art X:9). Once they are in effect they will result in the establishment of WTO bodies which serve to assist Members in the implementation of agreements, such as a Committee (Hoekman, 2014: 49). A further consequence of this incorporation into the WTO framework is the requirement of annual reporting on activities to the General Council, and the making available of documentation to all WTO Members. This feature contrasts directly with the problems surrounding the enforcement of PTA rules within the WTO: here, there is no real check on whether the content of the PTA is conforming to WTO rules (which are themselves unclear) and no significant continual oversight of PTAs by way of reporting is required, leaving many Members in the dark regarding the PTA's effects (Hoekman, 2014: 49; Mavroidis, 2011: 376).

4.6 Plurilateral Agreements and Developing Countries

The Doha Round was semi-formally referred to as the Doha Development Agenda, indicating the specific path that negotiations would follow; that is, with an appreciation for the particular needs of developing countries. To date, it is safe to say that this has not been achieved, as evidenced by the impasse the WTO currently faces. It is equally clear that the influx of PTAs and the related efforts towards negotiating mega-regionals will have no such designated focus, due to the lack of an overarching global body to lead the negotiations (Draper, Lacey & Ramkolowan, 2014; Ghibutiu, 2015). Of course, this puts developing countries in a precarious position. This section will briefly discuss issues regarding plurilateral agreements and particular ways they are able to cater to the needs of developing countries better than reliance on the PTA route is able to do.

It is important to note that as plurilateral agreements are able to benefit developing countries, the success of plurilaterals simultaneously relies on developing countries. The majority of WTO Members are developing countries, and their participation in the adoption of more plurilateral agreements is vital for these agreements to have real value. It would be possible for only developed nations to negotiate these agreements, but the result would be inadequate, both in terms of how the agreements are structured, and how they impact the majority of WTO Members. To allow only developed nations to negotiate new plurilateral agreements would undercut the value that these types of agreements could have. Thus, it is vital that developing countries are actively involved in the process of negotiating and creating plurilateral agreements which deal with issues of concern to these countries. Ways of promoting this active participation are discussed below in Chapter 5.

One of the most valuable suggestions for improving the relevance of plurilateral agreements for least-developed countries specifically is the addition of an 'aid-for-trade' dimension to these agreements (Khumalo, 2009: 9; Draper & Dube, 2013). As discussed in Chapter 1, implementation of the multilateralised Tokyo Codes was one of the major problems faced by developing countries, causing economic problems and loss of market

access, and is one of the biggest factors which make these countries wary of moving back to a similar system (Wolfe, 2009: 844; WTO, 2011c). What should be remembered here is that the multilateralisation of the Codes was not in itself an issue; rather it was the levels of commitment (beyond these countries' capacities) which were required to implement the agreements, and the potential downsides of not joining the WTO which loomed large. Practically, not all countries will be able to engage on an equal footing in the negotiation of a plurilateral agreement. Least-developed countries, due to their limited capacity, are the least likely to participate in these negotiations, as there are extensive disparities in countries' abilities to engage effectively on regulatory matters and their ability to participate fully (Page, 2003: 9-11; Wu, 2014: 113-120). These countries, regardless of the depth and breadth of the plurilateral agreement will most likely need to improve their standards of regulation and strengthen their facilities for implementation. Of course, moving towards a plurilateral approach will not alleviate these constraints, but it should be remembered that these apply just as much to multilateral negotiations as they do to plurilateral (Hoekman & Mavroidis, 2015a: 338). What may be required in order to make these agreements more inclusive, and thus promote the advantages of the plurilateral route, is for the benefits of the agreement to be granted to least-developed countries on a non-reciprocal basis.

Take, for example, a potential agreement dealing with trade and competition law. Parties to the competition agreement could include provisions extending comity[23] to other members in order to more effectively enforce anti-trust measures at the level envisioned by the agreement (Lawrence, 2006: 829). This practice could be extended to developing and least-developed non-members of the plurilateral agreement, allowing them to achieve a similar degree of enforcement against anti-competitive practices, without committing to overly onerous obligations. By creating and helping to achieve a common level of regulation in different countries, whether party to the agreement or not,

[23] Defined as: "[M]utual recognition of legislative, executive, and judicial acts." Black's Law Dictionary, 2014: 324.

this type of arrangement would help to create *de facto* international standards in the specified sector which would provide the basis for future rules, or at least facilitate accession to the agreement by developing countries at a later date (Nakatomi, 2013: 8; Collier, 2006: 1438).

In the case of a critical mass agreement, the benefits of liberalisation will be extended to all Members of the WTO on an MFN basis. The value of these benefits to developing countries may be limited, however, as those countries which are not signatories make up, by definition, a relatively insignificant amount of global trade in the sector (Collier, 2005: 1438). Thus, efforts towards plurilateral agreements, especially those to be included in Annex 4, should aim to include non-reciprocal preferences within the agreements themselves, perhaps on a temporary basis in a manner similar to the African Growth and Opportunities Act (Collier, 2006: 1437-1439).

Additionally, new plurilateral agreements could include specific mechanisms which cater for the needs of least-developed countries and other low-income Members, by providing for assistance in implementing the agreement within these countries. These mechanisms would help ensure that plurilaterals will have a development component, following the focus of the Doha Round, and are not limited to simply satisfying the interests of the major signatories (Hoekman & Mavroidis, 2015a: 343; Khumalo, 2009: 9; Warwick Commission, 2007). In addition, they would serve to alleviate the major concerns of many developing nations who are worried about later multilateralisation of the agreements and the obligations which would be imposed on them, (WTO, 2011c; WTO, 2011d) removing one of the most controversial aspects of this route for developing countries.

Of course, plurilateral agreements are also able to benefit developing countries in the world trading system without requiring any specific changes to the current system. These benefits arise mainly as a result of their function as an alternative to the proliferation of PTAs which, as discussed, will likely negatively impact developing countries economically. Preventing these negative impacts is, in itself, a benefit. In

addition, members who are not party to the plurilateral agreement may derive benefits from the existence of the agreement (Lawrence, 2006: 829-830). As an example, if a subset of the WTO membership agree through a plurilateral agreement to implement a set of standards on domestic regulation of environmental services, all countries who compete with them will benefit, regardless of whether they are parties to the agreement or not (Lawrence, 2006: 830). In a general sense, plurilateral agreements contribute to a system of more effective variable geometry within the WTO, allowing for differentiated treatment between dissimilar countries, in order to effect more balanced trading and negotiating equality between developing and developed Members (Hoekman, 2005: 418-420). In doing so, plurilaterals will help to untangle the spaghetti bowl, by creating a single, overarching regime for the regulation of certain issues within the WTO, effectively creating a 'definitive' set of rules upon which parties to the agreement can rely, and that non-parties can take into account (Nakatomi, 2013: 34).

Chapter 5

Potential Arguments Against Plurilateral Agreements

Despite the positives already discussed, especially those examined in contrast to PTAs, there are potentially problematic issues which would arise from the increased use of plurilateral agreements and the move towards increased variable geometry within the WTO. These problems are especially important given the WTO's commitment to multilateralism which, *prima facie*, provides for argument against increased plurilaterals. Hoekman and Mavroidis (2015a: 332-336) discuss a number of the most major potential problems that negotiation of further plurilateral agreements could produce within the context of the WTO membership. These include the erosion of the MFN principle (Hoekman, 2014: 50); the problem of power imbalances leading to inequitable rules being established in a sector (Bosworth, 2014); the possibility of creating a fragmented membership (WTO, 2011c; Hufbauer & Schott, 2012); the imposition of additional costs on the WTO (Dupuy, 2015) and; the possibility of undermining multilateral talks through loss of bargaining power (WTO, 2011c; Hoekman & Mavroidis, 2015a). These will be discussed below, along with prospective replies and attempts at solving or mitigating such problems.

5.1 Erosion of MFN

Perhaps the greatest problem with the increased use of plurilateral agreements would be the erosion of the MFN principle (Hoekman & Mavroidis, 2015a: 332; Sutherland, *et al.*, 2004: 19-23). Indeed, it was this point which was underscored by BRICS Trade Ministers at the 8th Ministerial Conference in Geneva, 2011 (WTO, 2011c).

If a proposed plurilateral agreement which covered matters already under the WTO's mandate, that is, a WTO+ Agreement, was to be included in Annex 4 (meaning that it may be applied on a preferential basis to signatories only) the erosion of the MFN principle would be unavoidable. Naturally this prospect is unwelcome within the WTO, especially in light of the organisation's continued commitment to multilateralism even in

the face of the Doha failures (WTO, 2011a). However, agreements which aim to undermine the commitment to multilateralism in this way, are not the types being advocated for here, nor by the majority of academic literature on the subject (*inter alia* Saner, 2012; Nakatomi, 2013; Draper & Dube, 2013; Trebilcock, 2014 ; Woolcock, 2013).

While the undermining of the principle of MFN is a significant problem, should it occur, it is unlikely that any erosion will be especially harmful to the trading system, as its effects will be minimised by WTO rules: If an agreement is WTO-X in its construction, there is no fear that the MFN principle will be eroded, as it would not apply to the subject matter. WTO+ agreements concluded in or out of the WTO which are premised on the requirement of critical mass will apply on an MFN basis, and thus there will be no erosion of the principle by these agreements. If an agreement which violated the MFN principle were to be negotiated outside of the WTO, whatever its content, affected WTO Members would have recourse to the DSB for the violation of MFN.

Erosion of the principle will occur, however, in cases where an agreement covers issues subject to the WTO and provides market accession concessions to signatory parties which are deemed to be unfairly discriminatory to non-signatories. In these cases, it is likely that the implementation of the agreement will denote a blatant undermining of the MFN principle. However, given the current rules on consensus for adding an agreement to Annex 4, it is unlikely for an agreement of this type to be negotiated, and less likely to be accepted. If a plurilateral agreement involved the patent and unreasonable lowering of tariffs on certain headings on a preferential basis, to the detriment of non-signatories and the WTO as a whole, it would simply be blocked by the WTO membership, and this would be known by negotiators. For those agreements negotiated within the WTO aiming for inclusion on Annex 4, even if the rules on consensus are relaxed, as suggested by many authors (Hoekman & Mavroidis, 2015b; Low, 2009; Trebilcock, 2014: 14; Draper & Dube, 2013: 3), it is unlikely that any agreement which serves to subvert the MFN principle will be accepted.

Preferential treatment will occur: it is a necessary consequence of creating an Annex 4 Agreement, and indeed is one of the reasons that these types of agreements are useful to developing countries. However, through the systems in place intended to regulate plurilateral agreements, such as consensus, discrimination will be kept to acceptable levels.

A related objection to the increased use of plurilateral agreements is that it will "open the door", so to speak, to agreements being formed among subsets of countries on specific, controversial issues (Hoekman, 2014: 50). These could include fragmentation on issues and ineffective, or even damaging, agreements to be made in areas such as the environment and labour, which are themselves prima facie outside the purview of the WTO. These too, could be blocked through the requirement of consensus, and it is this fact which will make it less likely that these issues will be negotiated as feared at all. The consensus principle operates here as a deterrent. However, while it acts to provide security, the principle of consensus should be balanced against the value that increased use of plurilaterals will have, and subsequently used sparingly, or better still, relaxed. If countries want to negotiate an agreement outside of the WTO, as was the case with the ACTA, they will do so regardless of the WTO's commitment to multilateralism. The WTO in those cases should aim to make itself a more attractive venue for the conclusion of these types of agreements by promoting the Annex 4 plurilateral option, rather than inviting countries to negotiate outside of its framework due to a lack of multilateral progress.

5.2 Establishment of Inequitable Rules in a Sector

The second potential issue with a plurilateral approach to rule-making is the potential for major players to set the rules in a specific sector, and is particularly pertinent to this paper (Hoekman & Mavroidis, 2015a: 332-334; Wolfe, 2009: 844-848).

The concern here is that when regulating certain sectors by plurilateral agreement, the sector's rules will reflect the interests and practices of the initial signatories, and may not cater towards the interests of those who may wish to accede at a

later date (Dupuy, 2015: 55). Specifically, it is argued that a plurilateral agreement which includes major trading countries such as the US or EU, will be adjusted to *their* desired level of liberalisation in the sector, and thus, their capabilities (Dupuy, 2015: 55). Indeed, as Scott and Wilkinson (2012: 17) point out, it is likely these developed countries who will determine the subjects for negotiation in the first place. Take the case of the ITA: least developed countries have little to no exports in the information technology sector and thus no economic interest in securing free trade here, yet it was this agreement that was advocated for and concluded.[24] Developing countries may not have the capacity to enter negotiations at the initial stage, (WTO, 1996d; WTO, 1996e; Sutherland, *et al*., 2004; Page, 2003)[25] where the rules for the sector will be set, and thus, the worry is that their concerns may not be adequately taken into account (Draper & Dube, 2013: 1-2). Representatives of least-developed countries are often not in a position to engage in negotiations on extra, optional agreements (Sutherland, *et al*., 2004). The kinds of capacity constraints and the resultant substandard participation by developing countries which is predicted will mean that there is less likelihood that the resulting agreement will adequately cater to the specific needs of developing and least developed countries. In addition, the rules in the sector which are, realistically, created by the initial signatories will be difficult to change, and accession on potentially unfavourable terms may effectively become non-negotiable down the line (Scott & Wilkinson, 2012; Dupuy, 2015: 55-56). There is also the fear, mainly held by developing countries (see WTO, 2003c; WTO 2011c), that the regulations negotiated in the PA will eventually be imposed on them, regardless of their decision to accede or not, if the agreements become

[24] Though, as mentioned in Chapter 3 above, the joining of the ITA will still have a positive effect, especially on developing countries. The point being made here is that the agreement pushed forward was not one involving agriculture, or textiles, which would be *specifically* valuable to developing countries.

[25] It is well established that the majority of least developed countries face major problems in negotiating in trade matters, as they lack the institutional infrastructure, as well as the human and financial resources to effectively pursue their trade and development interests.

multilateralised as the Tokyo Codes were (see Chapter 1.4, above) (Lawrence, 2006: 833; Scott & Wilkinson, 2012: 17).

Essentially the argument, emphasised by a number of non-governmental organisations, posits that there would be a potential advantage to countries moving quickly in negotiating a plurilateral agreement (Bosworth, 2014: 8, Green & Melamed, 2003; Dupuy, 2015: 55). Due to the resources and increased negotiating capacity of developed countries, this advantage will more than likely benefit those countries in particular, to the exclusion of a number of developing countries (Scott & Wilkinson, 2012: 17). The potential for non-signatories to negotiate another plurilateral agreement which adequately addresses their concerns in the same sector theoretically exists, but in practice this would not be feasible. Seemingly, countries will be at the mercy of those who form the 'club' first and set the rules (Scott & Wilkinson, 2012: 17; Lawrence, 2006). Practically these are likely to be developed countries.

Naturally, this argument against the increased use of plurilateral agreements is an important one, given the focus of this paper. I believe that there are three related counter-arguments which are relevant: firstly, the assumption by certain organisations and developing countries that plurilateral agreements of this kind will necessarily be dominated by developed countries may not be accurate (Hoekman & Mavroidis, 2015a: 334). Secondly, this problem is also a concern in regard to PTAs and the mega-regionals, arguably to an even greater extent. Finally, the likelihood that the regulations resulting from negotiation of such plurilateral agreements will be 'forced' onto non-participating developing countries in the future, as they argue occurred with the Tokyo Codes, is very low.

In regard to the first point, there is a presumption that issue-specific plurilateral agreements will be negotiated and shaped mainly by large developed countries, to the detriment of developing countries which lack negotiating power (Dupuy, 2015: 55). This may not be the case, as plurilateral agreements are also able to offer a mechanism which could be used to move forward by a large section of developing countries in an area where

one or more of the key WTO members are not willing to negotiate. An example given by Hoekman and Mavroidis (2015a: 334) is an agreement which centres on establishing duty-free and quota-free access for least developed countries. This point also comes back to the issue of variable geometry mentioned above: allowing greater variable geometry within the organisation empowers less developed countries with specific interests and which place value on different issues to negotiate agreements within the bounds of their interests; these agreements may not necessarily *require* the input of major nations. A coalition of African or Asian and Pacific countries would be able to wield some amount of power to negotiate a plurilateral amongst themselves, on common issues, for example. The Government Procurement Agreement and the ITA are examples of this: while the multilateral negotiations have stalled, the GPA and the ITA are progressing, growing in membership and coverage (Saner, 2012). Originally the number of parties to the GPA was low, and mainly involved highly developed countries, but it has been steadily increasing in the past few years, moving beyond the developed 'club' which had formed (WTO, 2014d). These agreements allow for a coalition of willing participants to proceed with negotiation on a topic and it is these parties who will create a platform for the rules.

As to the second point, the problem of rules being set by certain countries also exists in PTAs: one cannot ignore the fact that the increasingly prevalent PTAs, as well as the possibility of mega-regionals such as the TPP and the TTIP will also, effectively, create the 'rules of the club' to the exclusion of many developing and least developed countries, particularly those in Africa (Lawrence, 2006; Draper, Lacey & Ramkolowan, 2014). The lingering possibility of the conclusion of these types of mega-regional agreement will almost definitely have the effect of excluding countries who do not have similarly strong negotiating positions (see Chapter 2.5, above). The most significant aspect of the new wave of PTAs is that they establish new rules, and this is particularly problematic given their exclusionary nature (Hoekman & Mavroidis, 2015b: 115; Blanchard, 2015: 94-96). Even if one disregards excluded countries, PTAs have formed and are in the process of forming rules in certain areas which go beyond the WTO (Horn, Mavroidis & Sapir, 2010). If one regards it as a problem that only some countries will be 'rule-makers', as it

were, one must surely concede that the problem is not limited strictly to issue-based plurilateral agreements and cannot, therefore, consider that PTAs are a better alternative in this regard. In fact, given that increased use of plurilaterals would allow for greater variable geometry within the WTO, there would be at the very least a greater potential for avoidance of the above problem, or at least the potential to mitigate its effects through sanctioned variable geometry.

In regard to the third counter-argument, it seems unlikely that a repeat of the Uruguay Round, particularly the multi-lateralisation of the Tokyo Codes, will occur. Firstly, this is due to the fact that the legal and negotiating landscape within the WTO has changed (Finger, 2007). The stalling of the Doha Round means that a wide-scale multilateralisation of future WTO agreements as part of the Single Undertaking is unlikely to ever occur, as plurilateral agreements will most likely be negotiated in areas where the Doha Round failed to make headway (Harbinson, 2009). Subsequently requiring non-signing members to subscribe to these new agreements, negotiated without them on issues which they could not agree during multilateral talks, would be impracticable were it ever to be suggested. If a system of plurilateral 'clubs' is made an intrinsic part of the WTO, it is less likely that members would be 'required' to join any agreement which they believe they will have trouble implementing.

5.3 Fragmentation of WTO Membership

There is the fear that by placing greater reliance on plurilateral agreements, there may be a "long-term bifurcation in the WTO membership, splitting 'insiders' from 'outsiders'." (Hoekman & Mavroidis, 2015a: 334). As explained in chapter 1, this was the situation which was prevalent under the previous Tokyo Codes system (Sutherland, *et al.*, 2004: 66), and was, in fact, one of the main reasons for the adoption of the Single Undertaking principle and the consensus decision-making approach. The main concern there was the avoidance of a fragmented membership which also had the problem of free-riders (Hufbauer & Schott, 2012). The fragmentation argument posits that a plurilateral approach would divide members between those who are party to plurilateral agreements

and those who are not, creating a multi-tiered trading system (Dupuy, 2015: 55). Such a divide would result in a regime with certain parties operating by one set of rules and others operating by different set, and the argument holds this should be avoided (Scott & Wilkinson 2012; WTO, 2011d). Naturally, a divided system of this kind would be counter to the aims of negotiating by way of the single-undertaking principle, as variable sets of rules for different parties undermines the idea that certain countries may block proposals which go against their interests, in order to enforce fair negotiations. This was, in fact, a concern raised by many developing countries (WTO, 2003c; 2011b; 2011c). The single-undertaking, however, has become less of a negotiating tool and more of a blocking tool, arguably being abused and certainly contributing to the stalling of the Doha Round, suggesting that perhaps its relaxation may due (Mendoza, 2012: 27-33). Regardless, the argument against divergence applies even more to PTAs, which are currently undercutting the WTO's credibility in this regard. If parties to a plurilateral agreement settle on rules which are unacceptable to countries who do not intend to join, the question should be whether the plurilateral would be worse in terms of global welfare than if the countries concluded a PTA dealing with the issue. Especially in terms of legal certainty and coherence of trade rules, the promulgation of many different PTAs which deal differently with a specific subject area may be worse overall for global welfare than if the issue was addressed through a single plurilateral agreement (Hoekman & Mavroidis, 2015b). The value of a negotiating a plurilateral over a PTA, aimed at achieving the same goal, will need to be examined on a case by case basis. The substantive content of each plurilateral agreement, as well as the intent of the parties who wish to negotiate such agreement, will be important in determining its long-term effects on the membership of the WTO and global trade.

5.4 Increased Costs

Some argue that the increased use of plurilaterals will impose additional costs on the WTO Secretariat, and indirectly on the rest of the WTO membership, by utilising the infrastructure of the WTO (WTO, 2011a; Nakatomi, 2013; Hoekman & Mavroidis, 2015a).

Cost associated with plurilaterals agreements potentially include administration costs in making use of WTO facilities, the added cost if the DSB is used, and economic losses. This argument is particularly significant as plurilateral agreements may cover issues which are outside the current scope of expertise within the WTO Secretariat. The WTO in these cases will require additional expertise.

These costs may be monetary, of course, but one could also argue that time is a resource which may be considered limited in light of additional agreements, particularly with regard to the DSU and the time taken for disputes to be resolved. Put simply, despite the positive aspect that issue-based plurilateral agreements will be centred within the WTO framework, as discussed above, there are direct costs associated with such utilisation. Additionally, there are potential opportunity costs in respect of the limited resources of the WTO, which would now be stretched thinner. There will also be costs to countries which have set high tariffs, as they will lose revenue by lowering these tariffs.

There are, however, two counters to the argument of increased costs: First, in the event of any successful progress being made in the areas of rule-making or tariff liberalisation, be it multilaterally, plurilaterally or through a PTA, these costs will be incurred, and therefore this argument is immaterial. Under the ideal scenario of the successful completion of the Doha Round, the issues which would be dealt with by a plurilateral agreement would be dealt with multilaterally instead. In that scenario, the costs to the WTO and its membership will be incurred in any event, just as they would if a plurilateral which covered the same topics had been negotiated. The same is true if a PTA is concluded in the sector, though only for those members which are party to it. Second, there is evidence from previously concluded plurilaterals that they result in benefits, not just for parties, but on a global scale, and thus these costs are offset by strengthened global trade liberalisation (Dupuy, 2015: 55). As explained above, the ITA and GPA have had positive impacts on those countries which are parties to them, as well as to global trade facilitation (Saner, 2012; Dupuy, 2015: 55). The same is likely true of the currently under-negotiation Environmental Goods Agreement.

Unlike developed countries, tariff revenues make up a significant source of funds in developing countries, especially in Africa and Asia (Dupuy, 2015: 55). This means that removal of tariffs will allegedly be less favourable to developing countries, and theoretically may actually result in overall harm to their economies.

The harm caused in this sense should not be overstated, however. The loss of tariff revenue arising from the obligations of the plurilateral agreement is usually more than offset by additional tariff revenues which arise from the increase in importing goods within the sector as well as from the rising imports in other sectors due to the indirect effects of the agreement (as above) (Dupuy, 2015: 55). This was certainly the case with the ITA (Saner, 2012).

It must be emphasised that despite the fact that there may be an overstretching of WTO resources, the alternative is to allow the WTO to stagnate or be bypassed as a negotiating and rule-making forum. Surely it can be seen that an allocation of resources should be focussed on progress within the WTO system, rather than allowing it to fall further behind the liberalisation initiatives found in PTAs.

5.5 Losing Power in Multilateral Talks

Proceeding with plurilateral negotiations may imply that countries will have to relinquish bargaining chips which may be used to obtain concessions in other areas during multilateral negotiations (Hoekman & Mavroidis, 2015a: 335) This problem goes back to the underlying central feature of the Single Undertaking principle: issue linkage. In multilateral negotiations, one Member can give up something that another member wants, in exchange for agreement on an issue that it is of concern to it, regardless of whether the issues are within the same sector or not. Of course, issue-specific plurilateral agreements mean that such linkage is less likely to be possible.

Essentially, though, the value of this argument against plurilaterals is dependent on each individual plurilateral agreement and its costs, both direct and opportunity costs (Nakatomi, 2013). The subject matter covered by the plurilateral agreement and how it

chooses to regulate this content is important here. According to Hoekman and Mavroidis (2015a: 335-336), the absence of linkage potential might even act as incentive to join the agreement initially, if it reduces the opportunity cost of participation. In addition, they argue that the absence of linkage might prove a blessing in disguise, rather than a negative feature of plurilaterals: A narrower scope for negotiating will allow negotiators to strive towards addressing substantive issues which affect the area concerned and achieving the best possible solution in that context, without having to worry about trading away certain benefits for gains in a separate sector (Hoekman & Mavroidis, 2015a: 335-336; Saner, 2012).

As a final point, the fear of losing out on bargaining leverage in multilateral talks by concluding plurilateral agreements is a misplaced one. To be blunt, the leveraging power held by both sides has not been beneficial in coming to a conclusion in the Doha Round, and in fact has contributed to the deadlock we see today.

5.6 Creation of a Code of Conduct for Plurilateral Agreements

Given the potential problems with the negotiation of plurilateral agreements and the difficulties which may arise when trying to implement them in practice, especially 'fragmentation' of the WTO membership, it is important that the WTO sets out an agreement or code which defines the principles underlying new plurilateral agreements, and regulates the variable geometry of the WTO which will result (World Economic Forum, 2009; Lawrence, 2006). These *ex ante* rules would work to ensure that plurilateral agreements are not able to be used by countries to evade their WTO obligations, while simultaneously protecting the interests of vulnerable members. A code of conduct, first suggested by the World Economic Forum in 2009, would aim to address issues that Members have with the increased use of plurilaterals (World Economic Forum, 2009). Ideally these rules would apply to all plurilateral agreements, allowing each to be designed in conformity with certain principles of the multilateral trading system, such as openness, transparency and inclusiveness.

Following Lawrence's (2006: 825-826), as well as Hoekman and Mavroidis' (2015a: 341) suggestions, it is suggested that a potential code of conduct could include, among other things, the underlying principles that:

> "(i) membership is voluntary; (ii) the subject of the plurilateral is a core trade-related issue; (iii) those participating in plurilateral negotiations should have the means, or be provided with the means as part of the agreement, to implement the outcomes and; (iv) the issue under negotiation should enjoy substantial support from the WTO's membership" (Hoekman & Mavroidis, 2015a: 340-341).

The code embodying these principles could also contain specific rules for plurilateral formation and use. It would be especially important to include fairly strict rules on conditions for later accession to plurilateral agreements. This would serve to prevent a permanently fragmented system whereby smaller members were excluded by high accession costs. In addition, plurilateral agreements should be required to include transparency mechanisms to ensure openness and accountability, and so that non-members may stay informed on the content of the agreement. Alongside this should be regulations for inclusion in the negotiation phase of the plurilateral by all who are interested, regardless of whether they wish to sign immediately or not. This move would help to prevent developed countries from imposing their viewpoints and standards on developing countries by moving to negotiate on (particularly WTO+) issues first, and negotiating to a higher standard of implementation than developing countries are able to meet. Regarding dispute settlement and the protection of developing countries in this regard, the rules could include that only parties to an agreement may participate in WTO dispute settlement regarding that agreement and that, following the model of the GPA, in the case of non-implementation of dispute settlement recommendations retaliation is limited only to the issues covered by the agreement (Lawrence, 2006: 28). This would act to retain the incentives that joining the agreement would provide. Finally, either here or elsewhere, a requirement should be included that WTO members which oppose a plurilateral agreement must explain their reasoning for such opposition, aiming to dissuade tactical opposition in order to extract promises in other areas. (Hoekman & Mavroidis, 2015a: 341).

5.7 Conclusion

When viewing the advantages and disadvantages of plurilateral agreements, it is easy to note the negatives and argue that since they are not multilateral, there is no place for them in the near future within the WTO (WTO, 2011c). But what should be remembered is that the issue is based on the available alternatives which must be weighed against each other, as well as against the ideal scenario of a forward-moving Doha Round. The Single Undertaking principle, along with the vast negotiating agenda, has resulted in a Round which is straining under its own weight, especially in light of the major differences in capacity and interests of the negotiating members.

While many of the above criticisms of taking a plurilateral approach are valid, in many cases forming hurdles for the argument for more plurilaterals, solutions to the problems are available, as has been demonstrated. Seen in light of the proliferation of PTAs and the way in which they serve to undermine the WTO's attraction as a negotiating forum, it is strongly argued here that despite the negative aspects of plurilaterals, a plurilateral approach to rule-making should certainly be undertaken. Proposals for reducing the problematic characteristics of a plurilateral approach are made above, and found in the works of various authors (*inter alia* Hoekman & Mavroidis, 2015a; Draper & Dube, 2013, Hufbauer & Schott, 2012; Lawrence, 2006).

Chapter 6

Conclusion

The Doha Round, despite small victories at the recent Ministerial Conferences, is essentially gridlocked. The reasons for this indefinite stalling in the negotiation of multilateral rules are many and varied, though some of the most important relate to the methods by which the WTO makes decisions: the Single Undertaking principle and the process of decision-making by consensus. While each have their place within the WTO framework, certain issues arise from their application which cumulatively contributed to deadlocks on issues, slowing trade liberalisation initiatives within the WTO to a near halt. Though a potential option, it is not clear that moving away from these principles of negotiation would effectively address the reasons for the deadlock and allow the WTO to move forward. Additionally, this course of action would result in the loss of the benefits that these principles *do* provide.

The breakdown in talks at the 2008 Ministerial demonstrated the way in which the Single Undertaking principle has hindered the process of negotiation. There, issue linkage between geographic indications on food and market access in agriculture caused an impasse between Members, which transferred to the entire agenda as a result of the principle (Wolfe, 2009). The Single Undertaking also, directly or indirectly, contributed to the slimming-down of the agenda: the Singapore issues are important areas which require some form of regulation, though strict adherence to the Single Undertaking principle following their exclusion in 2003 meant that no significant progress in these areas has taken place over the past 15 years. The practice of decision-making by consensus, regardless of the fact that proposals are rarely blocked outright, is also problematic in this regard. The fact that complete consensus is known to be the only avenue for a proposal to be accepted may often cause Members to refrain from pursuing an issue of concern. Even when the process of negotiating multilaterally runs smoothly, it can take an extremely long time, as Members will only negotiate to find the 'lowest

common denominator' which will be accepted by all, but which may not result in significant progress in the area concerned.

Partly as a result of this lack of progress made in key negotiating areas, as well as generally within the Round, more countries have been turning to regional trade agreements to regulate trade areas that concern them. While the number of preferential trade agreements in force has been increasing steadily over time, their amount has escalated much more rapidly within the last 15 or so years.

Regardless of whether the failure of the Doha Round contributed to their ascent, PTAs *are* increasingly being employed as an alternative to the multilateral system; Members are using these types of agreements to make progress in negotiating areas which were not covered by the Doha Round, or where a distinct lack of progress was being observed within the Round. While there are some which argue differently, there is the potential that this increase in the number of PTAs will have significant effects on the multilateral trading system as a whole, undermining and eroding its credibility and value. The rules governing PTAs are confusing and as a result are not adequately enforced. Tied to this issue is a lack of transparency for a large percentage of these PTAs, which is directly opposed to the values of the multilateral trading system. More worryingly, there is evidence that proliferation of PTAs will have an adverse effect on developing countries in particular, either through the continued formation of confusing and expensive-to-implement rules, or through the exclusion of smaller, more vulnerable developing countries.

An alternative to this increasingly PTA-dominated system is through the increased use of issue-based plurilateral agreements to regulate certain areas of concern. This paper has argued that plurilateral agreements offer a means for interested groups of the WTO membership to make progress on issues of common interest. The move towards greater variable geometry within the WTO will allow for valuable progress to be made on a number of issues, while still providing for commitments to be undertaken on the basis of differing capacities between countries. It is proposed that these types of agreements are

used predominantly to regulate areas which do not have a large market-access dimension, such as trade facilitation, where the gains would benefit those countries which are signatories to the agreement. Vitally, plurilateral agreements of the type discussed are intended to work alongside the multilateral regime, as a *complement* to the negotiation processes of the WTO. Allowing even limited movement in negotiations on specific policy areas and rule-making should be welcomed. The move towards variable geometry is almost certainly preferable to the scenario where Members choose to – or rather have no choice but to – rely even more heavily on PTAs, which escape multilateral disciplines, or where they are motivated to engage in negotiations outside of the WTO, further undermining its credibility as a rule-making organisation.

There are of course concerns with placing greater reliance on plurilateral agreements, both as a concept and with the possibility of their implementation in practice. These include the potential erosion of the MFN principle and fragmentation of the WTO Membership. Counterarguments to these issues were presented in Chapter 5. The creation of a Code of Conduct for plurilaterals will do much to allay many of the other concerns raised regarding these agreements. The usefulness of the plurilateral approach is evident in both short- and long-term scenarios. Significantly, undertaking and concluding more plurilateral agreements could strengthen the WTO immediately by discouraging Members from turning to more PTAs for rule-making. While perhaps not ideal in the context of a multilateral system, plurilateral agreements, designed in the right way, expand the scope of the WTO in a way which is less damaging than PTAs, and also allow for fair multilateralisation down the road.

Given the above, it seems that by placing greater reliance on - and adapting to facilitate - more issue-based plurilateral agreements, the WTO may find a way through the Doha deadlock. Concerns have been raised about this approach, but Members, particularly developing Members who are wary of the plurilateral approach specifically, need not be overly concerned that these agreements could cause any harm at this stage. The consensus rule, even in a relaxed form, will act to prevent plurilateral agreements which are detrimental to non-signatories coming into effect. The challenge will be to

jump-start the process of moving towards these types of agreements, but the creation of a code of conduct regulating plurilateral agreements should placate those who are still wary. Changes to the current system may be required in order to facilitate plurilateral agreements effectively, but in the face of an ever-increasing proliferation of damaging PTAs which undermine the multilateral process and undercut the WTO's credibility, it is evident that an alternative is required. Plurilateral agreements constitute this alternative, and may yet be able to create a platform for rule-making *within* the WTO, restoring confidence in the Organisation and providing Members with a means of making negotiating progress following the deadlock of Doha.

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