

# EAC GENEVA FORUM

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## The “plurilateral” temptation and the Doha Round

Implications and options for the EAC countries

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## Introduction

After more than 11 years of discussions, Members of the WTO have not been able to overcome position gaps on specific modalities and the level of market access concessions under the Doha Development Round. Increased membership, a wide negotiation scope and large differences on interests and priorities among key WTO members have made any potential outcomes under this round elusive and the political stalemate evident. Several reports and statements made during the last two years have pointed at the consequential weakening of the multilateral trade system and the need to look at alternative approaches on decision-making in order to promote further liberalisation including an increased use of plurilaterals or regional trade agreements.

Today the “plurilateral track” is becoming more attractive for several members as a way to advance deeper liberalisation inside or outside the multilateral trading system. In this regard, some consider the “plurilateral track” as a response to the failure of multilateralism. This track is not a new option as it was already used under the Tokyo and Uruguay Rounds concluded in April 1979 and December 1993 respectively to open the door to agreements that did not enjoy consensus among the WTO membership at those times.

The main proponents of the plurilateral track have expressed the need to address current economic realities in order to facilitate the flows of key goods and services, the integration of value chains and to allow trade and economic expansion during times of crises. However, not all WTO members have the same level of sympathy toward plurilaterals as a solution to the Doha Round impasse, as it is considered that they may divert members’ attention off the

round, potentially break the single undertaking principle and ignore the development dimension of negotiations.

If the “plurilateral track” progresses an alternative, it could have significant implications for both developing countries in systemic, developmental and economic terms. This note seeks to provide EAC countries with a brief explanation of “plurilaterals” within the WTO, their typology, as well as recent proposals on new plurilaterals and to identify their potential implications for EAC countries on the road to the WTO MC9.

## Plurilaterals and their typology

A “plurilateral agreement” in lato sensu is usually understood as an international treaty with a limited number of Parties. The WTO sees plurilateral agreements as those having a narrower group of signatories. There are diverse types of plurilaterals. The most important for the purposes of this note are WTO plurilaterals, regional trade agreements and plurilaterals outside the WTO.

WTO Plurilateral agreements tend to be defined as agreements that have less than full membership, meaning agreements under which WTO Members are given the choice to participate or not. These contrast with all other WTO agreements to which all Members are Parties and are bound to them (e.g. Annex I and II Agreements). The main expectation of Members seeking a plurilateral is to create a precedent that the whole WTO membership or at least other members could accept at a later stage. In general, plurilaterals under the WTO do not create either rights or obligations to members

that have not accepted them. So far all WTO plurilaterals have been sectorial in nature, focusing on areas of specified interest of the “demandeurs”.

It is worth noting that not all WTO plurilaterals are subject to the same requirements or have the same effects. Plurilaterals that are not subject to the Most Favourable Nation (MFN) principle are found in Annex IV of the Agreement Establishing the WTO. The fact that these plurilaterals are not subject to MFN makes them somehow a club within the club, where benefits are only shared among Parties. The most important non-MFN plurilaterals are the Agreement on Government Procurement (GPA) and the Agreement on Trade in Civil Aircraft (TCAA). The other two plurilaterals listed in Annex IV have expired or have been terminated.

Plurilaterals work within the framework of the WTO and are subject to the oversight of the General Council. This implies that Plurilaterals must support and cannot contradict, change or undermine obligations under other WTO agreements. Perhaps the greatest advantage of WTO-plus plurilateral agreements within the WTO is the availability - and especially the enforceability — of the WTO dispute settlement system. The GPA and the ITA are both enforceable under the dispute settlement system on WTO Members that have chosen to accept them. Additionally, in order to include a new plurilateral agreement under Annex IV of the Agreement establishing the WTO, there is a need for consensus by all WTO Members in a Ministerial Conference.

There are also plurilaterals subject to MFN principle. These plurilaterals are usually more focused on lists of market access commitments than on rules and regulations. The clearest example is the Information Technology

Agreement (ITA) of 1996. In order to avoid free riding and to ensure the participation by “critical mass”, the ITA was supposed to only enter into force when the participants that have notified their acceptance represented about 90 per cent of world trade in information technology products. Original participants only represented about 83 per cent of trade, so the ITA only entered into force by mid of 1997 when some other WTO members joined. The experience of the ITA and concept of “critical mass” as a decision making tool has been proposed by the Warwick Commission as way of moving beyond the hurdles that have arisen from the varying interests, capacities and priorities that have stalled progress in the Doha Round. This and other similar proposals have allowed some WTO members to seriously think of the plurilateral track as a suitable option to pursue their interests.

One aspect of the ITA model that needs to be taken into consideration is that tariff liberalization under this agreement is full (zero tariff on all covered products). This liberalisation is not subject to any special and differential treatment (S&DT), so it is the same for all participants. This type of model is the one that some Members would like to see applied in current NAMA sectoral negotiations (zero-to-zero deals) in order to avoid the “free riding” by emerging economies and other advanced developing countries. In this case, the plurilateral track becomes just another way to get to similar liberalization results among key traders.

Under MFN plurilaterals, non-willing parties are not obliged to make any commitments. At the same time, the application of MFN allows them to enjoy the benefits of tariff reductions. This situation has positive connotations, making MFN plurilaterals more development friendly agreements when compared to other plurilaterals.

Both, non-MFN and MFN plurilaterals have expansive effects on their membership as well as on commitments made over the time. For example the GPA started with 22 members and today has 40 members. The ITA started with 29 signatories and it has today more than 70 participants. The main reason for such an increase in membership is that many countries have joined or are in the process of becoming party as a result of demands under the WTO accession process or the European Union (EU) expansion. Additionally, these agreements are revised and commitments deepened on regular basis. For example, the GPA was subject to a deep legal review and its schedule coverage was expanded in order to include sub-federal procurement. The new version of the GPA was adopted in MC8 in 2011. The ITA Committee has been working on the expansion of the product coverage since 1999 with some progress made to date but not yet an agreement. This expansive effect makes WTO plurilaterals a very effective tool to promote sectoral interests within the WTO that will become multilateral in nature with time. That's why their content, especially when including regulations, needs to be carefully assessed by non-participants.

Besides plurilaterals there is also the modality of regional trade agreements (RTAs), which also have a limited membership (usually regional). RTAs, while agreed outside the WTO, are subject to certain legal requirements (article XXIV of the GATT and V of the GATS) and scrutiny by WTO members (mostly notification and transparency). While the RTAs tended to have a more regional focus, this is changing and there are more and more agreements among partners in different regions or across regions. Perhaps of RTAs that are currently under negotiations process, the Trans-Pacific Partnership Agreement (TPPA) is the one that generates more concerns. The TPPA is seeking new trade liberalization and regulation

standard that would go well above existing FTAs already signed by the United States. RTAs tend also to have a wider coverage in terms of tariff lines, sectors and trade related regulations. What non-participants can do in relation to RTAs within the WTO is mainly to monitor that requirements under article XXIV of the GATT and V of GATS are fulfilled and that notifications are done properly. However they cannot influence negotiations or the outcome unless they join.

A recent phenomenon that is emerging is trade-related plurilaterals outside the WTO. In theory this type of agreement when related to trade in goods or services should be subject to MFN clause, unless they are notified as a RTA. The only non-WTO plurilateral that has been adopted so far in the Anti-Counterfeiting Trade related Agreement of 2011 (ACTA). The ACTA has 37 signatories including EU Members. Only few developing countries have signed it including Mexico, Morocco and the Republic of Korea. The main objective of the ACTA is to promote the effective enforcement of intellectual property rights (IPRs) globally. The negotiation of the ACTA has been particularly controversial due to low level of transparency and openness, and the fact that it raises the level of IP enforcement above the TRIPS Agreement.

In the case of the ACTA, MFN has not been an issue as all IP agreements among WTO Members, regional or otherwise is not subject to MFN exemptions as it occurs with RTAs under the GATT and the GATS. The reason why this has not been a problem for participants is that the standards under the ACTA already reflect the standards found in national legislations, which are applied to both nationals and foreigners of any origin equally.

## Recent proposals on plurilaterals

Several proposals for new plurilateral agreement have recently emerged. The most important ones are a potential International Services Agreement (ISA) and a potential Sustainable Energy Trade Agreement (SETA).

The ISA has been the consequence of a perceived low level of quality and number of services offers made so far and the continuous push from several coalitions of services industries. The idea of an ISA was one of the options that were discussed by representatives of 44 industrialized countries, including EU Members, and some advanced developing country members, discussed in a first “brainstorming” session held in early 2012. More recently proponent members have indicated in a formal statement that there is a need to enter in a new phase of services negotiations that would consolidate and expand market access commitments in a broad manner and in a way that would correspond more closely to actual practice (meaning current levels of autonomous liberalisation) . There is not yet an indication if the ISA will be a plurilateral or if it will be applied on MFN basis or not. The proponents are also exploring other options including a GATS Telecommunications/financial services annexes type of agreement or a RTA. In any case proponents have indicated that it would build upon the achievements of the GATS.

Among the options, a GATS telecommunication/financial annex type of agreement would be perhaps the best option for developing countries as they are applied under MFN basis, subject to the GATS architecture and

commitments inserted in the Members’ schedules. Options of a MFN plurilateral would not be negative either but the final track to be taken still is to be decided.

In economic and development terms, the implications of an ISA could be much larger than the GPA or the ITA due to its wider potential scope in terms of services subsectors coverage.

The SETA, an agreement proposed by the International Centre for Trade and Sustainable Development (ICTSD), would seek to phase out barriers to trade and investment in the new green technologies that are needed to spur sustainable and low carbon growth. Issues covered by this agreement would be addressed in two phases: a first phase would address clean energy supply goods and services, starting with solar, wind, small hydro and biomass and eventually extending to marine, geothermal, clean coal, and transport related biofuels. A second phase would address a wider scope of energy efficiency products and standards, construction, transportation, and manufacturing. In terms of barriers to be addressed, the scope of the SETA is very broad and includes tariffs, non-tariff barriers, services, subsidies and government procurement policies. There is no clear indication by proponents if the SETA should be applied on MFN basis or not, leaving this question to potential interested participants. While this proposal has raised a great deal of sympathy among several WTO Members due to its potential links with efforts toward addressing climate change, it seems too wide in scope to make it a technically feasible alternative in the WTO as it will touch on too many WTO agreements at the same time. In this regard, the SETA looks more as a clustered reform of how trade negotiations are carried on from a sustainable energy point of view than a WTO plurilateral sectoral initiative.

Additional proposals have also been made in a more superficial manner on potential plurilaterals applicable to trade facilitation and to environmental goods and services.

If plurilaterals become a more serious alternative, developing countries need to explore their use in sectors and areas of their interest. This for example could include a plurilateral that will jointly deal with CBD/TRIPS issues as well as geographical indication (GIs), and a potential GATS mode four agreement including tariff, non-tariff measures and subsidies among willing participants. Just as an example, more than 110 members have proposed a set of draft modalities to address TRIPS related issues (GI register, GI extension and a requirement to disclose origin of genetic resources or traditional knowledge used in their inventions). The number of supporters in this case is more than the number of participants of any existing plurilateral.

## Implications and options for EAC countries

The main implications of a potential re-emergence of plurilaterals can be classified in systemic, developmental and economic considerations.

### ● Systemic implications

- The proliferation of plurilateral agreements is an indication of diminishing role of multilateral trade system. The value of multilateral trade negotiations, which tends to advance interests of developing countries, will wane if no impetus is given to the Doha Development Round. Also, an increased number of plurilaterals may weaken even further the multilaterals trade system, as has already occurred with the proliferation of RTAs.

- The question whether a plurilateral is or is not subject to MFN is essential and its level of openness toward new participants is essential. Plurilaterals adopted on MFN basis allow developing countries to get benefits while avoiding the assumption of new obligations. If a country later decides to join a plurilateral because of its own political or economic interest, then it can do so. So far no country of the EAC has joined a plurilateral under the WTO or the ACTA.
- It is clear that the emergence of plurilaterals, especially if they arise on Doha Round covered issues, will affect the overall balance of the Doha Round as well as the principle of the single undertaking. The principle of the single undertaking is the one that will ensure that potential development gains or sensitive issues such as agriculture negotiations or a solution to the issue of cotton subsidies are finally taken.
- The argument that plurilaterals are needed to speed up sectoral deals is weak as it is possible to adopt and reach agreements that may be implemented on a provisional or a definitive basis under paragraph 47 of the Doha Ministerial Declaration. Additionally, the principle of the single undertaking ensures that early agreements adopted are taken into consideration when assessing the overall balance of the negotiations.
- It is important to remember that non-MFN plurilaterals would need approval by all WTO members allowing a political control based on the desirability of Members. Also, in the case of RTA, some ex post surveillance under articles XXIV of the GATT, V of the GATT and under relevant notifications made can be exercised. However, there is no possibility to

influence negotiations or the outcome from outside.

- Plurilaterals have an expansive effect over membership and market access over time. New plurilaterals may be required under the accession processes of acceding countries and in future RTAs or bilateral deals. For example, it is highly probable that the ACTA or similar standards will be required to counterparts in bilateral deals with developed countries.
- Trade ministers from Brazil, India, and South Africa have voiced their opposition to the plurilateral approaches to negotiations under the Doha Round on the grounds that they “go against fundamental principles of transparency, inclusiveness and multilateralism” . This shows high levels of concern.
- One key risk of non-participants in plurilaterals is that it is not possible to participate in negotiations and influence the outcome. This is particularly relevant in plurilaterals that incorporate trade rules and regulations. In this regard, developing countries and EAC may decide to participate in the negotiations, in certain cases, and finally decide not to participate in the final outcome if not in line with their domestic interests.
- **Developmental and economic implications**
- Plurilaterals may divert attention from the finalisation of the Doha Round and development issues therein; creating new tracks of work that may not necessarily be successful either.

- Plurilaterals may become a way to avoid the incorporation of new forms of S&DT, especially when related to tariff and market access concessions.
- Plurilaterals allow a pick and choose of specific sectoral issues usually of interest to developed countries or constituencies. It is time to start exploring areas, sectors or modes where plurilaterals may be of interest of developing countries as well. Options could include dealing jointly CBD/TRIPS issues as well as geographical indication (GIs), and a potential GATS mode four agreement including tariff, non-tariff barriers and subsidies.
- In many of the plurilaterals so far proposed, developing countries lack full capacity to benefit. Maybe one area where this could be different is in the case of services where several developing countries have strategic interest, are building successful export clusters and want to increase their participation in the value chains. However, this will depend on the modalities and outcome of such deals. Then an ISA may just seem to be a renegotiation of GATS at Doha under less favourable conditions. For example, a services plurilateral without commitments on mode four will not mean much for many developing countries.
- Plurilaterals will avoid tackling issues that can only be dealt with at the multilateral level such as agricultural and fisheries subsidies. This type of subsidies has clearly affected export prospects of EAC countries in areas where they have comparative advantages. As an example, these issues have not been addressed in any RTA subscribed so far.