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## Trade Conflict, Governance and WTO Working Practices

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## Trade Conflict, Governance and WTO Working Practices

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### DISCUSSION DRAFT—TO BE REVISED

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**Abstract:** *The WTO is under increasing stress, in part because its working practices have impeded its ability to perform key functions: supporting rule-making, ensuring transparency and resolving trade disputes. All three functions are needed to govern two types of measures: policies that distort competition by favoring national firms; and policies that regulate production and/or consumption to address market failures and global externalities. Open plurilateral agreements offer an avenue for revitalizing the ability of the WTO to perform its functions, although they need to be complemented by reform of WTO working practices in order to address the major sources of trade conflict.*

### Introduction

The stylized facts of the shifts that have occurred in the world economy are well known. High sustained economic growth in many developing countries has greatly increased their global trade share, driven in part by international FDI flows and technological and organizational changes that allow ever finer specialization. The multilateral trade regime provided a supporting framework for these trends. The role of the trade regime is perhaps most closely associated in the mind of the public in the case of China, with accession to the WTO helping to anchor its re-integration into the global economy. The competitive pressures associated with rebalancing of global income shares have led to perceptions that emerging economies' successes are based in part on unfair trade practices that are not adequately covered by WTO rules and disciplines. Concerns are particularly acute for activities of state-owned or controlled companies and industrial policies targeting new technologies. Although China is the primary focal point in this regard, other countries also have economies where State influence or control is substantial.

Rising use of a variety of protectionist measures by many countries around the world call for multilateral cooperation to establish or bolster rules of the game in a number of policy areas, including not only measures that are alleged to distort competition but also for domestic regulation of data privacy, cross-border data flows and trade in services and digital products. Agreeing on disciplines for policy instruments that affect competition on markets – including subsidies or fiscal incentives to attract or retain investment – is not a new challenge for the trading system but one that has become more urgent. Meeting the challenge requires deliberation supported by analysis of the negative spillover effects of specific policies, and approaches that are informed by the weaknesses and failures that helped lead to the current breakdown in cooperation. It is important to recognize that this is not just a “China issue.”

A basic purpose of the WTO is to provide a platform for countries to agree on rules for trade-related policies that create adverse international effects and to support their implementation. This has not been happening. The WTO has been stuck in a rut for much of the past decade, with many developing countries arguing that the Doha round agenda defined the work program for the organization and that Doha negotiations needed to be completed before new issues could be

addressed. This, in conjunction with concerns over weak compliance by many members with notification requirements, and long-standing US dissatisfaction with the WTO dispute settlement mechanism are all factors motivating unilateral recourse to trade measures by the US against China and its decision to block new appointments to the Appellate Body.

The absence of proactive and constructive deliberation in the WTO on where and how to update the rules of the game for industrial policies and domestic regulation, countries seeking to strengthen trade governance have negotiated preferential trade agreements (PTAs). Modern trade agreements encompass disciplines on policies affecting trade in services, protection of intellectual property rights, and dimensions of foreign investment as well as provisions on domestic regulation, reflecting concerns that trading partners adopt health, safety, labor or environmental regulations similar to those of the home country and that align with international norms (e.g. Dür, Baccini, and Elsig, 2014). Large players such as the EU or the US have sought to “export” their preferred regulatory norms to trading partners by linking preferential access to their markets to commitments by partner countries to address perceived negative regulatory policy spillovers (Lavenex, 2014; Young, 2015). The initiative by the US to negotiate the Trans-Pacific Partnership (TPP) and the parallel effort to conclude a Transatlantic Trade and Investment Partnership (TTIP) was in part driven by a desire to establish what the rules should be in areas where WTO rules are regarded to be inadequate.

The utility of PTAs in addressing perceived global policy spillovers has been limited. In part this is because of US withdrawal from the TPP and the decision by the Trump Administration to halt TTIP talks with the EU. More important is that many of the (nontariff) policies that are the source of trade conflicts require cooperation (agreement) between all the large trading powers – including emerging economies. PTAs offer only an imperfect and partial solution in disciplining on trade-distorting policies given that large emerging economies have not been willing to participate in deep PTAs that include disciplines on investment, competition, industrial and regulatory policies. Any agreements to extend and update existing multilateral disciplines in such areas must span all large trading economies to be meaningful in attenuating trade tensions.

Many of the policies that give rise to trade tensions have been the subject of long-standing multilateral rule-making efforts and are at least in part already subject to WTO disciplines. Examples include agricultural support policies; tariff escalation that constrains developing country firms from moving up the value chain; tax incentives to attract export-oriented FDI and the use of subsidies to support local production. Subsidies and measures with equivalent effect (e.g., tax concessions and rebates) accounted for about one-half of the 10,000+ trade-distorting actions imposed by G20 countries between 2009 and 2018 (Evenett and Fritz, 2018). While the rapidity and magnitude of Chinese economic growth and perceptions that the role played by State-owned enterprises and the extent of its industrial policies call for action to ensure there is a level playing field, it is important to recognize that the challenges confronting global trade governance extend beyond China. There is a broader agenda centering on governance of the digital economy, cross-border data flows and trade in services, and the use of industrial and technology policies that raise systemic, national security, competition and distributional concerns.

Sustaining and further deepening international cooperation to deal with such policy areas requires overcoming the constraints that have impeded the WTO from addressing trade tensions. US pressure on the WTO has stimulated discussion of WTO reform and the underlying reasons for the weak performance of the WTO in performing its functions. In parallel, WTO members have turned to

plurilateral agreements. Examples are the Information Technology Agreement; the effort to negotiate a Trade in Services Agreement (TiSA); talks on an Environmental Goods Agreement and the decision of many WTO members at the 2017 Ministerial Conference in Buenos Aires to launch plurilateral discussions on four subjects: (i) policies to assist micro, small and medium-sized enterprises (MSMEs); (ii) e-commerce; (iii) investment facilitation; and (iv) domestic regulation of services. WTO members that joined these groups demonstrated that consensus cannot be used to prevent groups of countries discussing issues of common interest.<sup>1</sup> These initiatives are a concrete response to the WTO deadlock and reflect a clear desire by many members to move forward and discuss non-Doha issues. Plurilateral initiatives may lend themselves better to addressing policy cooperation challenges than PTAs or broader multilateral trade negotiations that span all WTO members. Cooperation among groups of WTO members on an issue-specific, incremental basis offers a partial solution to the challenge of furthering trade cooperation and the current malaise in international (multilateral) cooperation. At a minimum, it provides a mechanism for groups of countries to engage on matters of interest to them and determine whether there is potential scope to cooperate.<sup>2</sup>

The plan of paper is as follows. Section 1 briefly describes the rising use of trade-distorting policies to illustrate the point that there is a broad agenda that extends beyond the US-China trade war and the disagreement on the operation of the Appellate Body. Section 2 discusses the deadlock that has prevailed in the WTO and that to some degree is a factor that has led to resort to unilateral trade policies and the pursuit of PTAs. Section 3 argues that open plurilateral agreements (OPAs) are an important dimension of revitalizing multilateral cooperation and presents a framework to help understand where OPAs may be useful to internalize policy spillovers. Section 4 concludes.

## **1. Rising use of trade-distorting policies**

WTO trade policy review reports and the Global Trade Alert document the fact that many measures have been imposed by governments since 2009 that potentially distort trade. The trend is worrisome, both in terms of the number of new measures each year and the share of total imports affected (Evenett and Fritz, 2018). Emerging economies, Germany and the United States have been the most prolific users of trade policy instruments in the post-2008 period. Other countries have been more restrained, but the trend is upwards in many countries. China is a prominent target of the countries that are the most intensive users of these policies (Figure 2).<sup>3</sup>

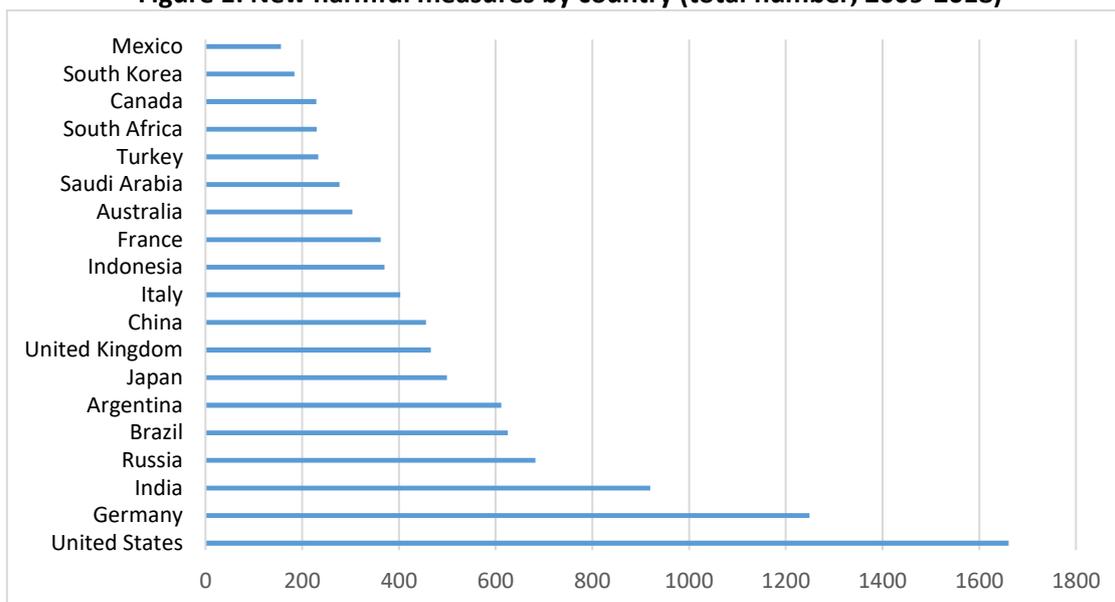
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<sup>1</sup> Participation in these groups spans a broad cross-section of the membership. The EU participates in all four groups. The US is part of one (e-commerce). China was a sponsor of three of the four groups – it decided not to join the group on e-commerce. India as well as many African countries decided not to be part of any of the groups. Independent of whether a WTO member is a sponsor/supporter of a group, deliberations of the groups are open to all. China, for example, reportedly is an active participant in the discussions on e-commerce (interview with WTO official, October 4, 2018).

<sup>2</sup> The feasibility of countries forming groups to cooperate and accept free riding by non-participants has long been a subject of analysis in international relations. See e.g., Schelling (1978) and Snidal (1985).

<sup>3</sup> In recent years China-related cases have also accounted for most of the disputes brought to the WTO by the four largest trading powers against each other (Wu, 2016).

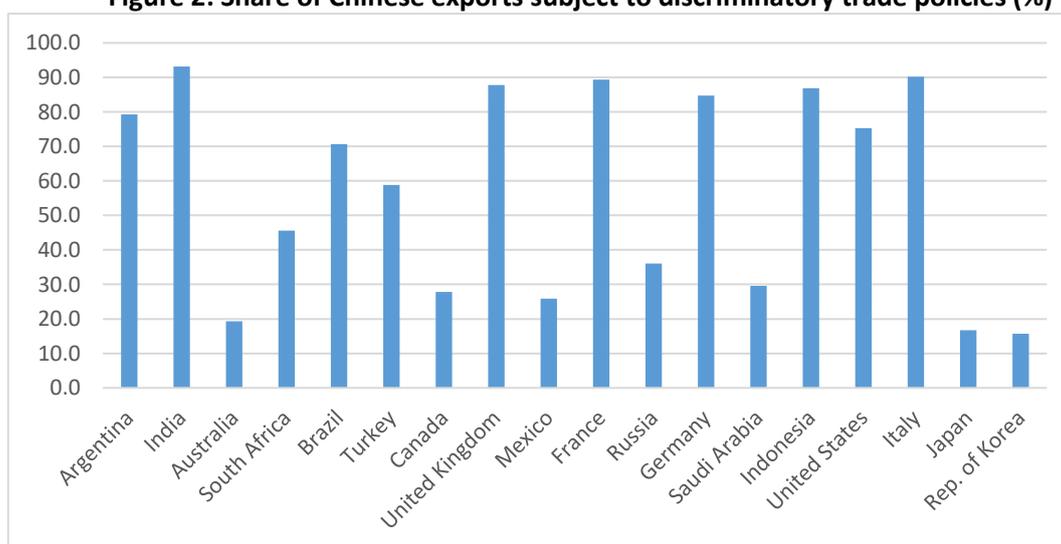
**Figure 1: New harmful measures by country (total number, 2009-2018)**



Source: Adapted from Evenett and Fritz (2018; Figure 9.1).

Most of the policy instruments used are non-tariff measures. About half of all measures imposed by governments since 2009 take the form of subsidies of some type or support exports (Figure 3). These are only partially covered by WTO disciplines. The same is true for measures such as public procurement and investment incentives. The data suggest WTO members need to engage in a deliberation on addressing the spillover effects of both trade policy instruments that featured on the Doha round agenda – tariffs, other border barriers and agricultural support measures – and those that were not central to the Doha round talks – notably different forms of subsidies for investment, production and exports.

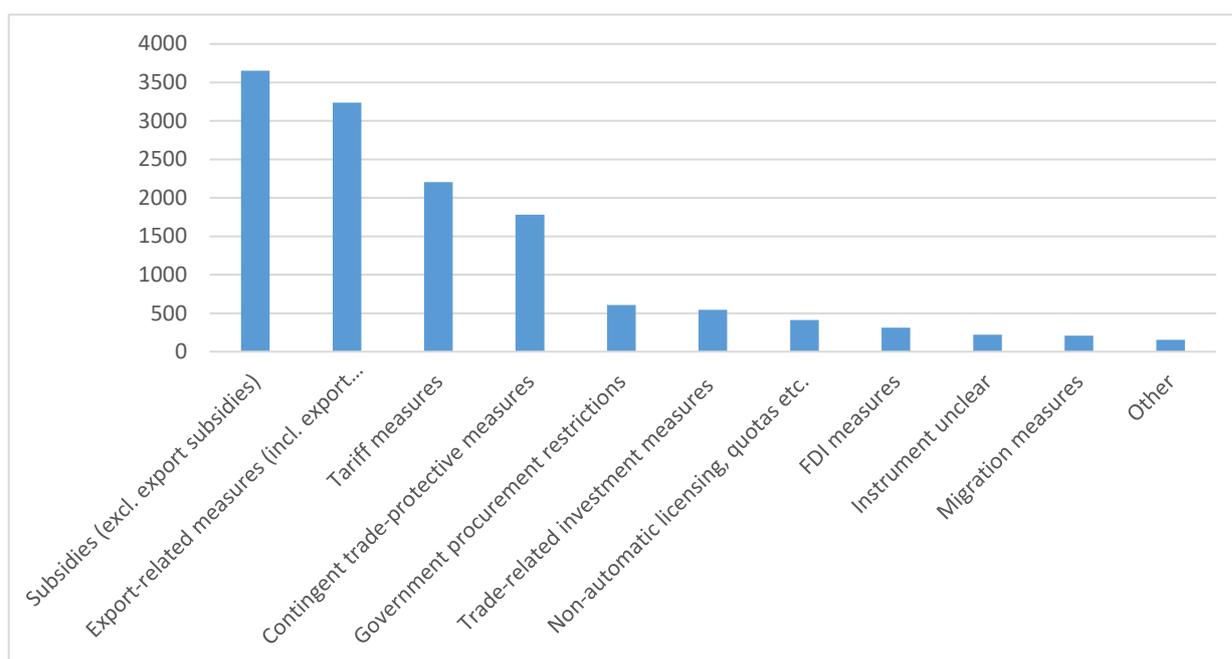
**Figure 2: Share of Chinese exports subject to discriminatory trade policies (%)**



Note: Data on the share of trade affected by measures are adjusted by the number of days an intervention has been in force. Data encompass the 2009-2018 period.

Source: Evenett and Fritz (2018; p. 38, Table 7.1).

**Figure 3: Use of Policy Instruments (total number of measures, 2009-2018)**



Source: Global Trade Alert database.

Of increasing salience are policy measures affecting trade in digital products and services. Cross-border digital transactions are growing rapidly. A recent effort to assess the policy stance of countries towards digital trade by Ferracane, Lee-Mikayama and van der Marel (2018) reveals great variation in the extent to which countries implement policies that inhibit digital trade, but documents a rising trend, with large emerging economies maintaining more restrictive policies than other nations. Many of the policies concerned are only partially covered by WTO agreements. More generally, restrictions on trade in services are often high (Borchert, Gootiiz and Mattoo, 2014). To date, the WTO has done little in these policy areas, reflecting the priority given in the Doha round to policies distorting trade in goods – a decision that arguably was a factor undermining the negotiations.<sup>4</sup> In the case of e-commerce and internet-enabled transactions, WTO members have periodically committed not to impose customs duties on electronic transmissions, but little progress has been made on rules of the road for domestic regulation that negatively affects the efficiency of the digital economy and the ability of foreign firms to provide services. As the world economy becomes ever more interconnected through the “Internet of things”, e-commerce and cross-border trade in services and data flows, cooperation on policies that affect the digital economy will become more important for firms and consumers.<sup>5</sup>

<sup>4</sup> One consequence of the decision to sequence the negotiations to put agriculture and non-agricultural market access issues first, little attention was given to services, reducing the incentives for firms accounting for most employment and economic activity in higher-income countries to lobby for a Doha Round outcome, including on agriculture. This led a subset of countries to decide in 2013 to engage in negotiations to establish a Trade in Services Agreement (TiSA) outside the WTO. These talks made substantial progress in developing an expanded set of rules for services policies but were put on hold in 2017 by the Trump administration.

<sup>5</sup> As discussed below, this situation changed in 2017-18 with the decision to proceed with plurilateral talks on e-commerce and domestic regulation of services.

## 2. Repercussions of WTO deadlock

Structural transformation driven by technological change has been and will continue to be a major force affecting labor markets, helping to generate political opposition to trade agreements and the WTO as visible embodiments of globalization. Concerns about safety, sustainability or social conditions in workplaces producing imported goods as part of complex international value chains, and worries about the transmission of intangible products through global information and telecommunications networks are becoming more prominent. The trade agenda increasingly centers on rules of the road to provide firms and consumers with credible assurances that foreign products and producers satisfy domestic regulatory requirements and norms. As noted previously, the WTO is not delivering such rules. The core negotiation, transparency, and conflict resolution functions of the organization are not functioning effectively, undermining the ability of the organization to fulfill its mandate.

- WTO members failed to conclude the first round of multilateral trade negotiations launched under WTO auspices in 2001, the Doha Development Agenda. To date, Members have not been willing to discuss a new work program for the organization that spans both outstanding 'Doha subjects' such as agricultural support policies and matters that are not on the Doha agenda but that are giving rise to trade tensions or that call for cooperation.
- Since 2017, deadlock on the negotiation front has been complemented by the refusal of the US to accept new appointments to the WTO's appeal court, the Appellate Body, threatening the dispute settlement function of the WTO.
- Many WTO members are not living up to their notification commitments, reducing transparency of policy and impeding the effectiveness of many WTO bodies in overseeing implementation of WTO agreements.

As discussed at greater length in Bertelsmann (2018), the weak performance of the WTO in part is due to its working practices, notably (i) consensus-based decision-making and (ii) special and differential treatment (SDT) of developing countries. Consensus has permitted WTO members to veto initiatives and block efforts that go beyond the issues agreed to comprise the Doha Development Agenda. SDT means that advanced developing countries can offer less than full reciprocity in trade negotiations and refrain from fully applying some WTO rules. Traditional SDT is no longer acceptable to many higher-income countries, notably the US, but not only the US. Conversely, many developing countries take the position that SDT is a vital feature of the WTO to which they attach great importance.

Consensus is primarily a practice and not a formal rule – voting is possible in principle but does not occur, reflecting a widely held view this would undermine the legitimacy of WTO decisions.<sup>6</sup> Countries large and small rely on the consensus practice as a guarantee that the results of

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<sup>6</sup> Some WTO provisions specify consensus as the decision-making rule, e.g., Art. X:9 on amendments to include new Annex 4 Plurilateral Agreements. Art. IX WTO specifies that if voting occurs, unanimity is required for amendments relating to general principles such as non-discrimination; a three-quarters majority for Interpretations of provisions of the WTO agreements and decisions on waivers; and a two-thirds majority for amendments relating to issues other than general principles. Where not otherwise specified and consensus cannot be reached, a simple majority vote suffices. Art. X provides that a member cannot be bound by a vote on an amendment that alters its rights or obligations and that it opposes. In such instances, the Ministerial Conference may decide to request that the member concerned withdraw from the WTO or to grant it a waiver.

negotiations are acceptable to them, ensuring the ‘ownership’ of the WTO by members and their polities. This positive aspect of consensus decision making is offset by its use to block activities that have nothing to do with negotiations, such as setting the agenda of committee meetings or proposals to discuss trade policy-related matters not covered by a WTO agreement or not part of the Doha Development Agenda. This matters because several policy areas that are central to current trade tensions – such as the effects of industrial subsidies in third markets, tax competition and the behavior of SOEs – were not part of the Doha round.

The unilateral protectionist actions by the US government in 2017-18 and its decision to block appointments to the Appellate Body until its concerns with its operation are addressed have raised the stakes. The pursuit of ‘America first’<sup>7</sup> policies by the Trump Administration as reflected in global safeguard actions against imports of washing machines and solar panels, national security-motivated import restrictions on steel and aluminum and tariffs on a broad range of imports from China in “retaliation” for alleged unfair trade practices have led to retaliatory actions against US exports.<sup>8</sup> In reaction to the countermeasures, the US initiated a national security investigation on imports of automobiles, a major export item for the EU (Germany). Talks between the US and China and between the US and China may resolve tensions in 2019, but absent agreement there is a serious threat of escalation, with associated detrimental implications for the world economy.

The Trump Administration has made clear that it eschews multilateral cooperation – reflected in 2017 decisions to withdraw from the Trans-Pacific Partnership (TPP), halt the TTIP and TiSA negotiations and statements by the President that the WTO was “the single worst trade deal ever made.”<sup>9</sup> Most of the engagement of the US today is through bilateral or trilateral channels. The EU is actively engaging with the US on a possible bilateral trade agreement and is engaging with Japan in a trilateral effort focused on common concerns regarding China’s industrial policies. At the same time WTO members have challenged the legality of some of the protectionist measures imposed by the US – notably the Sec. 232 measures to increase tariffs on steel and aluminum imports on national (economic) security ground. Many countries have also responded to US unilateralism by ramping up efforts – most of which were already under way or planned – to conclude trade agreements with each other as a means of improving the governance of trade relations and expanding cooperation to new policy areas that affect the ability of firms to compete.

Progress on rule making and conflict resolution requires agreement between the major proponents: China, the EU, Japan and the US. All four entities have engaged in bilateral discussions, with the EU, Japan and the US in addition launching a trilateral process to identify ways to strengthen disciplines of subsidies, state-owned enterprises and technology transfer policies.<sup>10</sup> A necessary condition for meaningful outcomes is that engagement becomes quadrilateral. There is no magic bullet: the key players need to negotiate with each other, with whatever is agreed applied on a most-favored-

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<sup>7</sup> See e.g., Vangrasstek (2019).

<sup>8</sup> Bown and Zhang (2019) provide a synthesis of US trade measures imposed by the Trump Administration during 2017-18. Countermeasures introduced by the EU affect US exports of cereals, juices, tobacco, apparel, iron and steel products, motorcycles and boats. The EU also launched a safeguard action to prevent diversion of steel from the US to the EU.

<sup>9</sup> <https://www.bloomberg.com/news/articles/2018-08-30/trump-says-he-will-pull-u-s-out-of-wto-if-they-don-t-shape-up>

<sup>10</sup> See, e.g., Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union, 9 January 2018. At: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/january/joint-statement-trilateral-meeting>.

nation basis. At the time of writing it is quite uncertain whether a quadrilateral agreement will emerge. The same applies to the dispute on the operation of the Appellate Body, which will cease to function at the end of 2019 when two of the remaining three sitting members reach the end of their mandate unless a deal is reached. In the absence of a deal, many WTO Members may agree to adopt arbitration or engage in a vote on filling the vacant seats, but such stop gaps will be very much second best.<sup>11</sup>

Generating the foundation for stronger cooperation requires revisiting WTO operating modalities to increase the scope for identifying where gaps in rules exist and bolster review of the operational performance of WTO bodies, including dispute settlement and the Appellate Body. The decision by groups of WTO members to engage in plurilateral discussions and negotiations is a positive development and offers some hope that the WTO can remain a relevant locus for trade cooperation. Plurilateral engagement is of course nothing new but mostly this has taken the form of exclusionary PTAs. The shift to plurilateral negotiations in the WTO context offers a prospect for open, nondiscriminatory cooperation on different types of trade-related policies. The move to plurilateral initiatives by itself can only be a partial solution to making the WTO more salient. Parallel efforts to enhance transparency, revisit the approach taken in the WTO to reflect differences in economic development levels and to review the performance of WTO bodies, including the conflict resolution mechanism are needed as well. Possible approaches to this effect are discussed briefly in Section 4. Addressing the conflict on the operation of the DSU and Appellate Body is a necessary condition for the WTO to be effective, not least because a functional dispute resolution mechanism is a precondition for agreeing to new rules for a given policy area.

The near-term prospects for agreement on one of the key factors constraining the WTO – revisiting the approach to economic development – are limited. Major differences in views exist on the need for special and differential treatment for any country characterizing itself as developing. As discussed in Section 4 below, this is probably not as binding a constraint as it sometime made out to be. Much has already been achieved in terms of revisiting how economic development differences are recognized and addressed in the WTO.<sup>12</sup> More important is the consensus working practice which allows WTO members to act as veto players in the pursuit of cross-issue linkage strategies. This makes successful pursuit of plurilateral approaches a critical element of revitalizing cooperation under WTO auspices. An important question in this regard is how much can realistically be done through cooperation that is limited to plurilateral cooperation. What types of issues could be addressed? To what extent do plurilateral initiatives lend themselves to resolving key trade tensions and sources of trade conflict? The larger the potential range of issues where plurilateral approaches can be used to address trade tensions, the better the prospects for the WTO to be the locus for trade cooperation.

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<sup>11</sup> Absent a resolution of the dispute on the operation of the Appellate Body, conflict resolution will revert to the pre-WTO situation in which panel reports are adopted only if the losing party agrees with the panel's findings. See Hillman (2018), McDougal (2018) and Sacerdoti (2017) for discussion of both the dispute on the Appellate Body and suggestions that have been made to respond to/resolve the conflict regarding the operation of the Appellate Body.

<sup>12</sup> This is reflected, for example, in stronger linkages between the WTO and international development agencies through the Aid for Trade initiative and the 2013 Agreement on Trade Facilitation (TFA), which embodies an innovative approach to recognize capacity differentials and differences in priorities across countries.

### 3. Open plurilateral agreements: a partial solution to sustaining cooperation

International trade cooperation can take different forms, including multilateral trade agreements that span all WTO members, PTAs among a small set of countries and issue/policy-specific agreements. The latter may be embedded in PTAs or they may be stand-alone, i.e., independent of a trade agreement. PTAs are permitted by the WTO if signatories liberalize substantially all trade in goods (Art. XXIV GATT) and/or remove substantially all discrimination against each other's providers of services across a broad range of sectors (Art. V GATS). Issue-specific agreements are permitted under two circumstances. First, if they apply on a nondiscriminatory basis. These are so-called critical mass agreements (CMAs), where a group of countries agrees to policy commitments that are applied to all WTO members. Second, if they apply on a discriminatory basis to signatories only and all WTO members agree by explicit consensus to accept that participating countries can include the agreement as a new Plurilateral Agreements (PAs) in Annex 4 of the WTO (Art. X:9 WTO).

All three approaches – PTAs, CMAs, and PAs – have commonalities with each other.<sup>13</sup> The main goal is to enhance access to markets by disciplining the use of specific trade policy measures that favor national (domestic) firms or industries. All focus on improving access to foreign markets, i.e., in addressing negative pecuniary spillovers created by foreign policies or lack of policies. These policies may be classic discriminatory trade policies such as tariffs that create a wedge between prices of foreign and domestically produced goods. Alternatively, they may be domestic policies that act to impede market access. In principle, all three instruments can be used to support cooperation on policies that do designed to protect or assist domestic economic operators. An example are agreements on product standards. All involve binding commitments, with enforcement taking the form of (re-)imposition of trade restrictions. If a country does not implement the findings of the dispute resolution process, complainants can impose trade retaliation. Thus, in all cases there is “enforcement linkage” to market access carrots and sticks.

PTAs have four salient characteristics. First, they liberalize access to markets through a process of reciprocal exchange of trade policy concessions. Second, they rely on the national treatment principle to prevent ‘concession erosion’ through substitution of domestic policies for trade policies. Third, and related, provisions on nontariff measures (NTMs) reflect a desire to facilitate trade (reduce trade costs) and not aimed at improving the efficacy or efficiency of national regulation. Fourth, they are self-enforcing: the threat of withdrawal of market access commitments is the mechanism to sustain cooperation, whether what is at issue are trade policies or domestic regulation-related commitments.

CMAs are a specific type of trade agreement where the focus is on a specific policy instrument and disciplines are negotiated among a subset of interested WTO members that apply only to those that sign on to them, but benefits are extended on a most-favored-nation basis to all WTO members. A key feature of CMAs is that they are open – the presumption is that any WTO member can participate if it desires to, whether as part of the group that initially agrees to pursue cooperation on a matter, or after the establishment of an agreement. Because CMAs are implemented on a nondiscriminatory basis they do not require consensus to be incorporated into the WTO – those members that decide to join a CMA can simply inscribe its provisions into their GATT and/or GATS

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<sup>13</sup> The term plurilateral is sometimes used to describe all three of these possibilities in the literature, giving rise to potential confusion. In this paper the term Plurilateral Agreement (capitalized) is restricted to Annex 4 WTO agreements.

schedules of commitments, as appropriate (Hoekman and Mavroidis, 2017). The main example of a CMA is the Information Technology Agreement (ITA). This abolishes tariffs on information technology products. The ITA has 82 participants, including the 28 EU member states, and has increased global trade substantially in electronic products.<sup>14</sup> CMAs have also been concluded for services sectors – an example is an agreement on basic telecommunications that was appended as a protocol to the GATS in 1997, which includes a so-called Reference Paper that establishes specific regulatory disciplines that signatories commit to apply to all WTO members.<sup>15</sup> Negotiations on a possible Environmental Goods Agreement spanning the EU and 17 other WTO members are an example of an ongoing critical mass negotiation.<sup>16</sup>

Plurilateral Agreements are similar to CMAs in that they apply only to WTO members that sign them and in principle are open to all WTO members. They differ from CMAs in that the benefits of PAs can be limited to signatories. The main example of a PA is the Government Procurement Agreement (GPA). The bar for adoption of discriminatory PAs is very high, as consensus allows any one member to block the inclusion of a new PA negotiated among a group of WTO members. Given the need for consensus to adopt new PAs into the WTO, in practice new issue-specific agreements will need to take the form of a CMA.

The choice of whether to pursue a PTA, a CMA or a PA will be determined by many factors. Abstracting from foreign policy and security objectives, which can be a key driver of pursuit of regional integration (PTAs), the potential for free riding and the need for cross-issue linkages to sustain cooperation are two key factors determining what type of agreement will be feasible. If free riding constraints bind, cooperation will need to be either a closed club – a PTA or a PA – or span a large enough number of countries to permit a CMA. If cooperation on an issue does not satisfy the Pareto criterion (no country is made worse off) or there are complementarities or substitutability across policy instruments, issue linkage (package deals) may be necessary.<sup>17</sup>

PTAs and PAs are instruments that prevent free riding. In both cases, WTO rules impose constraints that limit opportunistic behavior and outcomes that harm non-signatories. In the case of PTAs, the constraint is that integration must be far-reaching in the sense of spanning substantially all trade – i.e., countries are not permitted to cherry pick specific sectors for discriminatory liberalization. In the case of PAs, which by design are both issue-specific and discriminatory, the constraint is that all WTO members must agree to the formation of the PA, i.e., that it is not detrimental to them. If free-riding is a concern and a PA is perceived to be unlikely to be approved, cooperation either must span a critical mass of countries to permit nondiscriminatory application of what is agreed or go down the PTA route.

PTAs differ from CMAs and PAs in that they span multiple issues that are bundled into a package. This is also the case for multilateral trade negotiations (MTNs) such as the Doha Development Agenda and the Uruguay round that gave rise to the creation of the WTO. Such packages involve a mix of negotiation, enforcement and participation linkage (Maggi, 2016). The first of these involves negotiating two or more issues in one agreement, with the possibility of trade-offs across issues, the

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<sup>14</sup> See Gnutzmann-Mkrtchyan and Henn (2018) for estimates of the global trade impact of the ITA.

<sup>15</sup> Eighty-two WTO members have signed the Reference Paper. See [https://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/telecom\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm).

<sup>16</sup> Negotiations commenced in July 2014. See [https://www.wto.org/english/tratop\\_e/envir\\_e/ega\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/ega_e.htm).

<sup>17</sup> Complementary relationships may arise if the net welfare effects of trade liberalization depend in part on the quality of national regulation and governance. See e.g., Freund and Bolaky (2008) and Beverelli et al. (2017).

goal being to conclude one agreement – a package deal. Given agreement, enforcement linkage involves action in one issue area to enforce compliance with commitments in another (cross-retaliation). Participation linkage comprise situations where the threat of sanctions in one area is used to induce participation in an agreement addressing another policy area. All three types of linkage fall under the broader concept of conditionality – making cooperation in one area a condition for cooperation in another.<sup>18</sup>

Cross-issue linkages are a central feature of PTAs and MTNs. Cross-issue linkages are needed when policies are not separable, i.e., policies either can substitute for each other or they are complements so that addressing one area enhances the payoffs of cooperation in another. For example, NTMs can substitute for tariffs and specific types of NTMs may be substitutes for each other (e.g., a restrictive product standard may substitute for an import quota). If there are structural interactions between issue areas, linkage may be needed to allow cooperation (e.g., Spagnolo, 2001; Conconi and Perroni, 2002; Limão, 2005). In principle, issue linkage can increase potential overall gains, but as demonstrated by the Doha round, crafting a negotiating agenda that does so can be difficult. In the case of domestic regulation, cross-issue linkages may not be needed – and indeed, may make cooperation more difficult to achieve – because the payoffs to cooperation in a regulatory area generally are independent of what governments may or may not do in other policy areas. That is, the policy area is separable. In such cases there is no need to tie cooperation to market access – i.e., to engage in what Maggi (2016) calls enforcement linkage.

In considering the scope to pursue different types of trade cooperation under the umbrella of the WTO countries need to determine whether agreements will require cross-issue linkages to be feasible and whether free-riding constraints apply and, if so, what constitutes a critical mass of participation that internalizes enough of the benefits within the participating group of countries. The top part of Table 1 characterizes the trade agreements and the associated type of spillovers/goals that have been pursued by WTO members to date – PTAs, CMAs and PAs. The common characteristic is that they involve reciprocal market access commitments. The bottom part of Table 1 presents an alternative type of cooperation where reciprocal market access commitments are not a factor, but access to markets is enhanced through agreement to cooperate on domestic regulation. Such open plurilateral agreements (OPAs) can take the form of harmonization, recognition of equivalence of standards or regulatory regimes, adoption of agreed good regulatory practices or a commitment to apply the standards of an importing jurisdiction for a specific sector or type of activity. Different examples of open plurilateral agreements are listed – they illustrate the scope that may exist to expand this type of cooperation under the umbrella of the WTO. The 2013 TFA, the first new multilateral agreement negotiated in the WTO is an OPA that spans all WTO members.

An important question is how much more can be done through OPAs. This will depend on the types of issues discussed above, notable whether free-riding is a constraint, issue linkage is needed to obtain agreement and whether enforcement linkage is needed to sustain cooperation.

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<sup>18</sup> Conconi and Perroni (2002) contrast this notion of conditionality with a separation rule, in which there are explicit prohibitions on using sanctions in a given area to induce (enforce) cooperation in another.

**Table 1 Alternative Instruments for Cooperation**

	Main issue	Approach	Type of spillover	Characteristics of cooperation	
				MFN (critical mass)	Discriminatory (exclusive club)
<b>Trade agreements:</b> Binding State-to-State multi-issue package deals with fixed terms and binding, self-enforcing dispute resolution	<b>Market access</b> ("terms of trade spillovers")	Cross-issue linkage	Market access effects of discriminatory trade/industrial policies	Multi-issue multilateral agreements (E.g.: Uruguay Round)	Reciprocal PTAs (E.g. CETA, CPTPP, etc.)
		Enforcement linkage	Market access effects of domestic regulatory policies	Single issue, critical mass agreements (CMAs) (e.g. GATS Telecom Reference paper; ITA)	Issue-specific clubs (Art. II.3 WTO Plurilateral Agreements— e.g. GPA)
Type of cooperation	Main issue	Approach	Type of spillover	Characteristics of cooperation	
				MFN (unconditional application)	Open club (conditional application)
<b>Open plurilateral agreement (OPA):</b> Open, non-binding (severable); issue-specific	<b>Regulatory heterogeneity</b> (e.g., product markets; competition policy)	No linkage or "within" issue linkage	Pecuniary or non-pecuniary spillovers	International product or process standards (e.g., Codex Alimentarius)  Identification of good regulatory practices (OECD, APEC)  WTO Trade Facilitation Agreement	Mutual recognition agreements  Regulatory equivalence regimes (BASA; EU adequacy regime (data protection);  Exporter commitments to apply importer country standards (EU Forest Law Enforcement, Governance and Trade regime)

**Notes:** BASA: bilateral air safety agreement (EU-US); CETA: Comprehensive Economic and Trade Agreement (Canada-EU); CPTPP: Comprehensive and Progressive Agreement on Trans-Pacific Partnership; GPA: Government Procurement Agreement; ITA: Information Technology Agreement.

### ***Market access and cooperation on domestic regulation***

OPAs are likely to be most salient in supporting cooperation on domestic regulation where the objective is to reduce market access (operating) costs for international firms associated with regulatory heterogeneity. If regulators can cooperate on a regulatory policy area pertaining to sector A by either adopting the same requirements or agreeing to accept the regime of another country as equivalent to their own, products or producers in sector A will benefit from lower compliance costs. To achieve such regulatory cooperation cross-issue linkage is not needed: cooperation instead revolves around “within-issue” linkage in the sense regulators determine what constitutes equivalence or adopt similar requirements. The absence of reciprocal market access liberalization commitments implies that a feature of OPAs is that sovereignty is safeguarded through severability. This allows for the ability to exclude countries (sectors, agencies) from the application of regulatory cooperation in cases where local circumstances or social preferences differ too much, or the ex ante mutually agreed preconditions for cooperation are not satisfied. Severability also helps provide assurances against the exercise of power and outcomes that can be legitimately criticized as not satisfying the Pareto criterion and undercutting sovereignty. Keeping the negotiation and enforcement linkages that are the basic modus operandi of trade agreements off the table precludes situations where powerful countries may seek, and poor countries may be willing to accept, bad package deals. Severability also may increase the scope for OPAs to serve as instruments to help countries achieve underlying regulatory goals more effectively and efficiently – e.g., by promoting exchange of information, through review processes and related learning from experiences of different regulators, or by supporting specialization and a division of labor across cooperating regulatory agencies.

Regulatory cooperation can of course also be part of the more traditional type of cooperation characterized in the top part of Table 1. One motivation for inclusion of regulation-related provisions in PTAs is to create incentives for regulators to consider the trade effects of national regulation. This has some salience insofar as regulators may not do so in the ordinary course of business. Trade agreements may be used to signal potential problems to the appropriate agencies that otherwise may not be brought forward. Trade agreements offer a mechanism for raising the profile of domestic regulation as a trade-relevant issue and creating platforms to facilitate/encourage interaction between regulators to consider the trade implications of regulation and regulatory proposals. That said, PTAs, CMAs and PAs arguably offer limited prospects for supporting regulatory cooperation to reduce the costs of regulatory heterogeneity for a given product, type of data flow or service. One reason is that enforcement linkage motivations may backfire. Recent PTA negotiations illustrate that there is limited appetite for binding dispute resolution for regulatory provisions of agreements. The CPTPP chapter on regulatory coherence is not subject to binding dispute resolution and this possibility was taken off the table by the EU in the failed TTIP talks (Hoekman and Sabel, 2019). Different systems are needed, based on transparency mechanisms (information collection, incident reporting, sharing of data, dialogue).

Cooperation that centers on identifying good policy practice may not need binding dispute settlement procedures where the ultimate sanction is the threat of withdrawal of trade concessions (retaliation). If a country no longer applies what was agreed to be good practice it makes no sense to respond by doing the same – both because this will at most have only a small effect on the trading partner and, more important, doing so will be costly as the practice by assumption is beneficial to

apply – otherwise it would not have been adopted in the first place. In situations where a party to an agreement decides no longer to apply an agreed practice the appropriate response is to assess the reasons for this decision. If it reflects political economy forces in the partner country driven by rent-seeking behavior by vested interests, this is not a reason to change one’s own policy. Alternatively, if the change can be justified as enhancing national welfare, there may be reason to revisit the presumption that the policy constitutes good practice. In principle, however, situations where a party comes to believe there is a better way of regulating should give rise to discussion between parties to an agreement.

Linking regulatory cooperation to market access commitments can make it more difficult to expand the scope and ambit of regulatory cooperation. Most PTAs do not have accession provisions. Accession by a new member will be conditional on acceptance of engaging in preferential liberalization of market access. This is a requirement of WTO rules: ‘substantially all trade’ must be covered by a trade agreement for it to be WTO-consistent. Countries that are primarily interested in regulatory cooperation will need to be willing to engage on market access, and in turn, existing members must accept extending access to their markets to new countries. They may not be willing to do so for geo-political or foreign policy related reasons. Thus, the PTA route is an inflexible one, even for PTAs that have an accession provision – such as the CPTPP – given the need for far-reaching market access commitments that have nothing to do with regulatory cooperation and acceptance of fixed package deal.

OPAs may span agreements where the benefits of cooperation are extended unconditionally on a nondiscriminatory basis as well as cooperation where benefits are applied on a conditional basis (see Table 1). Examples of the former include the TFA, which defines a set of good regulatory practices to facilitate trade that all WTO members have agreed to implement, with countries determining for themselves the timeline for implementation and having the ability to request technical assistance if needed. Other examples are collaborative efforts in fora such as the OECD and APEC to define good regulatory practices and agreement by countries to adopt these. They also include international collaboration to develop product and process standards in international organizations and inter-governmental bodies (ISO, UNECE, etc.).

Regulatory cooperation to facilitate trade can be applied on an MFN basis as it is insensitive to free riding considerations. Because the primary focus is on identifying policies that are in the self-interest of countries to implement, there is no need for cross-issue linkages. Indeed, efforts to link different issues may impede agreement by shifting the focus away from defining good practices towards quid pro quo bargaining that characterizes negotiations on subjects where changes in policies give rise to political costs for governments. Nor is it necessary that all major trading powers are part of an agreement. While wide membership increases overall benefits, all that is necessary for cooperation is that enough countries are part of the process to justify participation costs.

Of greatest relevance from a regulatory cooperation perspective are OPAs where benefits are conditional on joint engagement and action by the parties. Insofar as national regulation applies equally to domestic and foreign products or firms – e.g., product standards and sector-specific market regulation – regulatory heterogeneity across countries for the same product or sector will generate transactions costs for international firms (e.g., as a result of duplicative testing and certification requirements). The associated spillovers can be addressed through cooperation that is conditional in the sense that parties need to be able to determine and demonstrate that their

regulatory regimes satisfy certain ‘quality standards’. The conditionality will vary in intensity depending on the type of cooperation that is envisaged. It can range from low (MRAs that requiring satisfying minimum standards) to very demanding (a regulatory equivalence regime such as BASA). Countries that do not have regulatory frameworks and institutions that are good enough will not be able to benefit from mutual recognition let alone equivalence arrangements. This gives rise to a potential need for cross-issue tie-ins (Conconi and Perroni, 2002) to encourage greater participation over time. An example is the inclusion of provisions ensuring access to technical or financial (development) assistance that is a core part of the 2013 Trade Facilitation Agreement. It is important that credible support be made available to help countries that are not (cannot be) part of an initial arrangement join subsequently if they desire to put in place the required regulatory framework and capacity to implement it. Openness must be made meaningful through technical assistance and other aid to help countries participate and benefit.

### ***Supporting implementation and gradual multilateralization***

Parties to any OPA need information on whether and how provisions of agreements are implemented. The secretariat can provide monitoring or analytical services if requested by the OPA parties. Insofar as an OPA is not enforceable in the sense that trade agreements are – due to absence of market access linkage – OPAs dealing with regulatory cooperation will need to establish terms of reference for the adjudicative bodies that are called on to resolve conflicts relating to difference in views regarding whether an agreement has been implemented. OPAs can be expected to develop a jurisprudence clarifying the processes used by authorities in implementing an agreement. In practice such conflict resolution is likely to focus on processes as opposed to outcomes, requiring authorities to explain their reasoning in specific instances where implementation of an agreement is challenged. The associated exchange of views and more generally peer review and dialogue in the committees established to oversee the implementation of an OPA may help to broaden the range of approaches used to address disputes and conflicts.

The WTO is the apex organization supporting a rules-based multilateral trading system. Other international organizations that support regulatory cooperation are either sector-specific or not global in their reach and membership. APEC is regional and does not have a secretariat. The OECD has limited membership, with accession subject to substantial conditionality; de facto if not de jure it is closed to most developing countries. Pursuing OPAs under WTO auspices can become a means for gradual multilateralization over time of successful agreements. Multilateralization is not a strong feature of the forms of regulatory cooperation observed in PTAs, or the adequacy, recognition or equivalence regimes established on a unilateral or bilateral basis. In the case of adequacy, for example, it is up to the exporting country to establish that its data privacy regime meets the criteria and standards established in the relevant EU regulations or directives. There is limited two-way let alone multilateral exchange, review and learning that would be a feature of OPAs. The same is true for proposals that exporting countries commit to apply an importing country’s standards to firms located in its jurisdiction when they provide goods or services to consumers to another country, in exchange for a commitment by the government of the latter to provide market access (Mattoo, 2018). Greater use of the WTO as a platform for OPAs may support the expansion of extant regulatory cooperation initiatives that operate independent of the WTO to more countries.

OPAs can also help revitalize cooperation in areas that call for binding agreements to address the negative spillover effects of national policies. If OPAs are used for policy areas that give rise to

potentially significant terms of trade effects they need to address the free rider problem, i.e., all the major players need to participate. This implies that even conflictual policy areas such as subsidies and addressing concerns that state-owned enterprises distort competition on markets lend themselves at least to some extent to plurilateral cooperation. Thus, not all countries need to be part of a deal on such policies. If all the large countries participate, free riding by others is not likely to be a great concern – because small countries are unlikely to impose large systemic spillovers. A plurilateral approach that is limited to the main players can also allow experimentation. For example, when considering expansion of disciplines on subsidies arguably it is necessary to consider that subsidies can be an appropriate tool to address market failures or pursue social objectives. This greatly complicates writing down hard de jure rules. Instead, a focus on effects may be needed. The design of any rules and their implementation should be informed by an understanding of the underlying goals – as elucidated by the government using them – and neutral assessments of their effects (Hoekman, 2016b). Exploring new approaches may best be done in smaller groups.

Several concerns may be raised regarding OPAs as a basis for cooperation. One is that countries that decide not to participate will not have obligations but nonetheless may have an interest in what is agreed to constitute good practice. In part this is because they may want to participate later, and in part this is because their firms may have to comply with whatever policies are adopted by a plurilateral group. This concern can be addressed by ensuring that OPAs are truly open and fully transparent, and by including relevant international organizations and sectoral entities where appropriate and encouraging international standardization where feasible. This was also an element of the process of negotiating the TFA, which drew extensively on practices that had been the subject of extensive deliberation in the World Customs Organization. Another concern is that some countries will not be able to participate despite being interested in doing so because of weaknesses in institutional capacity and capabilities. This is a valid concern that can and should be addressed by proponents of OPAs including commitments and establishing mechanisms to assist countries to satisfy regulatory preconditions for participation.

#### **4. WTO reforms to support trade cooperation**

Although plurilateral cooperation offers a lifeline to the WTO, there is only so much that can be achieved through this track. The situation confronting the trading system today has parallels with the 1980s, which saw extensive recourse to trade-distorting measures in response to a rapid rise in exports from East Asian economies. This motivated a preparatory process that led to the launch of the Uruguay Round in 1986. A similar effort is needed today, aimed at resolving the trade conflicts that are of greatest relevance from a systemic perspective. Three areas are particularly important: (i) deepening cooperation to address international spillovers from national industrial policies; (ii) resolving the impasse on the functioning of the WTO dispute settlement system; and (iii) addressing disparities in capacity and economic development in a more meaningful way. These areas for action are inter-related – e.g., addressing the last two will determine the prospects for making progress on the first one.<sup>19</sup>

A key ingredient of progress on the first front is a common understanding of the size and incidence of the spillover effects of policies that are only partly, if at all, subject to multilateral rules. Distinguishing between policies that are of systemic importance and distort competition in a major

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<sup>19</sup> See Hoekman (2019) for a more complete discussion on possible reforms of WTO working practices.

way and those that do not requires information on applied policies and analysis of their effects. Deliberation to identify how best to attenuate major spillovers and what types of remedies can be effective to sustain cooperation also requires such information. Efforts to revisit and where needed reform WTO processes to generate more and better information and to do more to learn from experience through monitoring and evaluation and peer review arguably is important to support nascent plurilateral cooperation initiatives and the sustain and improve the quality of cooperation among WTO members more generally.

The blocking of new appointments to the Appellate Body by the United States that commenced in 2017 illustrates the need to do more to assess its performance and establish mechanisms to consider the validity of the concerns that motivate the US action. What has been lacking is a willingness by WTO members to engage in an open discussion on the performance of the system and to consider that reforms may improve the system. After more than twenty years there are lessons to be learned from the track record to date. Instituting a process for periodic deliberation by the WTO members to assess rulings of panels and the Appellate Body and permit them to clarify their intent could be an important mechanism to course correct on matters where all members agree this is necessary.<sup>20</sup> Resolving the Appellate Body conflict should be placed in the context of the broader challenge of improving conflict resolution procedures. Formal dispute settlements (litigation) is not the only way to resolve conflicts. Reducing the weight put on litigation by bolstering transparency and using other WTO bodies to discuss relevant policies may be another part of the solution (McDougall, 2018). WTO bodies offer a venue for governments to discuss concerns and find solutions without recourse to formal dispute settlement procedures – as has been done to good effect in WTO committees dealing with product regulation (Wolfe, 2018).

More generally, the shift to plurilateral cooperation in response to the “consensus constraint” calls for strengthening the ability and capacity of the secretariat to provide support to the membership – information and analysis. This is necessary to help members assess what subjects lend themselves to plurilaterals, identify the magnitude of negative spillovers and their systemic salience, determine what might constitute a critical mass in terms of participation, whether cross-issue linkages are needed (i.e., determine the negotiating set), and so forth. Such information would also help determine what type of cooperation could be considered – e.g., which of the different options in Table 1 could be pursued. Technical support is needed to assist WTO members interested in engaging in plurilateral discussions to determine the contours of agreements, help participants learn about the issues and possible approaches to cooperate in an area, and to provide information to all WTO members, including those that do not participate in discussions and have no immediate interest in joining an eventual agreement. Putting together and disseminating information and assuring the transparency needed to make openness meaningful is an important service the Secretariat can supply.

A factor underlying the difficulties experienced in using the WTO as a platform for negotiations to update the rulebook is insistence by many developing countries on SDT: less than full reciprocity in trade negotiations and acceptance that developing nations should be less constrained in the use of

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<sup>20</sup> An example where such a correction arguably would have been appropriate is the WTO case law on global safeguards. The Uruguay Round Safeguards Agreement was designed to make safeguard actions easier to use as a quid pro quo for stronger disciplines on less transparent and more distortive voluntary export restraints and similar measures. Appellate Body rulings made global safeguards more difficult to use than was envisaged by the negotiators of the Agreement on Safeguards (Sykes, 2006).

trade policies than high-income countries. A central feature of SDT is that it applies to all developing countries. The WTO does not define what constitutes a developing country, leaving it to members to self-determine their status. Outside the group of 47 (UN-defined) LDCs, the only distinct group of developing countries formally identified in the WTO, there are no criteria that allow differentiation between developing countries. This has become a major bone of contention – and indeed has been for a long time. Periodic suggestions or efforts to consider adoption of criteria to differentiate between countries and determine when graduation should occur have been rejected repeatedly.

That said, it should be recognized that notwithstanding the rhetoric by opponents and proponents of traditional SDT, the building blocks for a more differentiated approach towards addressing economic development disparities are already largely in place. In practice differentiation has been negotiated on an issue-specific basis. An important example is the classification of developing countries based on per capita GDP and export competitiveness in Article 27 of the Agreement on Subsidies and Countervailing Measures. Other examples include the negotiating texts that were on the table in the Doha round on agricultural and non-agricultural market access, and the flexible approach taken in the TFA towards scheduling of commitments by developing countries and the opportunity it offers for developing countries to link implementation to technical assistance. The TFA experience suggests an issue-by-issue approach aimed at building a common understanding on what types of policies make sense (constitute good practice) is in principle feasible.

## **5. Concluding remarks**

The success of the multilateral trade regime in the post-Second World War period was attributable in large part to US leadership and the fact that the organization was dominated by broadly like-minded countries. Today, the US continues to participate actively in the normal WTO committee work, but it is casting itself in a different role than it has in the past, calling for WTO reform and contesting the operation of the Appellate Body. It laid out its view of key elements of a reform agenda at the 11<sup>th</sup> WTO Ministerial Conference in Buenos Aires in 2017, stressing better compliance with WTO obligations, greater differentiation among developing countries, and action to ensure that litigation is not used as an alternative to negotiation.

The European Commission and the United States have tabled specific ideas to modernize the WTO, some of which have been developed in cooperation with like-minded WTO members. Canada is leading a group of countries interested in supporting WTO reform, including strengthening of the normal work of the organization (the committees). The EU, Japan and the US have launched a trilateral effort to identify ways of bolstering multilateral rules on subsidies and technology-related policies. These are positive developments. For them to make a difference the four largest players – China, EU, Japan and the US – will need to agree on key policy areas that have become the source of serious trade tensions. This need not involve all WTO members and arguably should not, as this will inevitably give rise to issue linkage attempts and veto playing.

Any process to agree on an agenda to revise and extend the WTO rulebook is conditional on actions to improve the operation of the organization. This applies as much to the potential for new plurilateral agreements as it does to existing WTO agreements. If this cannot be achieved, the likelihood rises that the trading system will fragment into a set of PTA-based arrangements among countries that see value in accepting common rules on policies affecting competition on markets (notably the EU and the CPTPP member countries) and those that do not. A corollary of this scenario

is an increasing prospect of discrimination in world trade and investment policies, undermining the open, rules-based global trade regime. Bringing the joint initiatives launched at MC11 in Buenos Aires and the plurilateral e-commerce negotiations that commenced in early 2019 to a successful conclusion will provide a critical signal that the WTO remains relevant. This is not enough, however. The membership as a whole should consider reforms to reduce the prospects for the type of situations arising that have led to the US decision to block new appointments to the Appellate Body and impose restrictive trade policy measures unilaterally. Putting place processes to review the operation of WTO bodies, including the Appellate Body and the conflict resolution function of the WTO more generally is critical to ensure legitimacy, accountability and continued 'ownership' of the institution.

Contrary to arguments that plurilateral initiatives are second best in a world where consensus is not obtainable, OPAs can be a first-best response. Much depends here on the type of issue and whether free riding is a concern. OPAs are most likely to be applicable to instances (issues) where the problem is related to regulatory heterogeneity (Hoekman and Sabel, 2019). Cooperation on regulatory matters does not necessarily require large-N participation, or cross-issue linkage or the type of first difference reciprocity (Bhagwati, 1988) that is a basic feature of market access negotiations. This is not to deny the close link that may exist between market access and regulation, or that in some instances this link must be explicit in international cooperation between countries. But, insofar as reducing trade costs motivates international regulatory cooperation, this need not call for the type of cross-issue linkage that is a core element of trade agreements.

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