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Plurilateral Agreements: A Viable Alternative to the World Trade Organization?

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Abstract

Looking back at the history of the World Trade Organization (WTO), major accords that have been reached under the multilateral framework to date are in substance issue-based "plurilateral" agreements. This paper looks at some specific examples of issue-based plurilateral agreements—such as the Information Technology Agreement (ITA), the Financial Services and Basic Telecommunication Services Agreements, and the Anti-Counterfeiting Trade Agreement (ACTA)—with the aim of pointing to the crucial role they can play in resolving the stalemate at the WTO and the Doha Round and the accelerating proliferation of free trade agreements (FTAs). Through analysis of their characteristics compared with the WTO and FTAs, the paper attempts to identify the potentials as well as legal and substantive constraints of issue-based plurilateral agreements. It also suggests possible areas where new plurilateral agreements—whether single or multiple issue-based—can be developed. The paper also highlights the importance of plurilateral agreements as a mechanism complementary to the WTO and FTAs in enhancing the governance of the global trade system, and outlines conditions that need to be fulfilled to address the needs of developing countries.

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Contents

1. INTRODUCTION: WHY PLURILATERAL AGREEMENTS?

This paper deals with issue-based "plurilateral" agreements, presents an approach to trade liberalization and rulemaking in specific areas, and analyzes their necessity and contribution to the global trade system.

A recent achievement of this plurilateral approach is the conclusion of the Anti-Counterfeiting Trade Agreement (ACTA), for which Japan has been an advocate and took the initiative in the negotiation. The signing ceremony was held in October 2011 in Tokyo and Japan ratified the agreement in September 2012.

Looking back at the history of the World Trade Organization (WTO), major accords reached under the multilateral framework—such as the Information Technology Agreement (ITA), the Financial Services Agreement, and the Basic Telecommunications Services Agreement—were actually based on issue-based plurilateral agreements.

This paper analyzes issue-based plurilateral agreements as an additional framework complementary to the WTO and free trade agreements (FTAs), assessing their roles in rulemaking and liberalization in the area of international trade, with the aim of exploring the future prospects and possibilities of the plurilateral approach. It also illustrates that developing countries can join and utilize such agreements to improve their positions in the global trade regime.

1.1 Definition and Precedents

1.1.1 Definition

The scope of discussion on plurilateral agreements in this paper is confined to trade-related issues within the scope directly or indirectly associated with rulemaking and liberalization under the WTO. In this paper, the term "plurilateral" is defined as the involvement of three or more countries, with a view to their contribution to rulemaking and liberalization in trade. It is hoped that suggestions resulting from this analysis will lead to an enhanced international trade system and improved governance with the WTO as its center.

The relationship between multilateral and plurilateral agreements on trade-related issues is shown in Attachment 1. This paper examines plurilateral agreements (shaded in gray in Attachment 1) from various points of view.[1]

Regional trade agreements (RTAs) and FTAs are *country-based* plurilateral agreements that are, in principle, required to liberalize "substantially all trade"[2] and have "substantial sectoral coverage."[3] In contrast, the plurilateral agreements assessed in this paper are *issue-based* (or *issue-oriented*).

[1] For further detailed analyses, see Attachment 2.

[2] GATT Article XXIV.

[3] GATS Article V.

1.1.2 Precedents

Plurilateral Agreements in the GATT/WTO[4]

a) Tokyo Round Codes

The General Agreement on Tariffs and Trade (GATT) regime was founded on two types of rules: the GATT 1947, in which all member states participate, and *codes,* which refer to a series of non-most favoured nation (MFN) based agreements binding limited groups of participating member states. The Kennedy Round (1964–67) and the Tokyo Round (1973–79) produced a number of codes—the Agreement on Subsidies and Countervailing Measures, the Anti-dumping Agreement, the Agreement on Technical Barriers to Trade, the Agreement on Import Licensing Procedures, the Customs Valuation Agreement, the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement. Up until the establishment of the WTO, these codes had functioned fairly well. However, the number of subscribing countries was not necessarily large, even for key agreements, and generally ranged from 10 to 40 out of the 128 member states.[5] The situation changed dramatically during the Uruguay Round, resulting in the launch of the WTO.

The Uruguay Round concluded at the end of 1993 and the WTO came into existence in 1995. The single undertaking principle (i.e., nothing is agreed until everything is agreed), adopted at the conclusion of the Uruguay Round, greatly strengthened the rules regarding the rights and obligations of WTO member states and enhanced the stability and predictability of the global trade order in comparison to the pre-WTO period (i.e., the GATT 1947 era). However, from the viewpoint of at least some of the developing countries, this meant making commitments beyond their capacity and accepting the enforcement of rulings of the WTO Dispute Settlement Body.

Unlike in the GATT regime, all members are bound, in principle, by the same set of rules under the WTO. The Tokyo Round Codes became universal rules (Annex 1 agreements) with only few exceptions (Annex 4 agreements as analyzed below).

b) WTO Annex 4 agreements

Among the Tokyo Round Codes, only the Government Procurement Agreement and the Civil Aircraft Agreement remain as plurilateral agreements.[6] They are categorized as Annex 4 agreements in which participating members are limited in number, and obligations are imposed only on them.

Other Important Plurilateral Agreements

a) ITA (1997)[7]

[4] On historical developments, see Attachment 3.

[5] Among the 128 contracting parties (as of 1 June 1995), 18 subscribed to the Agreement on Subsidies, 24 to the Anti-dumping Agreement, 38 to the Agreement on Technical Barriers to Trade, 26 to the Agreement on Import Licensing Procedures, 18 to Customs Valuation Agreement, 18 to the Agreement on Trade in Civil Aircraft, and 13 to the Agreement on Government Procurement (quoted from "GATT Analytical Index").

[6] The International Dairy Agreement and the International Bovine Meat Agreement, originally included in Annex 4, are no longer in force.

[7] The author was Japan's negotiator for the ITA and the ACTA (until 2008). For case studies and lessons of the negotiations, see Nakatomi (2011a).

In 1997, two years after the establishment of the WTO, three important plurilateral agreements were concluded. In the area of industrial tariffs, the Quad group of major economies—the United States (US), the European Union (EU), Japan, and Canada—began to negotiate the elimination of tariffs on computers, telecommunication equipment, semiconductors, and semiconductor manufacturing machines in 1996, with support from their electronics industries. After tough negotiations that subsequently involved some non-Quad countries, a framework agreement was concluded at the first WTO Ministerial Meeting in Singapore in December 1996. In the form of the Ministerial Declaration on Trade in Information Technology (ITA Declaration), 29 economies (including 15 EU countries) agreed to remove tariffs on information technology (IT) products by 2000. Under the terms of this accord, it was to be decided before 1 April 1997 whether the ITA should be brought into force.[8]

The criteria for the entry into force of the ITA were:

1. Participants representing approximately 90% of world trade in IT products have notified their acceptance of the agreement (critical mass criteria); and
2. Staging of tariff reductions has been agreed upon to the participants' satisfaction.

Covered products include: semiconductors, computers, telecommunication apparatus, and semiconductor manufacturing equipment. Their definitions were provided in the form of Attachment A (list of products defined by harmonized system [HS] codes) and Attachment B (list of products defined by words and covered by the ITA regardless of tariff classification).

At a technical meeting held in Geneva in January 1997, it was decided that the Singapore Ministerial Declaration's version of the list of products were to be upheld, and exceptions to (or flexibility on) the staging of tariff reductions were discussed and adjusted.

In February 1997, the staging issues of Thailand and Malaysia were settled. At the subsequent review meeting held on 26 March 1997, the participation of 40 economies—together accounting for more than 92% of world trade in IT products—was confirmed, fulfilling the approximately 90% trade coverage criteria, resulting in an official decision that the ITA would be entered into force.

b) Financial Services and Basic Telecommunications Services Agreements (1997)

Also concluded in 1997 were two landmark services agreements—the Financial Services Agreement and the Basic Telecommunications Services Agreement—achieved by means of the participating members' commitment to the relevant reference papers and changes to their schedules of concessions. The resulting benefits are extended to non-participating members on a MFN basis, just as tariff bindings in ITA signatories benefit not only themselves but also non-signatory WTO members.

c) ACTA (2011)

The WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement) imposes a degree of discipline on trade in counterfeit and pirated goods. However, TRIPS provisions to this effect are neither sufficient nor clear enough in themselves. Furthermore, the TRIPS Agreement has not been implemented comprehensively, particularly in developing countries, and, as a result, trade in counterfeit and pirated goods remains rampant, causing damage in various forms.

This means that legitimate rights holders are being deprived of profits, which may suppress the incentive of businesses to innovate and create. This ongoing situation also poses a serious

[8] The ITA Declaration has no legal binding force despite its name.

problem to the general public because counterfeit products can be hazardous to the health and safety of consumers, and illicit trading can become a source of revenue for criminal organizations.

This gave rise to the notion that more effective and stringent international discipline must be put in place to address the damage and risks associated with trade in counterfeit and pirated goods.

Against this backdrop, Japan proposed to create a plurilateral agreement to deal with counterfeiting and piracy in 2005, a move that culminated in the conclusion of the ACTA. It was signed by like-minded countries in 2011, and Japan was the first to ratify it in 2012. Though negotiated and concluded outside of the WTO, the ACTA is intended to supplement the TRIPS Agreement.

Japan played an important role in terms of the realization of the ITA and the ACTA. In particular, in the case of the ACTA, Japan was the initiator and took the lead throughout the negotiations.

With respect to the history and legal consideration of the ITA and the ACTA, it is hoped my paper[9] on the ITA and the ACTA can serve as a reference point to better understand the background and reality of plurilateral negotiations.

1.2 Necessity of Plurilateral Agreements

1.2.1 Stalemate of the WTO and the Doha Round

Multilateralism embodied in the GATT and the WTO has been the backbone of the global trade system since the end of World War II. Countries across the world, including Japan, have benefited from free trade underpinned by the multilateral trade system. The GATT/WTO has been and should continue to be the cornerstone of the global trade regime.

However, the WTO has been facing serious difficulties,[10] a situation pointing to the need to pursue issue-based plurilateral agreements.

Slowness and narrowness of the Doha Round

Ever since its launch in 2001, the Doha Round of trade negotiations has faced two serious problems. The first and more serious problem has been the slow progress of the negotiations. Rulemaking for the multilateral trade system is adrift as the Doha Round continues to drag on without making much headway. Twenty years after the conclusion of the Uruguay Round in 1993 and 12 years after the launch of the Doha Round, the prospect for its conclusion remains remote. Although the WTO has played a useful role as a judicial system, as a forum for global trade rulemaking and liberalization, it is in a state of serious confusion.

The other serious problem is the narrow scope of issues covered by the WTO and the Doha Round. With negotiations focused on market access for industrial goods (i.e., non-agricultural market access [NAMA]), agriculture, and services, other important issues—such as investment and competition—were dropped from the agenda at the WTO Cancun Ministerial Meeting in 2003. The scope of the current WTO negotiating agenda is too narrow to meet the demands

[9] See Nakatomi (2011a). The paper explains some of the important checkpoints to realize plurilateral agreements.

[10] See Nakatomi (2011b).

and challenges of industries and businesses operating on a global scale. Simply dealing with border measures does not serve the needs of evolving business activities across borders.

Decision-making by consensus (159 vetoes) and single undertaking

The slowness and narrowness of the Doha Round are closely related to the decision-making mechanism of the WTO, or more specifically its underlying principles of consensus and single undertaking that makes decisions in the WTO extremely difficult and time-consuming.

1.2.2 Accelerating FTA proliferation

Against this backdrop, member states' confidence in the WTO as a vehicle for making global trade rules and promoting liberalization has been undermined. With more governments and business communities looking to FTAs as a means of gaining benefits, FTA competition has intensified. The number of RTAs in force reported to the WTO had reached 379 by early 2013.[11]

Twenty years since the completion of the Uruguay Round, the WTO remains unable to make tangible progress in liberalization and rulemaking. It is only natural for those in the business community to feel that they cannot afford to continue to rely solely on the WTO.

1.2.3 Conclusion of ACTA negotiations

A recent achievement of the plurilateral approach is the conclusion of the ACTA in 2011.

At a time when the Doha Round continues to face a difficult situation, the successful conclusion of the ACTA suggests the possibility of promoting rulemaking and liberalization under an issue-based plurilateral framework as an additional channel, complementary to the multilateral WTO approach and efforts through FTAs.

1.2.4 Polarized global trade regime and global governance

So long as the Doha Round remains adrift, FTAs will inevitably dominate the global trade regime. FTAs are a necessary tool for liberalization and rulemaking in trade. At the same time, however, the proliferation of FTAs will lead to the polarization of the global trade regime, introducing differing and mutually inconsistent rules. The problem is especially serious with FTAs involving the US and the EU as well as with regional FTAs.[12]

There is a clear danger that the proliferation of FTAs may undermine the multilateral trade rules embodied in the GATT/WTO. The spaghetti bowl effect, a term that initially referred to the complexity of rules of origin incorporated into FTAs, is no longer limited to that realm and has been growing into a phenomenon encompassing global trade rules in general. The concern over such disturbing developments should be shared by all economies around the world as the fragmentation of global trade rules endangers the smooth and efficient operation of global supply chains. A spaghetti bowl of rules of origin could possibly be tolerated, but a spaghetti bowl of global trade rules is intolerable.

[11] As of 10 January 2013. The number includes customs unions and enabling clauses.

[12] One example is the case of the Republic of Korea–EU FTA and the Republic of Korea–US FTA. The Republic of Korea accepted different sets of rules vis-à-vis the US and the EU in such areas as international standards, which are apparently not consistent with each other.

The emergence of mega FTAs or RTAs may also create mega problems unless rules are harmonized across them. They would pose an especially serious challenge to developing countries that are not members and are left outside such mega-FTAs/RTAs. Even for those that choose to participate, adjusting to different rules would be an extremely difficult task.

Issue-based plurilateral agreements could remedy the situation and introduce consistent global rules while the WTO and the Doha Round are not in motion.

1.2.5 An important tool for both developed and developing countries to promote liberalization and rulemaking

Together with FTAs, issue-based plurilateral agreements can serve as an effective driver of liberalization and rulemaking in trade. Perceiving the current situation as a choice between just two options—the WTO and FTAs—is an erroneous approach. It is necessary to always consider the possibility of issue-based plurilateral agreements.

Developments since the establishment of the WTO have clearly shown the importance of issue-based plurilateral agreements. The ITA (liberalization), the ACTA (rulemaking), the Financial Services and Basic Telecommunications Services Agreements (liberalization + rulemaking) are evidence of the effectiveness of the plurilateral approach in achieving progress in the trade area.

These agreements, above all the ITA, also suggest that well-designed plurilateral agreements would be accessible and beneficial to developing countries, that is, if they are established in a manner accommodating the economic interests of developing countries and their technical capacity constraints. Transparency in the negotiation process, technical assistance, and capacity building are essential to facilitating greater participation of developing countries.

Indeed, it is no exaggeration to say that most of the important trade agreements concluded after the establishment of the WTO are plurilateral ones. As such, they can be a viable third choice in the dichotomy of the WTO and FTAs.

2. CHARACTERISTICS OF PLURILATERAL AGREEMENTS

This chapter takes a look at the characteristics of issue-based plurilateral agreements compared with the WTO. It also discusses how issue-based plurilateral agreements differ from sector-specific initiatives under the framework of FTAs. Although both issue-based plurilateral agreements and FTAs are complementary to the WTO and can potentially provide a basis for multilateral rulemaking in the future, they differ with regard to the following points:

2.1 Paving the Way for Addressing Specific Issues and Areas

The most prominent feature of issue-based plurilateral agreements is that participating parties can freely choose issues and areas in which to try and come to an agreement. This may sound like nothing special. However, in the case of the WTO, a succession of negotiations is treated as a round, meaning their outcomes must be accepted in a single undertaking. This makes it difficult to promote an initiative for liberalization or rulemaking in a specific area while the round is in process.

Furthermore, adding a new initiative to an already weighty agenda is virtually impossible. Indeed, in reality a trend to the contrary can be observed, with the scope of issues on the agenda for the Doha Round shrinking rather than expanding. In particular, the outcome of the

WTO Ministerial Conference in Cancun in 2003, in which two issues of the utmost importance for industries—"trade and investment" and "trade and competition"—were dropped, seriously undermined the credibility of the WTO. In contrast, the plurilateral approach enables the launch of discussions on issues in a specific area—whether liberalization or rulemaking—among countries concerned with a good chance of reaching a meaningful conclusion that can impact the participating countries and their industries.

With respect to FTAs, in cases where two or more WTO members negotiate and conclude any agreement discriminatory against other members, they must initially satisfy conditions provided for in GATT Article XXIV:5 and the General Agreement on Trade in Services (GATS) Article V. In other words, FTAs can be defined as country-based plurilateral agreements.

Furthermore, GATT Article XXIV requires that a FTA covers "substantially all of the trade"—which is construed to mean about 90% or more of the existing trade—between the signatories to the FTA. Therefore, FTAs are, by nature, not suitable as vehicles for issue-specific or sector-specific negotiations.

Indeed, WTO members may form a service sector FTA, a deal specifically on trade in services. Yet, such an agreement is required to have "substantial sectoral coverage" (GATS Article V), and liberalizing just a specific service sector is not permitted under the GATS.

WTO members may negotiate measures for addressing sector-specific problems in the course of discussing overall bilateral trade issues under the framework of FTAs. However, the aforementioned requirements would, in many cases, impose significant constraints on attempts to address sector-specific problems. Needless to say, discussing rules and liberalization measures for various areas comprehensively under the framework of multinational, regional FTAs such as the Trans-Pacific Partnership (TPP) Agreement and the Japan–EU Economic Integration Agreement (EIA) is possible and offers some significant benefits.

2.2 Allowing Flexibility in the Choice of Participants

Another distinctive feature is flexibility in the choice of participants. Whereas negotiations under the multilateral framework of the WTO must, in principle, involve all members (159 economies), such is not the case under a plurilateral framework. It is therefore possible to discuss specific issues among specific countries in preparation for discussions under a broader framework in the future.

In the case of issue-based plurilateral agreements, any group of like-minded countries can discuss specific areas or issues of their choice. In contrast, FTAs are country-based, whereby a specific pair or group of countries would first determine whether or not to pursue trade liberalization between or among them.

2.3 Getting Around the Decision-making Ordeal of the WTO

Decisions at the WTO are, in principle, taken by consensus of all of the members, inhibiting its ability to respond with agility. An issue-based plurilateral agreement and FTA provide various options to get around this constraint.

2.4 Responding to the Changing Needs of Industries with Agility

In developing global value chains, businesses and industries around the world are engaged in trade and investment activities by making tough and difficult decisions on a daily basis. It is no

exaggeration to say that the WTO is a world apart from those working in the fast-changing world of business. As a result, businesses and industries are showing increasingly less interest in the WTO apart from its dispute settlement mechanism.

In contrast, FTAs and issue-based plurilateral frameworks can respond to and address the changing needs of businesses and industries in a more practical time frame.

2.5 Preparing for Multilateral Rulemaking in the Future

Needless to say, plurilateral agreements may not include any provision contradictory to WTO rules, to the extent that participants are WTO members. However, an issue-based plurilateral agreement struck by a group of countries—each of which is firmly committed to the improvement of the WTO system—in a specific area of their concern in a manner ensuring consistency with WTO rules can provide an important basis for improving these rules in the future (this holds true, to some extent, for provisions under major FTAs). In view of the governance of the global trade system, it is critically important to define issue-based plurilateral agreements as a tool for governance and link them to the WTO.

In the case of FTAs, GATT Article XXIV and GATS Article V provide for exceptions to the WTO principle, allowing for discriminatory application of FTA rules. As such, FTAs are in principle applied on a non-MFN basis. (As the TRIPS Agreement does not provide for such provisions, intellectual property rights [IPR]-related arrangements agreed to as part of a FTA must be applied on a MFN basis.)

Issue-based plurilateral agreements are not necessarily of such a discriminatory nature.[13] Rather, as is the case under the ITA, the Basic Telecommunications Services Agreement, and the Financial Services Agreement, liberalization commitments made under plurilateral agreements are, in many cases, applied to non-party members on a MFN basis.

There exist no general provisions setting forth requirements for plurilateral agreements to be regarded as WTO-consistent, those that are equivalent to GATT Article XXIV for FTAs. This means that no deviation from the WTO principles is permitted for plurilateral agreements in general, and, in this regard, it may be necessary to take a more cautious approach in pursuing one.

The GATT Council's decision in 1979 (L/4905), made at the time of adopting the Tokyo Round Codes, stipulates that "existing rights and benefits under the GATT of contracting parties not being parties to [plurilateral agreements], including those derived from Article I [i.e., the right to MFN treatment], are not affected by these agreements."

It has been argued that RTAs, particularly mega RTAs, can make up for the two major defects of the WTO system—i.e., slowness and narrowness—and, by further expanding and deepening RTAs, it is possible without relying on issue-based plurilateral agreements to build a foundation for making future rules on global trade. How should we evaluate this argument? There is no doubt that RTAs—particularly mega RTAs—will be the driving force for trade liberalization and rulemaking. However, can they serve as an autonomous mechanism for making future rules governing global trade?

[13] They differ depending on the nature of each agreement.

Professor Richard Baldwin has put forward a WTO 2.0 scenario in which mega RTAs will set trade rules to deal with the new issues of the 21st century.[14] But I cannot help but question the automaticity of the scenario for the following reasons:

Emergence of a spaghetti bowl of rules

Since mega RTAs are negotiated by different sets of countries under varying time schedules, there is no guaranteeing that the resulting agreements will be in harmony with one another as I analyzed in section 1.2.4 above. It is quite predictable that different RTAs will come up with their own solutions not only in the area of rules of origin but also regarding trade rules in general. In order to prevent this, it is necessary for all countries concerned to cooperate closely and make harmonization efforts. There is no guarantee that such cooperation and efforts will be made simultaneously.

Cost of ex-post harmonization

Of course, it is technically possible to disentangle the spaghetti bowl in an ex-post-facto manner. However, it would take a long time and be very costly. Harmonizing rules across a series of mega RTAs that will be established and put into effect may take as long and cost as much as completing a new round of trade negotiations.

Regionality of RTAs

RTAs are, by nature, region-based agreements aimed at finding regional, not global, solutions. The scope of membership is limited in number, resulting in the application of different solutions between member and non-member economies. Therefore, although mega RTAs certainly help build a foundation for making future rules on trade and are an indispensable vehicle to promote liberalization and rulemaking, they would inevitably cause spaghetti bowl problems unless rules are harmonized across them on an issue-by-issue basis. Also, adjusting differences in applicable rules between member and non-member economies is essential in light of the need to make rules on a global level.

Issue-based plurilateral agreements, which can prevent the fragmentation of rules that would otherwise result from the emergence of mega RTAs, are an important tool for making future trade rules. It is expected that they will continue to play a complementary role to the WTO and mega RTAs.

3. CONSTRAINTS ON PLURILATERAL AGREEMENTS

Plurilateral agreements have various constraints, however. This chapter examines constraints on plurilateral agreements from legal and substantive points of view.

3.1 Legal Constraints[15]

Legal constraints on realizing plurilateral agreements involve different issues depending on whether they constitute part of the WTO agreements or those outside it.

[14] See Baldwin (2011, 2012).

[15] See Attachment 2.

3.1.1 Agreements within the WTO

Incorporating a new plurilateral agreement into the WTO agreements (as an Annex 4 agreement) involves securing consensus among all of the WTO members. Amendments to the existing WTO agreements without creating a new Annex 4 agreement lead to amendments to the Annex 1 agreements, which also require consensus among all of the WTO members[16].

There are strong calls for maintaining decision-making by consensus, which is also part of the tradition of the GATT/WTO. However, continuing to focus solely on consensus at a time when the WTO has lost its nature as a club poses the serious risk of undermining its *raison d'etre* by further accelerating the FTA race. The WTO as the main architect supporting the global trade system is faced with the need to examine its variable geometry, and discussions to that effect are now becoming essential.[17][18]

Presented below are two ways of thinking derived from the above viewpoint and some discussion on the possible revival of the code approach.

Critical mass plus MFN extension

Successful precedents for this approach of critical mass plus MFN extension have been set by the ITA, the Financial Services Agreement, and the Basic Telecommunications Services Agreement. As a matter of legislative theory, there is an argument that a departure from the principle of decision by consensus should be allowed under certain circumstances, where there exists an agreement among a critical mass of the WTO members, on the premise that all of the benefits resulting from such plurilateral agreements be applied to non-participating WTO members on a MFN basis.[19] This argument should be studied further.[20]

Referring to precedents set by the ITA, the Basic Telecommunications Services Agreement, and the Financial Services Agreement, the Report of the First Warwick Commission points to the need to introduce critical mass decision-making under the WTO based on the condition that benefits resulting from a new critical mass agreement be extended to all WTO members. The report also discusses criteria that must be fulfilled to protect the rights of WTO members, specifying seven conditions including the following:

[16] On the legal constraints of plurilateral agreements, see the National Foreign Trade Council (NFTC) report, Harbinson and De Meester (2012).

[17] The principle of variable geometry is being discussed in relation to the diversity of the WTO members from the viewpoint of promoting the further development of the WTO system. While such discussion looks at variable geometry in the forms of plurilateral agreements, special and differential treatment (S&D) including the "graduation" of developing countries, and RTAs, this paper focuses solely on variable geometry in the form of plurilateral agreements.

[18] Lawrence (2004) and the Global Agenda Council on Trade (2010) discuss the necessity of "protocols" under which plurilateral rulemaking is systematically incorporated into the WTO.

[19] See the Report of the First Warwick Commission: The Multilateral Trade Regime: Which Way Forward? (University of Warwick 2007).

[20] The scope of application of this proposal is not clear but definitely includes the establishment of new Annex 4 agreements. In addition, an amendment to Annex 1 agreements may be included.

(1) New rules are required to protect or refine the existing balance of rights and obligations under the WTO and/or the extension of cooperation into new regulatory areas will impart a discernible positive global welfare benefit;[21]

(2) The disciplines are binding and justifiable so as to attain the objectives laid out in the first criterion above;

(3) The rights acquired by the signatories to an agreement shall be extended to all WTO members on a non-discriminatory basis, with the obligations falling only on signatories;

(4) WTO members shall consider any distributional consequences arising among members from cooperation in new regulatory areas and shall consider the means of addressing any such adverse consequence that they anticipate.

Codes (Annex 4 agreements)

It is technically possible to create a new, non-MFN-based Annex 4 agreement by consensus. However, achieving consensus on such agreement that would enforce differentiated treatment across WTO members is nearly (if not completely) impossible in reality. Further consideration and discussion should be made to alleviate voting conditions for Annex 4 agreements as a way to implement "variable geometry" within the WTO.

Modification of schedules of concessions and commitments

As a legislative theory concerning a procedure for incorporating plurilateral agreements into WTO agreements, there are calls for introducing schedules of concessions and commitments as a means to promote liberalization in broader areas. This approach is currently adopted under WTO agreements on tariffs and trade in services (including the Agreement on Government Procurement as an example of Annex 4 agreements). It is argued that WTO members should utilize this approach as a tool to expand their respective obligations under the WTO to promote liberalization in areas other than tariffs and trade in services.

Concessions and commitments listed in respective members' schedules are defined as their obligations under the WTO. Such schedules of concessions and commitments can be utilized as a means to check voluntary promises made by respective members. Also, as a way of incorporating agreements reached under a plurilateral framework into WTO-binding commitments, an approach using schedules of concessions or commitments is an interesting idea meriting further debate.[22]

Some people argue that the WTO already has a full-fledged framework for negotiating and making necessary agreements by consensus of its members, but that they have been unable to utilize this framework due to insufficient effort. I do not agree with this argument.

The existing decision-making framework that assumes the same rights and obligations applicable to the 159 member economies and consensus among them has been paralyzing rulemaking in the WTO and the Doha Round. It is time to take a hard look at this system that

[21] Low (2011) argues that a plurilateral agreement which boosts the welfare of one group at the expense of another without improving economic welfare as a whole should not be allowed, whereas a plurilateral agreement that is welfare-improving globally is desirable even if it involves compensation to be lowered.

[22] "Cottier (2006) discusses the possibility of introducing schedules of concessions or commitments, similar to those annexed to the GATT and the GATS, in the areas of Trade Related Intellectual Properties (TRIPS), Technical Barriers to Trade (TBT), Sanitary and Phytosanitary measures (SPS), import licensing, customs valuation, agriculture, dumping, and industrial subsidies.

has been unable to deliver results—except for some plurilateral agreements—despite 20 years of trial and error after the conclusion of the Uruguay Round, and to start discussing ways to rebuild it.

Failing this, the WTO would lose its relevance, and there would be no stopping the ongoing move toward it being replaced with mega FTAs.

Reforming the procedure and other matters relating to plurilateral agreements indicated above is indispensable in order to accommodate the increasing diversity of WTO members and their changing needs. This is also a challenge we must confront if we are to save the WTO.

3.1.2 Agreements Outside the WTO

As is the case for the ACTA, plurilateral agreements can be created to complement or reinforce the existing WTO rules (TRIPS-plus rules in the case of the ACTA). Or they can be created to set rules in areas not covered by WTO rules. A plurilateral agreement on competition rules is a case in point.

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 the WTO. For example, had it been TRIPS-minus in substance, the ACTA would have been in violation of the WTO TRIPS Agreement. In contrast, a plurilateral agreement on competition would, in principle, not violate any WTO agreement because competition issues are not covered by the existing WTO rules.

3.2 Substantive Constraints

This section looks at constraints or critical factors affecting the formation of issue-based plurilateral agreements. The selection of participants is the most critical factor in determining the substance and also the success of plurilateral agreements.

In principle, plurilateral agreements must not affect the existing rights and obligations of non-participating WTO members, including the right to MFN treatment under GATT Article I.[23] At the same time, the MFN principle (under GATT Article I, etc.) mandates the non-discriminatory distribution of benefits derived from such agreements.

In the case of the ITA, it was agreed that signatories must represent at least approximately 90% of world trade in products covered by the agreement as a prerequisite to its entry into force. The minimum threshold for the coverage of participants was set in order to avoid free riding by non-participating WTO members, a problem arising from the MFN application of benefits. This is a standard criterion used in plurilateral initiatives for tariff reduction and elimination, an area in which the free riding concern is particularly strong. The threshold value does not have to be, but is typically set at, 90% to deal effectively with this problem.

As such, even though agreements are concluded under a plurilateral framework, the relationship with non-participating WTO members is always taken into account in decision-making.

Including major WTO members as signatories is the key to success. Without the participation of major players, plurilateral agreements cannot materialize because they would distort competition among businesses. The distribution of benefits on a MFN basis would not be a problem insofar as major WTO members participate. However, in the case where the coverage

[23] Council Decision (L/4905) on 28 November 1979.

of participants is less than satisfactory (such as when not all of the major countries participate), whether signatories can agree to extend benefits on a MFN basis poses a critical question. As such, critical mass and MFN-based benefit distribution are closely interrelated.

Another key to concluding a successful plurilateral agreement is to strike the right balance between the following three factors: 1) level of discipline (ambition), 2) scope of participating countries, and 3) timing of realization. Japan always gives consideration to this point and had sought the support of other countries in promoting the ACTA initiative.[24]

Consider that these three factors are measured by the yardsticks of X, Y, and Z, respectively. Then, countries negotiating a certain agreement must seek to achieve the optimal mix of these three factors, that is, maximizing the value of $F = \alpha X \times \beta Y \times \gamma Z$. Needless to say, it is possible to add more yardsticks or factors to consider. However, a simple model such as this tends to work better when considering a plurilateral agreement involving a large number of players, and, as a matter of fact, the above model worked well for the ACTA negotiations.

To be sure, this is no easy task as the three factors are in conflict with each other. For example, raising the level of ambition decreases the number of participants and prolongs the process of negotiations. Yet, no matter how difficult it may be, balancing the three conflicting factors is crucial to achieving a meaningful plurilateral agreement. The successful conclusion of the ACTA in 2011 was made possible as the participating members managed to strike a balance and maximized $F = \alpha X \times \beta Y \times \gamma Z$.

4. POTENTIAL AREAS FOR FUTURE PLURILATERAL AGREEMENTS

4.1 Overview

Experiences with a series of plurilateral agreements hitherto concluded—i.e., the ITA, the Financial Services Agreement, the Basic Telecommunications Services Agreement, and the ACTA—have not only revealed the nature and difficulty of such agreements but also provided many valuable lessons regarding their potential. At a time when the WTO and the Doha Round are stuck in a quagmire, issue-based plurilateral agreements may be a ray of hope as they have the potential to play the pivotal role of enhancing the governance of the entire global trade system.

This chapter will look into the possibility of concluding new plurilateral agreements.

4.2 Specific Possibilities

4.2.1 Tariff Reduction and Elimination

First, possible plurilateral or sectoral agreements in the area of tariff reduction and elimination include those on the expansion of the ITA and the elimination of tariffs on environmental goods. The key points at issue and approaches in this regard have been discussed in this paper, including in the section that analyzed the ITA.

[24] See Attachment 4, which was actually used in the ACTA negotiation.

It is necessary, in principle, to develop a negotiation package by always considering the combination of the three yardsticks measuring the realizability of agreements—the level of ambition, the timing of realization, and the scope of participants.

Regarding the scope of participants, the coverage of countries is usually too small if the membership comprises only developed countries, and such an agreement is prone to exploitation by free riders. To avoid this, it is vitally important to involve major developing economies, and the success of this task hinges on the formulation of a mutually beneficial negotiation package that is enticing enough to attract them. For instance, lowering the level of ambition by narrowing down the coverage of products is one way to achieve this.

Furthermore, as was the case with the ITA, some consideration needs to be given to responses to non-tariff issues and a possible linkage to tariff reduction and elimination packages in other areas. In doing so, it should be kept in mind that trying to deal with non-tariff issues will naturally cause negotiations to drag on and tend to reduce the number of participants.

4.2.2 Services

The Financial Services Agreement and the Basic Telecommunications Services Agreement can be cited as pioneering cases of plurilateral agreements in the area of trade in services, and approaches employed for their realization are well known.

Although much depends on how services negotiations under the Doha Round will turn out, it will be necessary hereafter to explore the possibility of concluding plurilateral agreements on specific service sectors (e.g., agreement on environment services) or issue-specific plurilateral agreements (e.g., agreement on domestic regulations). As the global economy becomes more service sector-oriented and increasingly more service companies move into the global market, there will be a wide range of potential areas for plurilateral initiatives.[25]

4.2.3 Government Procurement

To begin with, the successful conclusion at the 2011 WTO Ministerial Conference of the renegotiation of the Agreement on Government Procurement (GPA) should be welcomed.

In this area, a very high level of discipline imposed by the GPA, a non-MFN-based plurilateral agreement, has long hampered the expansion of its membership. However, it is noteworthy that a range of non-signatory economies, including the People's Republic of China, are now showing interest in joining the agreement, attracted by the government procurement market of signatory economies.

If the recent conclusion of the GPA renegotiation serves as an impetus and drives membership expansion going forward, interest in plurilateral initiatives in general will likely increase as well. Now that the renegotiation has ended successfully, it is necessary to shift the focus onto increasing the number of participants.

[25] Lee-Makiyama (2011). In this paper, Lee-Makiyama calls for establishing the International Digital Economy Agreement (IDEA), an expanded version of the ITA, which includes not only tariff reduction and elimination but also services liberalization commitments.

4.2.4 Electronic Commerce

Electronic commerce, or e-commerce, is another potentially promising area for plurilateral initiatives. Discussions on a moratorium on customs duties on electronic transmissions took place more than a decade ago along with those on the question of whether e-commerce should be dealt with under the GATS or the GATT (regarding which Japan took the initiative in advocating application of the latter).

Subsequently, the US has incorporated various provisions related to e-commerce including those for a moratorium on customs duties and tariffs on e-commerce into its FTAs with such countries as the Republic of Korea and Australia. Japan has also introduced its first set of such e-commerce provisions—including those for a moratorium on customs duties and tariffs, MFN and national treatment (NT), and market access—in its economic partnership agreement (EPA) with Switzerland.

In fact, e-commerce provisions under existing FTAs are far from satisfactory, and discussions should be deepened toward introducing additional provisions. A possible approach in this regard would be to pursue further development of rules for e-commerce through various opportunities such as the Trans-Pacific Partnership (TPP) and the Japan–EU Economic Integration Agreement (EIA), while at the same time exploring the possibility of bringing them all under a plurilateral framework.

4.2.5 Trade and Investment

Following a failed attempt to conclude the Multilateral Agreement on Investment (MAI) at the Organisation for Economic Co-operation and Development (OECD), the relationship between trade and investment was included in the initial agenda for the Doha Round negotiations, but was subsequently dropped at the WTO Ministerial Conference in Cancun in 2003. This turn of events has been greatly affecting overseas investment not only by Japanese companies but also those from the US, Europe, and many other countries. Lack of satisfactory international rules on investment is critically detrimental to international business activity, particularly in countries that grant national treatment only after the establishment of a local subsidiary while continuing to demand technology transfers.

Bilateral investment treaties (BITs) are definitely important but not enough. Discussing plurilateral rules on investment is necessary not only for investing countries—i.e., Japan and other developed economies—but also for developing countries where foreign direct investment (FDI) is essential for economic growth. Indeed, all countries and regions around the world need this discussion because it is anticipated that south-south and south-north investment will expand in the coming years. It is also expected that developing economies' attitude toward initiatives for creating international rules on investment will change over the course of time and it will become necessary to deepen discussions on procedures for settling investment-related disputes, including investor-state dispute settlement (ISDS) provisions.

4.2.6 Trade and Competition

Interaction between trade and competition policy was put on the agenda of the Doha Round in response to a strong request from the European Commission (which was supported by Japan). However, like the issue of trade and investment, it was dropped at the WTO Ministerial Conference in Cancun.

The loss of venue for discussing competition-restrictive trade measures and their treatment under the WTO has been making it extremely difficult to discuss export restrictions imposed by certain countries and companies at a time when natural resources markets are becoming increasingly oligopolistic (e.g., export restrictions of natural resources and mergers between natural resources giants). Disciplines on state owned enterprises (SOEs) cannot holistically be discussed in the WTO, either.

The competition authorities of some economies are already engaged in policy dialogue. However, it is also necessary to launch international discussions on competition-restrictive situations and measures from the viewpoints of both trade and competition.

4.2.7 Standards and Conformance, and Technical Barriers to Trade

At the launch of the Doha Round, Japan attempted but failed to put technical barriers to trade (TBT) on the agenda due to a lack of sufficient support from other WTO members. Today, however, while the Doha Round remains gripped by deadlock, non-tariff issues and behind the border measures are drawing much attention. Establishing a set of effective rules for such issues is critical in view of the need to create an environment that can respond properly to the globalization of business.

Discussions in this area are expected to make progress at the Asia-Pacific Economic Cooperation (APEC) forum and in the course of negotiations for interregional FTAs. The OECD also has a repository of relevant knowledge and expertise accumulated over the years. Since this area is extremely broad in scope and involves various treaties and agreements, it will be necessary to clarify the scope of issues to be discussed. However, despite such odds, this area deserves active efforts and commitments in view of the need to create business-friendly rules and build global value chains.

Issues are wide-ranging, including the definition of international standards, best regulatory practices, mutual recognition agreements (MRAs), and certification rules. This is an area in which soft law has traditionally played an important role, and the WTO relies significantly on external institutions.[26] The fact that cooperation between the WTO and external specialized agencies is highly valued can be seen as an indication that the former lacks sufficient knowledge and expertise in this area.

It is considered quite possible to enhance TBT provisions through a plurilateral initiative. Given the highly specialized and technical nature of TBT issues, an in-depth discussion is warranted. At the same time, however, it must be remembered that developed and developing economies are still divided over rulemaking for TBT as well as for standards and conformance. Thus, starting with like-minded countries would be a reasonable approach to a plurilateral initiative.

4.2.8 Rules of Origin

Efforts to harmonize non-preferential rules of origin have made little headway due to difficulties imposed by their multi-purpose and often protectionist nature (rules of origin are used for statistical purposes, enforcement of anti-dumping and countervailing duties, quota management, etc.). As for preferential rules, different countries have different rules, creating a situation often referred to as the spaghetti bowl effect phenomenon. The chaotic presence of many different rules and their arbitrary nature are, no doubt, hindering global trade. Indeed,

[26] Footer (2010).

various plurilateral forums should be utilized to propose and take steps to improve rules of origin, particularly those of preferential terms.

4.3 International Supply Chain Agreement (ISCA)

The issues and areas above are possible candidates to be dealt with by means of an issue-based plurilateral agreement. They can be discussed separately, but it is also possible to bundle some mutually-related issues into one agreement.[27]

Businesses relying on global supply chains obviously want to see liberalization and rulemaking of the broadest possible scope. For instance, one option worth considering is to pursue, in collaboration with major economies and business societies, a plurilateral agreement on an international supply chain, a package of rules for standards and conformance, e-commerce, country of origin, investment, competition, and so forth. Or rather, these types of proactive proposals are crucially needed for the further enhancement of global supply chains and the development of the international trade system.[28]

It goes without saying that such initiatives must be intended to support the multilateral trade regime under the WTO and are designed to provide a basis for multilateral rulemaking in the future. Thus, they must be consistent with WTO rules.

It is too time-consuming and risky to wait for the results of upcoming mega RTAs such as the TPP, the Japan–EU EIA, and the Regional Comprehensive Economic Partnership (RCEP), not only for non-participants but also for participants. As analyzed in Section 2, RTAs do not provide the global solutions business societies are pursuing. Mega RTAs can facilitate and improve value chains. However, they could also create mega problems if the disciplines they contain are not harmonized across them.

Annexed in Attachment 5 is the concept paper of an International Supply Chain Agreement (ISCA) based on the draft circulated by the author, originally to the International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IADB) Expert Group Meeting on Global Supply Chains in Geneva in November 2012, to respond to the requirements of business societies and to deal with the challenges for the global trade system posed by mega RTAs.[29]

This year's World Economic Forum Enabling Trade Report[30] and World Bank blog by Bernhard Hoeckman and Selina Jackson[31] referred to ISCA Concept Paper as an option to "holistically" deal with supply chain issues.[32]

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[27] In the area of "Sustainable Energy Trade," "Fostering Low Carbon Growth: The Case for a Sustainable Energy Trade Agreement" (ICTSD 2011) is a trial designed to deal with various issues in a plurilateral agreement. In the IT areas, see Lee-Makiyama (2011).

[28] "Trade Patterns and Global Value Chains in East Asia: From trade in goods to trade in tasks." WTO/IDE-JETRO 2011.

[29] See Nakatomi (2013b, 2013c) for the details and necessity of ISCA.

[30] Enabling Trade-Valuing Growth Opportunities 2013 by World Economic Forum, page 27.

[31] Shifting Focus in Trade Agreements—From Market Access to Value-Chain Barriers, by Bernhard Hoeckman and Selina Jackson (2013) (http://blogs.worldbank.org/trade).

[32] See also Sweden National Board of Trade (2013).

4.4 Summary

In terms of the possible legal form of agreements, the areas discussed above can be broadly classified into the following three groups: 1) those in which the incorporation of rules into WTO agreements is assumed (tariffs, services, government procurement); 2) those in which immediate incorporation into WTO agreements is not assumed (investment, competition); and 3) those in which specific policies have not been set and will depend on future developments (e-commerce, standards and conformance/TBT, rules of origin).

However, as seen in the case studies on the ITA and the ACTA, discussions on the legal form of agreements are inseparable from the type of forum, participants, and the intended content of agreements. In this sense, a conclusion can be drawn only by examining all of these factors on an area-by-area basis.

The areas discussed in Sections 2 and 3 above are intended to be examples and have been selected from those closely related to trade and the WTO. Thus, there are many more potential areas for plurilateral agreements, if not limited to those related to the WTO.

For instance, in the area of trade and the environment, there may be more items—other than the liberalization of environmental goods and services—that should be dealt with under a plurilateral framework, depending on future developments in the relationship between multilateral environmental agreements (MEAs) and the WTO. Trade facilitation may be another possible area for plurilateral initiatives, that is, in the (hopefully, unlikely) event of failure of the ongoing efforts under the WTO. Indeed, further globalization and the changing needs of industries will certainly generate various new demands and requirements. Furthermore, it may become necessary to discuss some of those issues together as a combined package as in the case of issues related to global supply chains.

At the moment, FTAs and RTAs are serving as essentially the sole channel for promoting trade liberalization and rulemaking because of the stalemate in the WTO negotiations under the Doha Round. Continuing this trend could result in the fragmentation and inefficiency of the global trade regime.[33]

The sense of speed permeating the WTO and its round of trade negotiations is just not acceptable, given the pace at which globalization is taking place and business environments are changing. While firmly supporting the WTO as the bedrock of the global trade system, governments around the world should consider utilizing issue-based plurilateral agreements more proactively in parallel with pursuing FTAs so that they can respond more quickly to new problems faced by their industries and challenges in global trade.

4.5 Recent Developments Toward Plurilateral Agreements

Since the Eighth Ministerial Conference, there has been active movement toward plurilateral agreements, as exemplified by the following two developments.

One is the discussion on the expansion of product coverage and participants of the ITA. Since there is an agreement among existing signatories not to discuss non-tariff barriers at this juncture, the focus is on the expansion of product coverage. The other is a move toward launching negotiations on an International Services Agreement (ISA), for which the concept

[33] The US and the EU differ in their trade regimes and legal systems. Seeking to harmonize various systems in a bits-and-pieces manner in this situation would definitely cause inefficiency and give rise to new problems. A spaghetti bowl of rules must be avoided by all means.

has been discussed so far. One crucial issue is its legal framework—whether it should take the form of a GATS Article V agreement (FTA) and hence keep the resulting benefits only to its signatories. It is still too early to judge the eventual outcome of this discussion. As such, WTO members are increasingly turning to a plurilateral approach in seeking progress in both trade liberalization and rulemaking in a bid to realize concrete results toward the next Ministerial Meeting in Bali.

These have been welcoming recent developments in plurilateral agreements involving certain WTO members to meet the evolving needs of business societies.

5. CONCLUSION: GOVERNANCE OF THE GLOBAL TRADE SYSTEM AND PLURILATERAL AGREEMENTS

I have looked at issue-based plurilateral agreements from various angles, for instance, in the light of precedents as well as their legal and practical constraints. I have also identified possible areas where such agreements can be utilized as a vehicle for promoting trade liberalization and rulemaking in the future. Developing an appropriate understanding of the nature of issue-based plurilateral agreements would enable us to pursue not only single-issue agreements but also multi-issue agreements such as an ISCA.

In concluding this paper, I would like to answer two fundamental questions posed regarding issue-based plurilateral agreements.

5.1 Are Plurilateral Agreements Replacing the WTO?

Today, as the stagnation and problems plaguing the WTO have become all too clear, it is imperative to prepare and establish a mechanism for making full use of issue-based plurilateral agreements along with FTAs. The WTO, which operates on the principles of a single undertaking and decision-making by consensus, is groaning under its own weight, with its membership growing in size and diversity and a large number of issues listed on its agenda.

On the other hand, FTAs are proliferating. There is a high possibility that they may replace the WTO as the primary rule maker and promoter of trade liberalization.

Plurilateral agreements can and must present solutions and provide much-needed impetus to the WTO, thereby enabling it to cope properly with global issues in reality. The issue-oriented approach of plurilateral initiatives is instrumental in supporting the free trade regime and the WTO that are vital not only for Japan but also for all of the WTO member economies.

Are plurilateral agreements replacing the WTO? The answer is clearly “no,” as I have extensively discussed in this paper. They should and do complement the WTO, which is facing serious challenges posed by FTAs.

Are plurilateral agreements competing with FTAs? Again, the answer is “no.” They complement FTAs by offering global solutions, a task that cannot be accomplished by FTAs.

5.2 Can Plurilateral Agreements Address the Needs of Developing Countries?

The second question is whether plurilateral agreements can properly address the needs of developing countries. I have already looked at this issue in various parts of this paper.

However, I would like to supplement my earlier discussion since developing countries' participation is of vital importance.

The success of the ITA as well as of the financial and telecommunication agreements, each with a wide participation of developing countries, clearly demonstrates how plurilateral agreements can accommodate the demands and concerns of developing countries. As discussed earlier, once a critical mass has been reached, plurilateral agreements will be readily accepted by nonmembers (including developing countries), provided that the benefits of such agreements are to be extended to nonmembers on a MFN basis.

The crucial question that needs to be asked here is whether plurilateral agreements can be realized with the willing participation—not just acquiescence—of a broad scope of developing countries. This relates to the question of whether a critical mass can be created with the participation of developing countries.

Here I would like to point to five factors that are likely to facilitate the participation of developing countries.

First, as already discussed, the proliferation of FTAs—especially the emergence of mega FTAs—has put developing countries in a difficult situation. Above all, those left outside of the mega FTAs would face a high risk of seeing their presence in the global economy undermined. Issue-based plurilateral agreements may help their positions. Should the Doha Round continue to fail to make progress, those developing countries not invited to join any mega FTA would naturally turn their attention to plurilateral initiatives as a way of protecting their national interests.

Second, developing countries, which are increasingly diverse in their economic interests, would find that there is much merit in participating in plurilateral agreements designed to promote liberalization and rulemaking in specific areas of interest. Since areas or issues of interest differ from one country to another, treating all developing countries as a group may not be an efficient approach. Even though the WTO and Doha Round may be the best forum for setting global trade rules, they are not functioning as expected. Given this reality, the plurilateral approach may be an attractive alternative for both developing and developed countries seeking changes to the trade regime.

Third, plurilateral agreements should be designed to encourage the participation of like-minded developing countries. In this regard, ensuring transparency in the negotiation and implementation of agreements is key to widening participation. It is also critically important to disseminate information on the economic merits of the plurilateral approach. The success of the ITA would not have been possible without the shared understanding of the economic importance of the agreement.

Fourth, technical assistance and capacity building should be an integral part of plurilateral agreements. This is crucial to ensuring the participation of a large number of developing countries, as many of them lack the technical capabilities necessary to accommodate new rules and procedures.

Fifth, dispute settlement provisions should not be too stringent, so as not to discourage developing countries from joining.

Can plurilateral agreements properly address the needs of developing countries?

The answer is "yes," provided they are designed to attract like-minded developing countries with due consideration given to the factors described above. Indeed, as evidenced by the ongoing efforts to expand the product coverage of the ITA, the participation of like-minded

developing countries is becoming a crucial factor to the successful conclusion of plurilateral agreements of almost any kind.[34]

More active discussions should take place about how we can create an environment that will facilitate the participation of like-minded developing countries in issue-based plurilateral agreements.

5.3 Global Governance and Plurilateral Agreements

The WTO, FTAs, and issue-based plurilateral agreements need to be considered collectively from the viewpoints of trade liberalization and rulemaking. Promoting issue-based plurilateral agreements contributes to an understanding of the problems embedded in the WTO and finding a direction for reform.

Setting a framework for an issue-based plurilateral agreement involves the selection of both issues and members, hence, requiring a more strategic approach than would be the case in pursuing multilateral agreements or FTAs.

In the face of progressive globalization and continuous changes in the economic environment, governments will be required to have a good command of all of these various tools, applying the right one to the right need to deliver the best possible solution. It is hoped that this paper will provide useful insights to governments and businesses in pursuing issue-based plurilateral agreements and implementing trade policies in the future.

[34] See Nakatomi (2011a). At the time of negotiating the original ITA, the Quad members accounted for about 80% of global IT trade, enabling the successful conclusion of the agreement under their initiative.

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ATTACHMENT 1: MULTILATERAL AGREEMENTS AND PLURILATERAL AGREEMENTS ON TRADE-RELATED ISSUES

<table>
<tr><td rowspan="2">Multilateral agreements</td><td colspan="4">Plurilateral agreements</td></tr>
<tr><td>Country-based plurilateral agreements</td><td colspan="3">Issue-based plurilateral agreements</td></tr>
<tr><td colspan="3">WTO rule: Yes</td><td colspan="2">WTO rule: No</td></tr>
<tr><td>WTO

Annex 1, 2 & 3 to GATT 1994</td><td>GATT Article XXIV
GATS Article V

RTAs/FTAs</td><td>Annex 4 Agreements on:

- Government Procurement
- Trade in Civil Aircraft</td><td>Financial Service Agreement, Basic Telecommunications Agreement, ITA, ACTA, etc.

In the future, plurilateral agreements may be concluded in the areas of services, electronic commerce, standards and conformance (TBT), country of origin, etc.</td><td>In the future, plurilateral agreements may be concluded in the areas of competition, investment, etc.
(In the area of investment, TRIM is already in place)</td></tr>
</table>

ATTACHMENT 2: COMPARISON OF TRADE-RELATED MULTILATERAL AND PLURILATERAL AGREEMENTS

	WTO (Multilateral)	Plurilateral agreements						
		RTAs/FTAs (Country-based plurilateral agreements)	Issue-based plurilateral agreements*					
			WTO Rule: Yes					WTO Rule: No
			Annex 4 agreements	Service-sector agreements (Financial Services Agreement / Basic Telecommunications Agreement)	Tariff reduction / elimination agreement (ITA)	ACTA	Others	
Participants (countries/regions)	159	Two or more	Two or more	Critical mass Current membership: Financial Services Agreement (70) / Basic Telecommunications Agreement (69)	Critical mass (ITA): Approx. 90% of world trade (Currently, ITA covers 97% of world trade or 73 countries.)	37 (10 + EU 27)	Two or more	Two or more
Basic rules	Annex 1 to Agreement Establishing WTO (WTO Agreement)	GATT Article XXIV (Substantially all trade) GATS Article V (Substantial sectoral coverage)	Annex 4 to WTO Agreement	Protocols to GATS concerning financial services / basic telecommunications services	GATT	TRIPS	?	

Establishment of a new agreement		Participants	Consensus of all WTO members No voting provision	Protocols to GATS concerning financial services / basic telecommunications services (by consensus of all WTO members) >> Participants' schedules of commitments and lists of exemptions from GATS Article II (MFN treatment) amended and attached	Ministerial declaration by participating countries >> Participants' schedules of concessions amended	Participants	? (Separate consideration for each negotiation area)	Participants
Amendments to existing agreements	Consensus of all WTO members No voting provision	Participants	Participants	Modification of schedules under GATS Article XXI	Participants (in terms of each participant amending its schedule of concessions)	Participants	Participants	Participants
Obligations under WTO rules	YES	NO	YES	YES (subsequent to amendments to schedules of commitments)	YES (subsequent to amendments to schedules of concessions)	NO	? (Depends on content of agreement)	NO

Application of benefits on MFN basis	YES (in principle)	NO	NO (for Agreement on Trade in Civil Aircraft and Agreement on Government Procurement) * YES is possible for future agreements.	YES	YES	YES TRIPs has no provision for MFN exceptions.	YES in principle? (L/4905) Depends on relevant WTO provisions and content of agreement	NO
Others	Doha Round launched in 2001 and ongoing on basis of consensus of all WTO members	In principle, no selectivity for negotiation areas * Service-sector agreements possible under GATS Article V (505 agreements reported to date)	Only two agreements are in force now. (Agreement on Trade in Civil Aircraft and Agreement on Government Procurement)	Regarded as a precedent-setting plurilateral agreement on trade in services	Regarded as precedent-setting plurilateral agreements for tariff reduction and elimination	Standalone agreement supplementary to TRIPs Agreement	Negotiation areas may be selected * Must be WTO-consistent, in principle (Separate consideration for each negotiation area)	Plurilateral agreements on trade and competition, etc. fall into this category
Establishment	1995	?	1995	1997	1997	2011	?	?

* For the purpose of the paper, issue-based plurilateral agreements signed by three or more countries are considered from the aspect of contribution to rulemaking and liberalization in the field of international trade.

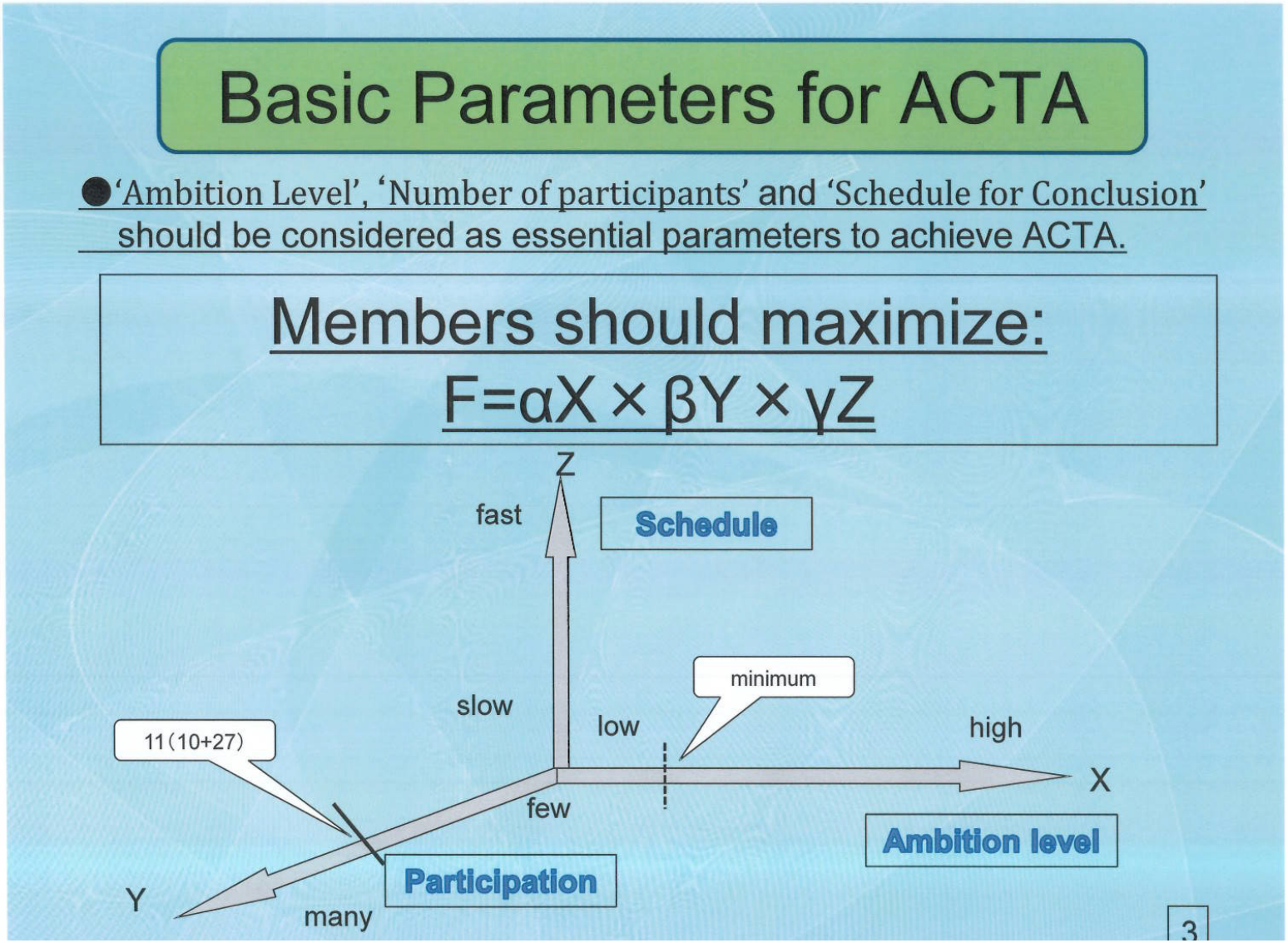
ATTACHMENT 3: GATT/WTO AND CHANGES IN THE TREATMENT OF PLURILATERAL AGREEMENTS

	1947 -	1979 - Introduction of Tokyo Round Codes	1995 - Establishment of WTO	Incorporation of Future Plurilateral Agreements
GATT	GATT 1947 Participation of all members	GATT 1947 Participation of all members	GATT 1994 Participation of all members	
Codes		Agreement on Subsidies and Countervailing Measures, Anti-dumping Agreement, TBT Agreement, Agreement on Import Licensing Procedures, Customs Valuation Agreement, Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement, International Bovine Meat Agreement >> Non-MFN based agreements Participation of some members	Agreement on Subsidies and Countervailing Measures, Anti-dumping Agreement, TBT Agreement, Agreement on Import Licensing Procedures, and Customs Valuation Agreement were turned into Annex 1a agreements under the WTO (participated by all members). >> Participation of all members	
WTO Annex 1A agreements on trade in goods			Participation of all members	?? Introduction of schedules of concessions approach? Amendments by critical mass plus MFN-based distribution of benefits?

WTO Annex 4 agreements			Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement International Bovine Meat Agreement (Only first two agreements are effective today). >> Non-MFN-based agreements Participation of some members	?? Easing procedural requirements for establishing new agreements? (e.g., Critical mass + MFN-based distribution of benefits)
WTO Annex 1B agreements on trade in services			Participation of all members Introduction of schedules of commitments approach	Additional sectoral agreements by same approach as those used for Financial Services Agreement and Basic Telecommunication Agreement? (Amendments to schedules of commitments)
WTO Annex 1C agreements on trade-related aspects of intellectual property rights			Participation of all members	?? Introduction of schedule of concessions/commitments approach? Amendments by critical mass plus MFN-based distribution of benefits?

- Issue-based plurilateral agreements between three or more countries are considered here with a view to their contribution to rulemaking and liberalization in the field of international trade.

ATTACHMENT 4: BASIC PARAMETERS FOR ACTA



ATTACHMENT 5: CONCEPT PAPER FOR AN INTERNATIONAL SUPPLY CHAIN AGREEMENT (ISCA)

Concept Paper for

an International Supply Chain Agreement (ISCA)

Improving global supply chains by an issues-based plurilateral approach[35]

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Research Institute of Economy, Trade and Industry

1. Necessity and Background

Need to accommodate the globalization of business activities
Lack of progress in the World Trade Organization (WTO) Doha Round (slowness)
Narrow scope of the Doha Round (narrowness)
Proliferation of regional trade agreements (RTAs) and resulting “spaghetti bowls” of rules of origin as well as of trade rules and disciplines

- Fragmentation of rules across different RTAs involving big players poses by far the most serious problem.
- Big RTAs are indispensable for international trade liberalization and rulemaking but do not provide a global solution.

2. A Possible Tool for Reform

[35] Original version of the concept paper was submitted to ICTSD/IADB E-15 Expert Group Meetings on Global Value Chains and RTAs in Geneva, November 2012.

1) Accelerating WTO negotiations where applicable

Potential areas include non-agricultural market access (NAMA), services, trade facilitation, the expansion of the International Technology Agreement (ITA), etc.

Progress, however, is not necessarily forthcoming.

2) Big RTAs

Big (cross-regional) RTAs—e.g., the Trans-Pacific Partnership Agreement (TPP), a free trade agreement (FTA) between the United States and the European Union (EU), and one between Japan and the EU—can facilitate the development and efficient operation of global supply chains if, and only if, there is strong coordination among the members concerned and others toward the development of uniform global rules.

An international supply chain agreement (ISCA) is a possible mechanism for coordination among the members concerned, thereby enabling them to untangle the spaghetti bowl effect of multiple sets of rules of origin and trade rules.

3) ISCA

To improve global supply chains in certain priority areas, the possibility of launching plurilateral negotiations should be studied, following such successful precedents as the ITA, the Basic Telecommunication Services Agreement, the Financial Services Agreement concluded in 1997, and the Anti-Counterfeiting Trade Agreement (ACTA) in 2011.

3. Basic Principles to Underlie the ISCA

1) A plurilateral agreement covering multiple areas

2) Complementary to and consistent with WTO agreements, thereby creating the basis for future multilateral rules

a) Complementary where relevant WTO agreements exist
(cf. ACTA approach as a trade-related aspects of intellectual property rights (TRIPs)-plus agreement)
e.g., Agreement on Technical Barriers to Trade (TBT Agreement),

b) Creating new disciplines/rules where relevant WTO agreements do not exist
e.g., competition, investment, e-commerce, preferential rules of origin

3) ISCA negotiations should neither delay nor undermine the Doha Round
Areas to be covered by the ISCA should not overlap with the Doha Development Agenda (DDA).
e.g., trade facilitation should be pursued in the DDA negotiations unless it becomes clear that progress is not expected.

4) Promotion and participation by like-minded members (critical mass)
The United States, the EU, Japan, and other leading developed members ++
Like-minded developing members

5) An agreement outside the WTO

6) Most favoured nation (MFN) extension to provide the basis for future rules
Benefits resulting from the agreement should be extended to non-participants in general to create de facto international standards in the targeted areas to provide the basis for future WTO rules.
The free riding issue has been exaggerated in many circumstances.
Exceptions to MFN can be discussed further.
In areas where relevant WTO rules exist, MFN extension is generally required by the WTO agreement concerned.

7) Avoiding the fragmentation of trade rules and the spaghetti bowl phenomenon
In the course of negotiations, participating members should seek to address the fragmentation of trade rules that either has been or may be created by big regional RTAs.

8) Timeframe and targets for negotiations
Conclusion within a maximum of three years
Business requires speed.
Speed is also crucial to prevent the creation of an “unswallowable” spaghetti bowl of big RTAs.
The level of ambition should be carefully controlled by participating members.
The harmonization of existing business practices and rules should be the primary goal of the negotiations.

Big members must not engage in a fight for hegemony.

9) Dispute settlement

To avoid protracting the negotiations and enable wider participation in the future, dispute settlement provisions should not be too stringent.
cf. ACTA

10) Sufficient consultation with the business community

As in the case of the ITA, the full involvement of the business community is essential to picking up its needs and bringing the negotiations to a successful end.

11) Transparency

To enable the ISCA to serve as the basis for future multilateral rules, the transparency of the negotiations should be open and visible to the governments of non-participating members as well as to the business community.

4. Possible Areas to be Covered by the ISCA

1) Defining the agenda in close collaboration with the business community

The views and opinions of the business community should be respected and taken into account in selecting areas subject to negotiation.

2) Setting a focused agenda to enable the negotiations to be concluded within a designated, short time period

Almost all of the WTO agreements are somehow relevant to global supply chains.
The level of ambition, scope of participating members, and negotiation speed are correlated (see the attached chart used in the ACTA negotiations).
Overburdening the agenda is tantamount to stifling and killing the negotiations from the outset.

3) Potential areas for consideration

The following are some of the potential areas and issues that should or may be considered for inclusion in the agenda for the ISCA negotiations to stimulate discussion. Other areas and issues can also be considered.

3.1) Areas already covered by WTO agreements

a) Technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures

TBT measures are unquestionably the area of interest to the business community.

Many behind-the-border measures and non-tariff barriers are related to TBT measures.

By introducing further clarity, transparency, good practices, and so forth, the ISCA can complement the TBT Agreement and hence facilitate cross-border business activities.

Likewise, the ISCA may complement certain elements of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).

b) Trade facilitation

This should be added to the ISCA agenda if, and only if, trade facilitation negotiations in DDA fail to move forward.

c) Export restrictions

Although the WTO rules impose disciplines on export restrictions, they are much weaker than those on import restrictions.

To facilitate the development and efficient operation of global supply chains, discussions should take place to set out rules to discipline export restrictions as explicitly as those governing import restrictions.

3.2) Areas not covered by WTO agreements

a) Investment

The issue of trade and investment was dropped from the DDA at the Cancun Ministerial.

It is becoming clear that not only investment protection but also investment liberalization is necessary.

No single country can persuade the governments of other countries to fix the problems in their investment regimes.

Establishing a common position on investment rules is essential.

Investment rules benefit not only developed members but also developing countries in need of inward foreign direct investment (FDI) and investment opportunities abroad (North-South, South-South, South-North investment).

b) Competition

Trade and competition was also dropped from the DDA at the Cancun Ministerial.
Competition rules are useful, for example, in disciplining the anti-competitive practices of state-owned enterprises (SOEs) and oligopolistic suppliers in certain areas as well as dealing with discriminatory export controls.
Regarding SOEs, serious discussion should take place first on their definition and the disciplines governing them.

c) E-commerce
Issues related to MFN, national treatment (NT), market access (MA), and intellectual property right (IPR) protection in e-commerce are undoubtedly the area where collaboration among the like-minded countries can produce meaningful results for business around the world.

d) Preferential rules of origin
The harmonization of non-preferential rules of origin is covered by the DDA but is not progressing well because of their multi-faceted nature (e.g., statistics, trade remedies, quota management, etc.).
Preferential rules of origin are not covered by the DDA.
As the first step toward eliminating the spaghetti bowl effect of preferential rules of origin, collaboration should take place within the ISCA framework to lessen the burden on business.

3.3) Others
a) Capacity building and technical assistance
In order to enable wider participation, collaboration for capacity building and technical assistance is essential.

b) Collaboration in analyzing global supply chains
As in the case of the WTO/Institute of Developing Economies–Japan External Trade Organization (IDE–JETRO) study on global value chains, participating members must collaborate to deepen their common understanding of changes in value chains and trade in tasks.