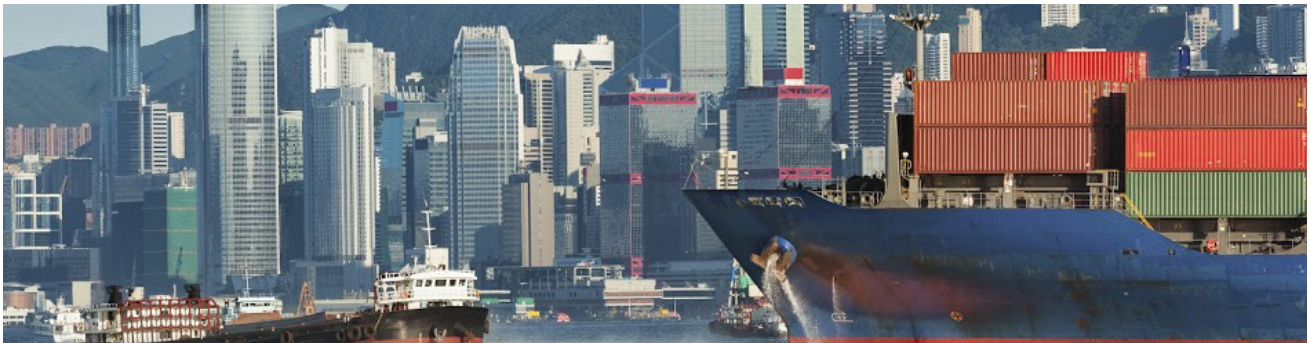




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Plurilaterals and the Multilateral Trading System

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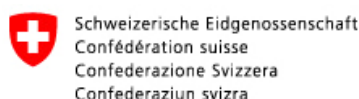
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ABSTRACT

The multilateral trading system was shaped by plurilateral agreements. Given the size of the World Trade Organization's (WTO) membership and the diversity of interests in play, it is possible that the single undertaking has run its course. The ongoing Doha Round impasse means that key WTO rules are not being updated, while trade liberalization has moved to other forums, principally regional.

Plurilaterals could, in principle, be used to pioneer new rules or market openings in an otherwise clogged system, thus keeping the WTO at the centre of the global trading system. The single undertaking principle does not legally prevent the addition or adoption of new agreements to the WTO, be they multilateral or plurilateral, even if a multilateral trade negotiation round has failed. Rather, it is a negotiating device adopted by choice, and can be done away with.

Yet the absence of the single undertaking could fundamentally alter the balance of issues and interests under negotiation. Plurilaterals could conceivably revolve around the export interests of the major trading powers. There is also apprehension about the negotiation of non-Doha issues and the impact of this on the multilateral trading system. For these reasons and more, many developing countries, including some large trading powers such as BRICS, in principle, seem to be opposed to plurilaterals.

Plurilaterals could ultimately be the right way to proceed, but the main challenge is to kick-start the process. First, the notion of negotiating a code of conduct to govern subsequent negotiation of plurilaterals should be introduced into formal WTO processes. Second, efforts to launch the "sustainable" and global value chain plurilaterals should be accelerated, and accompanied by including as many member states and relevant stakeholders in transparent discussions about the putative merits of these two potential plurilaterals.

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LIST OF ACRONYMS

BRICS	Brazil, Russia, India, China, and South Africa
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GPA	Agreement on Government Procurement
GVCs	global value chains
ICTSD	International Centre for Trade and Sustainable Development
ISA	International Services Agreement
ITA	Information Technology Agreement
LDCs	least developed countries
MFN	most favoured nation
NAMA	Non-Agricultural Market Access
PTAs	preferential trade agreements
TPP	Trans-Pacific Partnership Agreement
TTIPA	Transatlantic Trade and Investment Partnership Agreement
UNFCCC	United Nations Framework Convention on Climate Change
US	United States
WTO	World Trade Organization

INTRODUCTION

The multilateral trading system was shaped by plurilateral agreements. Historically, a number of plurilateral codes evolved in parallel with the tariff agreements negotiated under the General Agreement on Tariffs and Trade (GATT), with nine being concluded in the Tokyo Round (Kennedy 2012). These were folded into the Uruguay Round under the single undertaking, whereby nothing is agreed until everything is agreed. That process took place under unique historical conditions, notably the end of the Cold War and the consequent peaking of the power and influence of the United States (US) in the multilateral trading system, thus enabling a unique deal tailored to American designs. Consequently it is the Uruguay Round that can be considered *sui generis*, rather than the current potential reversion to plurilateral codes.

Given the size of the World Trade Organization's (WTO) membership and the diversity of interests in play, it is possible that the single undertaking has run its course. The ongoing Doha Round impasse means that key WTO rules are not being updated, while trade liberalization has moved to other forums, principally regional. While preferential trade agreements (PTAs) are compatible with the WTO (WTO 2011a), increasing recourse to them in the context of stagnation in the multilateral rule-making mechanism constitutes a growing existential crisis for the WTO. Therefore, proponents of plurilaterals argue that those countries with core interests in updating the rules and in pursuing liberalization under the aegis of the WTO should be allowed to proceed, provided the correct conditions pertain. Opponents, principally developing countries, worry that their interests will be neglected as the major trading powers steam ahead without them, in the worst case potentially "imposing" plurilateral outcomes on them at some future date, but at the least forging new standards that developing countries will find difficult to implement, which could lead to loss of market access. This fear stems primarily from the multilateralization of some Tokyo Round codes under the single undertaking approach adopted for the Uruguay Round. Nonetheless, WTO members have agreed to explore new approaches to advancing negotiations under the aegis of the multilateral trading system (WTO 2011b). Plurilaterals, in principle, offer one option. This could introduce complexities and risks, but retaining the centrality of the multilateral trading system, even if its integrity may be called into question, could outweigh such potential costs. Accordingly, this brief constitutes a high-level consideration of the "cost-benefit" equation involved in pursuing plurilateral approaches, with brief application to key subjects on the Doha Round agenda.

CHALLENGE AND OPPORTUNITY: CAN PLURILATERALS REVIVE THE MULTILATERAL TRADING SYSTEM?

The short answer to this question is "yes, but..." The "yes" part of the answer pertains to the fact that plurilaterals could, in principle, be used to pioneer new rules or market openings in an otherwise clogged system, thus keeping the WTO at the centre of the global trading system. Since the WTO is a global public good, the benefits of which are widely acknowledged and evidenced in particular through Member state recourse to its dispute settlement mechanism, it is clear that progress beyond the Doha impasse would be substantially beneficial. For this reason, many countries, mostly developed, support the adoption of new approaches to concluding the Doha Round, through plurilateral negotiations in particular. There is precedent for this, since plurilateral agreements were resorted to in order to break the impasse in the Tokyo Round negotiations, resulting in the aforementioned "codes" system (Saner 2012).

The single undertaking principle does not legally prevent the addition or adoption of new agreements to the WTO, be they multilateral or plurilateral, even if a multilateral trade negotiation round has failed. Rather, it is a negotiating device adopted by choice, and can be done away with (Kennedy 2012). For instance, even though the single undertaking was adopted for the Doha Round, paragraph 47 of the Doha Ministerial Declaration provides that "...the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. *However, agreements reached at an early stage may be implemented on a provisional or definitive basis*" (authors' emphasis).

An important question is whether paragraph 47 obviates the need to obtain consensus, thereby allowing members to proceed with negotiation of plurilaterals, or if the paragraph allows for negotiation of plurilaterals but consensus is still required for the provision to become actionable. The challenge in carving out a package for the least developed countries (LDCs) from the Doha Round would suggest that such unbundling still requires, *de facto* if not *de jure*, consent from all members. Similarly, the Hong Kong Ministerial Declaration, with specific reference to the services negotiations in Annex C, provides for a request-offer approach to be pursued on a plurilateral basis to facilitate the participation of all Members, focusing particularly on

developing countries whose negotiation capacity is limited. However, progress has been painfully slow, not least because the services negotiations are formally and politically linked to progress in other negotiating areas, principally agriculture and Non-Agricultural Market Access (NAMA).

Yet the absence of the single undertaking could fundamentally alter the balance of issues and interests under negotiation. Plurilaterals could conceivably revolve around the export interests of the major trading powers. Once those interests are satisfied, they would effectively be removed from the equation of broader, cross-issue trade-offs. This could make it difficult, if not impossible, to launch major trade rounds in the future. In addition, it could leave untouched the key sectors that still enjoy substantial protection in the major trading powers, notably agriculture and labour-intensive manufacturing, such as clothing. Therefore, developing countries especially could find that their export interests are substantially hit, and they have no recourse beyond asymmetrical PTAs. In such a scenario, while the multilateral trading system could have advanced, potentially innovating new rules too, it could end up being more skewed towards the interests of the major trading powers. And those countries that do not have much influence in the multilateral trading system, especially LDCs, could find that new standards and market access conditions are forged without taking their interests into account, for example, development concerns in the Doha Round (IDEAS Centre 2013). There is also apprehension about the negotiation of non-Doha issues and the impact of this on the multilateral trading system. That raises the question of whether these plurilaterals should be limited to negotiating the issues currently under deadlock in the Doha Round, or if the negotiation of plurilaterals should henceforth be the default position for progress in rulemaking in the WTO. The latter approach would make developing countries more nervous as they could see it as the erosion of the multilateral system. For these reasons and more, many developing countries, including some large trading powers such as BRICS (Brazil, Russia, India, China, and South Africa), in principle, seem to be opposed to plurilaterals.

In the end, developing countries may not have much choice. The emergence of "mega-regionals" raises the possibility that developing countries will be excluded from market share in the signatory regions.¹ Also, since these mega-regionals are being negotiated outside the scope of the multilateral trading system, developing countries are prevented from negotiating the rules that may set standards for the trading system as a whole. In this light, plurilaterals have more scope to strengthen the multilateral trading system than PTAs, especially mega-regionals. Plurilaterals also offer "insurance" to countries seeking to advance their trade interests through PTAs, particularly through mega-regionals. Since those processes are large, complex, politically sensitive, and therefore vulnerable to failure, Member states negotiating them are likely to want to keep open their options for advancing trade rules through the WTO. As the Doha Round has failed, plurilaterals could constitute that insurance.

There is an implicit understanding regarding the uniquely vulnerable position of LDCs in the global trading system, and the consequent need to shield them from reciprocal commitments. It can, therefore, be reasonably expected that any plurilateral concluded would have special provisions for LDCs that confer rights and exempt them from any commitments. This is discussed further below within the context of creating a code of conduct for the negotiation of plurilaterals.

So while the window for exploring new approaches—particularly plurilaterals—to concluding the Doha Round has opened a crack, many obstacles remain. At the heart of this impasse is distrust and mismatched ambitions. Therefore, it is important to shed light on what exactly plurilaterals could entail legally, their limitations, and how the trust deficit could be sensitively and constructively handled.

RESPONSES

First, it is critical to understand what exactly plurilaterals are and how they relate to existing WTO rules. This frames the political economy possibilities and constraints, and provides context to a concrete proposal to negotiate, upfront, a code of conduct to govern subsequent negotiation of plurilaterals. Such a code could allay the worst fears and build sufficient consensus to proceed. The next issue then is which plurilaterals should be attempted, in what combinations and sequence. This is a challenging set of speculations since it encompasses many Member states with widely diverging interests, so it is briefly attempted in the penultimate section.

TOWARDS A TAXONOMY OF PLURILATERALS

Broadly speaking, plurilaterals can be characterized as either "inclusive" or "exclusive."

Inclusive plurilaterals essentially entail conditional, unilateral, sectoral liberalization. They are market access instruments, and almost certainly would not apply to rules. The key point is that liberalization arising under their rubric is conducted on a most favoured nation (MFN) basis, and is conditioned on other main trading powers also conducting such MFN liberalization. The only way around this would be to ensure that both countries that have an interest, and those that should ideally have an interest, are part of the "critical mass"

1 | The ongoing Trans-Pacific Partnership Agreement (TPP), and the proposed Transatlantic Trade and Investment Partnership Agreement (TTIPA). At the centre of both is the US, incorporating the third largest economy in the world in the form of Japan in the case of the TPP; and the entire European Union (EU) in the case of the TTIPA.

necessary for the initiation of the plurilateral negotiation. In that sense, inclusive plurilaterals are challenging to achieve, but once agreed upon they obviate the need for consent by all WTO Members via the Ministerial Conference; this consent would be required for exclusive plurilaterals. The foremost example of this approach is the Information Technology Agreement (ITA),² whereas sectorals under the NAMA negotiations could be considered potential candidates.

Since the ensuing liberalization is unilateral, it does not depend on WTO rules or broader negotiations per se. It could also be locked in through revisions to Member state tariff or services schedules as submitted to the WTO. This approach has the advantage of achieving liberalization breakthroughs where broader negotiations are stalled, such as under the Doha Round. However, it carries the longer-term danger that major exporting interests could be removed from the equation of subsequent, broader liberalization efforts.

As with inclusive plurilaterals, exclusive plurilaterals involve liberalization only for those Members participating and signing up to the subsequent agreement. The key difference is that the benefits of such liberalization are only available to parties to the agreement. Exclusive plurilaterals take several forms—goods PTAs, covered by GATT Article XXIV; services PTAs, covered by GATS Article V; and those residing under the Marrakesh Treaty, Annex 4. PTAs have their own sets of rules, and consequently are not considered here since Member states are free to pursue them. Our concern, therefore, is with agreements that fall under Annex 4, such as the Agreement on Government Procurement (GPA).

The GPA essentially opens up government procurement markets only to firms from signatory countries. This agreement, and two others covering bovine meat and dairy (both terminated in September 1997), do not apply on an MFN basis. The biggest legal hurdle to the adoption of any new Annex 4 plurilateral agreement is the consensus requirement. Article X:9 of the WTO agreement provides that “The Ministerial Conference, ... may decide exclusively by consensus to add that agreement to Annex 4.” For such consent to be granted, the interests of non-participating countries become an important consideration, particularly in the current political economy of the WTO, and could possibly influence the content of the agreements. The meaning of “consent” in this context is most probably that no Member objects. Any new agreements of this kind, therefore, would require the “consent” of all WTO Members through the Ministerial Conference or General Council—a tall order indeed. The multilateralization of any current Annex 4 agreements would also need to be adopted by the Ministerial Conference, as this would entail an amendment to the provisions of the WTO Agreement.³

With some developing countries such as Brazil, China, India, and South Africa having openly expressed their rejection of the idea of a plurilateral alternative to the Doha impasse, preferring instead a multilateral approach, it is likely that these countries would veto any attempt to adopt a new

plurilateral agreement under Annex 4.⁴ This raises the probability of an impasse. The issue of exclusive plurilaterals should then possibly be considered alongside questions of whether the consensus rule needs a review, otherwise the system could be held hostage through the exercise of effective veto power. Against this, the consensus rule works as a safeguard against a possible repeat of the Uruguay Round precedent regarding the incorporation of Tokyo Round plurilateral agreements into the single undertaking.

Some analysts point to the possible use of waivers from existing rules, as covered under the Marrakesh Treaty Article IX, as allowing for plurilateral outcomes. However, a waiver applies only to existing rules, and cannot be used to negotiate new rules. It could conceivably be granted for new market access arrangements, such as for generalized system of preferences market access for poor countries. But such arrangements would not constitute plurilateral arrangements per se. At best, a waiver could potentially be sought with regard to an inclusive plurilateral that does not fall within Annex 4, but only with the intention of exempting the application of the MFN obligation to non-participants to the negotiation. An example would be the ITA where the participants could theoretically seek a waiver from the MFN obligation, and thus only apply the benefits among themselves, even though the agreement is not an Annex 4 one. Furthermore, waivers are granted for limited periods only and can be withdrawn. Therefore, this avenue would be cumbersome at best, and most likely very partial relative to what proponents of plurilaterals are looking for.

2 The Information Technology Agreement (Ministerial Declaration on Trade in Information Technology Products) was signed at the Singapore Ministerial Conference in December 1996 by 29 countries, but because of its 90 percent trade coverage criteria, only came into effect in April 1997 when other countries signed up to it. The ITA is basically about tariff reduction in all products listed in the Declaration, and such tariff reduction is on an MFN basis. There is a provision in the agreement for the periodic review of product coverage, but despite the participants having been consulting on this since 1997, agreement has yet to be reached on additional product coverage and consultation continues (WTO), http://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm.

3 Article X: 1 of the WTO Agreement provides, in short, that a proposal to amend the provisions of the WTO agreement must be submitted to the Ministerial Council whose decision to submit such proposal to the WTO Members for acceptance shall be taken by consensus. For the proposal to be adopted, two-thirds of the Members must agree to it, and the amendment is effective for all members, but only if it does not modify Members' substantive rights and obligations. All Members whose rights such amendment infringes and who have not accepted the amendment may be asked, by a three-quarter majority of the Ministerial Conference, to withdraw from the WTO or, they may be allowed to remain Members upon consent by the Ministerial Conference. Hence, the Article X: 1 process is a very onerous one and, with the political activation of developing countries within the WTO, it is highly unlikely that any proposal to multilateralize Annex 4 agreements would ever see the light of day unless such developing countries were sufficiently reassured.

4 Note that China has been negotiating to accede to the GPA since it formally joined the WTO in 2001. But this process predates the Doha Round.

Each plurilateral arrangement would specify its own dispute settlement arrangements with recourse to the WTO's dispute settlement mechanism (DSM) being an attractive option and a major motivation for negotiating plurilaterals. WTO dispute settlement can be built in two ways—for exclusive arrangements residing under Marrakesh Annex 4, the rules of the agreement could specify this; and for inclusive arrangements if the liberalization schedules are lodged with the WTO, then dispute settlement would apply. Appendix 1 of the Dispute Settlement Understanding (DSU) provides that application of the DSM to plurilateral trade agreements "shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures." In order to be able to apply the DSU procedures, the members of the plurilateral agreement would have to include, in the agreement, a provision for the application of the DSU, as well as adopt a decision that sets out the dispute settlement provisions of the agreement, and notify it to the Dispute Settlement Body (DSB). However, the decision to amend the list of covered agreements under Appendix 1 of the DSU has to be adopted through a consensus decision by the Ministerial Conference. Any special or additional rules and procedures regarding the adjudication of any matters related to the plurilateral agreements can vary on a case by case basis depending on the particular agreement.

ACCEPTANCE OF PLURILATERALS: POLITICAL ECONOMY CONSIDERATIONS

Inclusive plurilaterals are clearly not as problematic as exclusive ones, since the full consent of the entire membership of the WTO is not required. Launching inclusive plurilaterals is where the real political economy lies, since they are subject to the free-rider problem. Therefore, the real challenge is in securing "critical mass", that is, a sufficient body of major current or potential exporters such that those outside the arrangement do not constitute an export threat while keeping their own markets closed. Critical mass is, therefore, a flexible concept, and will be defined according to the industry subject to the plurilateral and who the main actors in that industry are.

Exclusive plurilaterals of the GPA Annex 4-type are much more challenging to initiate and conclude. As WTO law currently stands, Members wishing to initiate such negotiations need to be assured that no WTO Member would object to the arrangement. These plurilaterals also face the "critical mass" problem. Since intra-Member trust in the WTO context is extremely low, initiating new exclusive plurilaterals currently seems to be a challenging proposition. By contrast, if trust in the negotiating process grows, the "critical mass" requirement would diminish, and vice versa.

Therefore, the central question is how to rebuild trust in favour of plurilateral negotiations in the wake of the Doha Round's failure.

THE CASE FOR A "CODE OF CONDUCT" TO GOVERN PLURILATERAL NEGOTIATIONS

There is a case for taking a step back and initiating a formal process of negotiating a "code of conduct" to govern plurilaterals in advance of formally initiating any, as proposed a few years ago by the World Economic Forum's global agenda council on the global trade system (World Economic Forum 2010). Such a code could reassure the many developing countries that are nervous of having plurilateral agreements foisted on them, and could include, among other things, the underlying principles that:

1. membership is voluntary;
2. the subject of the plurilateral is a core trade-related issue;
3. those participating in plurilateral negotiations should have the means, or be provided with the means, as part of the agreement, to implement the outcomes;⁵
4. the issue under negotiation should enjoy substantial support from the WTO's membership; and
5. the "subsidiarity" principle should apply in order to minimize the intrusion of "club rules" on national autonomy.

Flowing from these principles, plurilateral codes should also be governed by a set of rules. These could include, among others, the following:

- only parties to the agreement can participate in WTO dispute settlement and, consequently, cross-agreement retaliation should not be allowed, since it would reduce the incentives to join the agreement;
- Any WTO Member can participate in the negotiations voluntarily, subject to demonstrating sufficient capacity to implement the outcomes; and
- the provision of benefits to non-members should not be required, since that would reduce the incentives to negotiate the plurilateral, but could be allowed.

Further, transparency mechanisms should be built into plurilateral negotiations so that exclusiveness could be minimized in order to build trust and interest in it.

5 | Article X: 8 of the WTO Agreement.

6 | At the inaugural ICTSD Expert Group meeting on the multilateral trading system and PTAs participants agreed that these should include technical assistance and special and differential treatment. The revised GPA agreement provisions may be of some guidance in this regard.

Nonetheless, negotiating such a code is likely to be a fraught undertaking given the ongoing impasse in the Doha Round and would require, at a minimum, upfront good-faith gestures on the part of major trading powers such as committing to a real “LDC outcome” from the rump of the Doha Round. Even then success is not guaranteed since there are quite a few developing countries that remain implacably opposed to the notion of plurilaterals. Consequently, it would take time and patience to build the case.

WHICH PLURILATERALS?

The first question requiring an answer is whether to focus on “carve-outs” from the current Doha Round, or rather select new subjects not contained in the Doha mandate. In its favour, the “Doha carve-out” option means the potential plurilateral agreements would be drawn from the negotiation subjects as agreed in the negotiation mandate. This would ensure that the plurilateral agreements remain within the ambit of the membership’s expectations, since they would be based on subjects agreed to by the broad membership of the WTO. Nonetheless, non-Doha plurilaterals should also be on the table since they could incorporate key areas not adequately covered under current rules, such as investment (World Economic Forum 2013).

Providing a focus to the selection of subjects is the real challenge. Two coherent attempts are worthy of closer analysis, which unfortunately is beyond the scope of this paper—the idea of negotiating a “green” or “sustainable” plurilateral as advocated by the International Centre for Trade and Sustainable Development (ICTSD) and other organizations; and the idea of negotiating a global value chains (GVCs) friendly plurilateral as advocated by the World Bank and the World Economic Forum. The “sustainable” plurilateral is driven by the imperative of addressing climate change and would tackle the underlying competitiveness problem in the climate talks head on, potentially dealing with a major blocking dynamic in the United Nations Framework Convention on Climate Change (UNFCCC) process. Of course it would also confront the politics of that process. The latter would cluster several negotiating areas critical to the operation of GVCs, notably trade facilitation and network services, both of which are critical to LDCs, and developing countries more generally. However, support among the membership for this initiative would depend on a sufficient number of Member states buying into its unilateral liberalization policy logic (World Economic Forum 2012). Currently that seems like a tall order, to judge by the ill-fated LDC package—within which trade facilitation features centrally.

In addition there is the putative International Services Agreement (ISA), and the various NAMA sectorals proposed to date. The ISA seems almost certain to end up being a PTA, which would not require the broader membership’s consensus to implement. The NAMA sectorals, if conceived as inclusive plurilaterals, would “merely” require critical mass to initiate negotiations. However, the political economy dynamics

around the free-rider problem are such that inclusive NAMA sectorals are unlikely to get off the ground unless BRICS and other significant emerging markets come on board. As things currently stand, in the post-financial crisis world of creeping protectionism, that seems like a distant prospect.

Furthermore, the underlying dynamic of the “Doha carve-out” option is fraught with difficulties. This essentially comes down to the fact that the progress of the single undertaking up to this point would have to be unpicked, which could yield a cascade of objections. In principle, a balance could be struck between the multiplicity of interests in play, but the logic of constructing it could lead inexorably back to the single undertaking. In short, if all interests are to be catered for, then we would end up where we started—with a comprehensive negotiating round.

If the “Doha carve-out” is so challenging, what about starting new negotiations on issues not covered under the Doha mandate? The main, probably fatal, obstacle is the fact that the major developing country trading powers that would be needed to secure both critical mass and the broader membership’s consensus, notably BRICS, have so far insisted on maintaining the integrity of the Doha architecture. So while a subject like investment is interesting and necessary to consider in its own right, the prospects of actually launching plurilateral negotiations on it and other non-Doha subjects seem vanishingly small for as long as the Doha impasse endures.

CONCLUSIONS

Getting beyond the Doha impasse is a challenge. Plurilaterals could ultimately be the right way to proceed, but the main challenge is to kick-start the process. From the preceding analysis, we propose a two-pronged strategy, recognizing that the timeframe for success is medium term, and that success is by no means guaranteed. First, the notion of negotiating a code of conduct to govern subsequent negotiation of plurilaterals should be introduced into formal WTO processes. If successfully pursued, this could substantially enhance levels of trust among the membership and, thereby, contribute to building sufficient consensus to launch a serious attempt to negotiate plurilaterals. Second, and in parallel, efforts to launch the “sustainable” and GVC plurilaterals should be accelerated, and accompanied by including as many Member states and relevant stakeholders in transparent discussions about the putative merits of these two potential plurilaterals. In the process, consideration should be explicitly given to whether launching negotiations in these two areas might establish a sufficient “critical mass” of interest among the whole WTO membership and, if not, what other subjects could be added, bearing in mind the need not to overwhelm the negotiating agenda.

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