EXECUTIVE SUMMARY

Introduction

The complex agenda and diversity in the economic situations and levels of development of participating countries make slow progress inevitable in multilateral trade negotiations. The procedure of decision-making by consensus inherited from GATT 1947 days compounds the problem.

Developing countries are strongly committed to the practice of decision-making by consensus as it protects them from new obligations being imposed on them without their support and consent. There is little likelihood of any change in this practice.

In this situation, the WTO members have been considering, and even engaging in, the alternative of open plurilateral negotiations (OPAs). In these negotiations, a subset of WTO members accounting for a substantial proportion of world trade (critical mass) decides to go ahead with negotiations for plurilateral agreements in selected areas, without waiting for all members to be on board. These negotiations remain open to all WTO members that are willing to join in undertaking new or higher levels of obligations while at the same time extending benefits on an MFN basis to all non-participating members. Benefits of OPAs are extended to all WTO members, whether or not they are participants in the negotiations or signatories to the agreement.

Negotiations for OPAs cut through the delays by requiring agreement only among participating members. Support for the plurilateral approach has been on the rise in the WTO but a number of members have registered opposition as well. They doubt the legitimacy of the plurilateral approach in the multilateral framework of the WTO.

Open Plurilateral initiatives in the GATT 1947 period

The use of open plurilateral agreements in the first three decades of GATT 1947 was mainly in the area of non-tariff measures (NTMs).
• In 1960, 15 developed countries adopted a declaration that prohibited the use of export subsidies on manufactures. Although it was open to all countries to join it, no developing country accepted it.

• In 1967, 16 developed countries, the EEC and Yugoslavia accepted the Anti-Dumping Code, 1967, with improved norms for the application of Anti-Dumping measures. Although the Anti-Dumping Code, 1967, was negotiated as a multilateral agreement, it evolved effectively into an open plurilateral agreement when a large number of developing countries did not join it and yet were extended its benefits by parties to the Code.

• In 1979, the Tokyo Round resulted in five NTM Agreements (the Agreement on Technical Barriers to Trade; the Agreement on Interpretation and Application of Articles VI, XVI and XXIII; the Agreement on Implementation of Article VII; the Agreement on Import Licensing Procedures; and the Agreement on Implementation of Article VI) that were all open plurilateral agreements. It was not mandatory for any government to accept these agreements but, at the same time, it was open for acceptance by any of them. As in the case of the Anti-Dumping Code, 1967, Article I of the GATT 1947 made it obligatory for parties to the agreements to extend benefits to non-signatory contracting parties to the GATT 1947 on an MFN basis. Only the developed countries and a handful of developing countries became parties to these plurilateral agreements.

Despite the limited adherence of developing countries to the plurilateral agreements on non-tariff barriers emerging from the Tokyo Round it is observed that the Round considerably enlarged recourse to open plurilateral agreements in GATT 1947. Variable geometry in international agreements on trade policy, first introduced in the Declaration on Giving Effect to the Provisions of Article XVI:4 in 1960 and continued in the Anti-Dumping Code, 1967, matured as a full-fledged doctrine in the Tokyo Round Codes on non-tariff measures. A way had been found to deal with situations in which some governments are eager to accept higher levels of obligations in trade policy while others are not ready.

In the Uruguay Round, the OPAs agreed in the Tokyo Round evolved further and 15 years later, they became full-fledged multilateral agreements. Looking back from the vantage point of 1994, it is possible to argue that open plurilateral agreements agreed over the previous decades paved the way for multilateral agreements on non-tariff barriers that were eventually embodied in the WTO Agreement. They facilitated rather than impeded the evolution of multilateral agreements.

Open plurilateral agreements: experience under the WTO Agreement

The WTO Agreement aimed to bring an end to the practice of plurilateral agreements but pragmatism brought them back. The first few years saw three plurilateral agreements and a fourth came 20 years later.

• The Information Technology Agreement (ITA) was agreed in 1997, initially among 39 participants but rising eventually to 54 participants, to eliminate import tariff in six categories of products.

• In 2015, the Agreement on Expansion of Trade on Information Products was reached among 24 out of the 54 original ITA signatories to expand the list of products for the elimination of tariff.

• In the plurilateral negotiations held after the entry into force of the WTO Agreement, a number of members agreed to broaden their Uruguay Round commitments to include, inter alia, basic telecommunication services.

• Plurilateral negotiations held after the Uruguay Round also resulted in the addition of new commitments on financial services.

Support for plurilateral negotiations in the WTO has shown an upturn after the Nairobi Ministerial Meeting in 2015. At the 11th Ministerial Conference in December 2017 at Buenos Aires, large groups of members sponsored the Joint Statement Initiatives (JSIs) in four areas, viz., investment facilitation for development, domestic regulation in services, electronic commerce and MSMEs. The talks on these subjects that have ensued have made steady progress, and in fact the negotiation on domestic regulation in services has been completed. The number of WTO members sponsoring the JSIs, already large at the outset, has grown impressively.
Objections raised against open plurilateral agreements

In a paper circulated to WTO members, India, South Africa and Namibia raised three main issues on the plurilateral negotiations envisaged in JSIs. First, that for integrating the outcome of negotiations on rules and disciplines in the area of services into the WTO architecture, the procedure for amendment contained in Article X of the Marrakesh Agreement needs to be followed instead of inscribing them into the Schedules through certification procedures. Second, that the JSIs do not have a multilateral mandate for negotiations on any issue. Third, that the JSIs on investment facilitation and electronic commerce contain new disciplines and, therefore, they require prior approval by the full membership before undertaking negotiations, as envisaged in Article III.2 of the Marrakesh Agreement. In this connection it is mentioned in particular that the existing agreements do not cover areas such as non-service investment included in the JSI on Investment Facilitation and privacy and consumer protection included in the JSI on electronic commerce.

On the first point, we need only to note that Article XVIII provides specifically that additional commitments shall be inscribed in a member’s Schedule. The second point about the need for a multilateral mandate is also not valid as the rules do not mention it nor has it been required in practice in plurilateral negotiations undertaken in the past in the WTO. As regards the third point, it needs to be pointed out that the first sentence of Article III.2 provides for negotiations among WTO members ‘concerning multilateral trade relations in matters dealt with under the agreements in the Annexes’. The language in this provision is so broadly formulated that a plausible case can be made in favour of permitting negotiations on investment facilitation on goods in the light of the TRIMs Agreement and in favour of negotiations on privacy and consumer protection in the light of the GATS.

The paper by India et al. does, however, make the valid point that undertaking negotiations on investment falls foul of the decision on the July Framework taken by the General Council in 2004 to put a stop to negotiations in the WTO on investment (and competition policy and government procurement).

The underlying motivation of the countries raising objections, in all likelihood, is the fear that plurilateral initiatives would help to propel forward WTO negotiations on new issues at the expense of negotiations on traditional issues.

Conclusions and recommendations

- Open plurilateral agreements (OPAs) have emerged in order to enable negotiations to be undertaken by sidestepping the problem of consensus in multilateral negotiations. In these negotiations, a subset of members accounting for a substantial proportion of world trade (critical mass) decides to go ahead with negotiations in selected areas, without waiting for all members to come on board. Doors, however, are kept open for the remaining members to join in at a later stage, whenever they are ready. An important feature of OPAs is that benefits are applicable on a non-discriminatory basis to all WTO members, whether or not they are participants in the negotiations, or signatories to the plurilateral agreement. There can be no adverse fall-out of OPAs for members who do not join in at the outset.

- The big argument in favour of negotiation of OPAs is that it cuts through the delays involved in trying to obtain consensus among the full membership at each stage. Negotiation of OPAs is the suitable pathway to impart momentum for the non-discriminatory liberalization of trade and rule-making in the WTO.

- No provision in the WTO Agreement specifically authorises or permits OPAs. They have evolved as a WTO practice as they have proved useful to foster non-discriminatory liberalisation of trade and rule-making. The approved procedures of the WTO allow new commitments flowing from plurilateral negotiations to be added to the Goods and Services Schedules through a simple process and thus, to be accommodated within the legal structure of the WTO.

- During the GATT 1947 era, open plurilateral agreements proved to be stepping stones for multilateral agreements. Variable geometry at the appropriate time facilitated rather than hindered progress towards multilateral agreements in non-tariff measures.

- Objections have been raised by India, South Africa and Namibia against the JSIs, but for the most part, their attack on the plurilateral approach does not carry conviction. It ignores the contribution that OPAs can make to resolve the current crisis in the multilateral dialogue on trade in the WTO. It overlooks the support that plurilateral negotiations and agreements have provided in the GATT1947 period to the process
of rule-making on a non-discriminatory basis. It does not recognise the reality that OPAs do no harm to the interests of WTO members that do not participate in plurilateral negotiations or do not accept plurilateral agreements formally.

- A strategic solution is imperative to deal with the fear of developing countries that allowing plurilateral initiatives will result in new issues being put on the WTO agenda at the expense of old issues. Developed countries must move forward on old issues such as agriculture and anti-dumping and developing countries too must yield ground and participate in the discussions on important new trade issues, such as those related to climate change.