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# MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from the GATS

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## Abstract

*Scheduling additional commitments for policies affecting trade in goods in the General Agreement on Tariffs and Trade has been plagued by two sources of ambiguity: the treatment of changes introduced unilaterally by members subsequent to an initial commitment and the treatment of new commitments by World Trade Organization (WTO) members pertaining to non-tariff policy measures affecting trade in goods. This is not the case for trade in services, as the General Agreement on Trade in Services makes explicit provision for additional commitments to be scheduled. Neither secondary law, in the form of decisions formally adopted by the WTO membership, nor case law has clarified the situation for trade in goods. This matter is important for the WTO as it determines the feasibility of clubs of countries agreeing to new enforceable policy disciplines that bind only signatories but are applied on a non-discriminatory basis to all WTO members. In this article, we discuss the legal state of play and the 'policy space' that WTO members have to establish most-favoured-nation, club-based disciplines for non-tariff measures.*

## 1 Introduction

The General Agreement on Tariffs and Trade (GATT) was primordially a tariff bargain with concessions on tariff bindings reflected in the schedules of all contracting parties.<sup>1</sup> Disciplines included in the GATT on the use of non-tariff measures (NTMs) were meant to insure contracting parties against erosion of negotiated tariff concessions. The idea was to ensure that any imposition by governments that went beyond tariffs

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<sup>1</sup> General Agreement on Tariffs and Trade 1994 (GATT), 55 UNTS 194.

burdened equally imports and domestically produced goods. Over the years, specific disciplines were negotiated under the GATT on various types of NTMs. These either bound all contracting parties – for example, requirements to ensure transparency of applied policies – or only a subset. The codes of conduct for specific NTMs that emerged from the Tokyo round (1973–1979) only applied to countries that signed them; the same is true for the current Annex 4 World Trade Organization (WTO) plurilateral agreements on government procurement and civil aircraft.<sup>2</sup>

Typically, commitments on tariffs were included in the schedules of concessions, whereas commitments on non-tariff policies were reflected in specific agreements such as the Tokyo Round codes. This approach is consistent with the concession erosion argument. If NTMs were included in schedules of commitments, the concession erosion objective would have been circumvented: imports would be burdened not only with tariffs but also with non-tariff barriers that would not apply to domestic goods. Over time, however, as discussed further below, some countries also included NTMs in their schedules of concessions.<sup>3</sup> Moreover, unilateral changes to schedules of commitments were made for a variety of reasons.

There is nothing sacrosanct about the legality of what is scheduled in the WTO in the sense that case law has established that the consistency of scheduled commitments can always be contested before panels. WTO case law has taken a very clear stance on scheduling practices: they must respect the law. Thus, scheduling in itself does not confer legality. There is a WTO public order that restricts contractual autonomy. The ultimate arbiter of WTO legality when it comes to the commitments agreed during a negotiating round is the WTO judge, comprising the dispute settlement panels and the Appellate Body.

Commitments arise not only as the result of negotiating rounds. They also arise through protocols of accession that are agreed by new members. Standing case law concerning commitments entered through protocols of accession suggests that they are justiciable, but the deference that WTO judges will show towards bargaining solutions is quite remarkable, as we will see later. This raises questions. Why is deference shown when a commitment is entered through a protocol of accession and not so when it is done unilaterally? Of particular interest to this article is whether and why a commitment that is the result of an agreement between a subset of countries and that is applied on a non-discriminatory basis would be treated differently. Other important questions are whether non-tariff policy commitments can simply be scheduled. If yes, what stops WTO members from scheduling all agreements on non-tariff measures? Is it necessary to establish that a set of non-tariff policy commitments negotiated among a set of countries formally constitutes an agreement? Must all WTO members agree before a subset of the membership can apply new policy disciplines to themselves, even if the benefits are extended to non-signatories and no obligations are imposed on non-participating nations?

<sup>2</sup> Hoekman and Mavroidis, 'WTO à la Carte or WTO Menu du Jour: Assessing the Case for Plurilateral Agreements', 26 *European Journal of International Law* (2015) 319.

<sup>3</sup> Santana and Jackson, 'Identifying Non-Tariff Barriers: Evolution of Multilateral Instruments and Evidence from Disputes (1948–2011)', 11 *World Trade Review* (2012) 462.

This article focuses on these questions. They are important for the trading system because the answers affect the feasibility of – and incentives for – most-favoured-nation (MFN) clubs to form.<sup>4</sup> A MFN club in this article describes a group of countries that commit to WTO+ policy disciplines – that is, commitments that go beyond existing WTO rules, bind only those that sign on to implementing them and the benefits of which extend on a non-discriminatory basis to all WTO members.<sup>5</sup> The presumption in the scholarly literature and policy circles is that the GATT provides limited options ('policy space') to members that desire to negotiate commitments on a club basis. This contrasts importantly with the General Agreement on Trade in Services (GATS), which allows WTO members to make additional commitments on services trade policies if they wish to, as long as these do not violate other provisions in the GATS.<sup>6</sup> In the case of policies affecting trade in goods, WTO members can conclude either critical mass agreements (CMAs) on a MFN basis to reduce tariffs – as illustrated by the Information Technology Agreement (ITA)<sup>7</sup> – or they can try to conclude an Annex 4 plurilateral agreement that imposes additional disciplines on the use of non-tariff policies – as was done in the case of government procurement.<sup>8</sup> In both instances, only a subset of the WTO membership participates. A major difference is that CMA tariff deals are (must be) applied on a MFN basis, whereas plurilateral agreements are not.<sup>9</sup>

To date, CMAs under the GATT have been restricted to initiatives to reduce tariffs, whereas in the GATS context, CMAs have been negotiated on policies of a regulatory nature. Examples of CMAs dealing with services are the Agreement on Financial Services (which came into effect in 1999, with 70 WTO members making commitments, albeit with significant differences in terms of coverage and depth)<sup>10</sup> and the Annex on Basic Telecommunications (entering into force in 1998, with initially 55 WTO members signing on).<sup>11</sup> Annex 4-type plurilaterals such as the Agreement on

<sup>4</sup> The term most-favoured-nation (MFN) club is used by Saggi and Sengul, 'On the Emergence of an MFN Club, Equal Treatment in an Unequal World', 42 *Canadian Journal of Economics* (2009) 267. Our use of the term differs from theirs. They define a MFN club as a set of countries that agree to apply the MFN principle in the context of developing a theoretical framework they use to analyse the incentives for, and welfare implications of, the club to abide by MFN.

<sup>5</sup> In this article, we use the term World Trade Organization + (WTO) to characterize agreements that go beyond existing WTO rules. This may comprise either expanding on existing multilateral (WTO) agreements, or it may involve disciplines in a policy area that is not covered by an existing WTO agreement.

<sup>6</sup> General Agreement on Trade in Services 1994 (GATS), 1869 UNTS 183.

<sup>7</sup> Information Technology Agreement, December 1996, available at [www.wto.org/english/tratop\\_e/inftec\\_e/inftec\\_e.htm](http://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm) (last visited 21 February 2017).

<sup>8</sup> Hoekman and Mavroidis, *supra* note 2.

<sup>9</sup> Note that 'critical mass' in what follows need not imply that many countries are involved in a club – if only two countries agree to a bilateral deal that is applied on a MFN basis that also constitutes critical mass for the purposes of this article.

<sup>10</sup> The negotiations on financial services were successfully concluded on 12 December 1997. They are available at [www.wto.org/english/news\\_e/pres97\\_e/pr86\\_e.htm](http://www.wto.org/english/news_e/pres97_e/pr86_e.htm) (last visited 21 February 2017). The Annex on Financial Services is available at [www.wto.org/english/tratop\\_e/serv\\_e/10-anfin\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/10-anfin_e.htm) (last visited 21 February 2017).

<sup>11</sup> Bronckers and Larouche, 'A Review of the WTO Regime for Telecommunications Services', in K. Alexander and M. Andenas (eds), *The World Trade Organization and Trade in Services* (2008) 319.

Government Procurement (GPA) must be agreed by all WTO members, including those that have no intention of joining – that is, the consensus constraint binds.<sup>12</sup> The need for consensus applies whether or not a proposed Annex 4 plurilateral agreement is applied on a non-discriminatory basis. Consensus also is required for the incorporation of new rules of the game that would apply to all WTO members.<sup>13</sup>

The question that motivates the discussion that follows is whether clubs of countries can agree to new rules for non-tariff measures pertaining to trade in goods that apply on an MFN basis without needing the approval of all WTO members. In the case of services, this question does not arise, as the matter was addressed by the drafters of the GATS. Article XVIII of the GATS (‘Additional Commitments’) permits members to make commitments that complement (are additional to) the specific commitments made with respect to national treatment and market access. The inclusion of Article XVIII was in part the result of the inability to conclude certain sectoral negotiations before the end of the Uruguay Round, giving rise to a need for a mechanism through which the results of post-Uruguay Round negotiations could be incorporated into the GATS. But, more generally, this provision reflected an understanding that the GATS was to be an instrument for progressive liberalization of trade in services and that new commitments to this effect would result from future multilateral negotiations. The drafters of the GATS foresaw a process of regular, incremental efforts to expand the reach of the GATS, the first of which was to be initiated five years after the entry into force of the agreement.

In our view, incorporating an Article XVIII analogue into the GATT to allow WTO members to make additional commitments on non-tariff measures would be the preferred way of addressing the disparity between the GATS and the GATT. However, this will require a negotiation and an agreement among all WTO members. Given the likely difficulty of obtaining the consensus required for amending the WTO, a more immediate, pragmatic question is to determine what can be done under prevailing GATT provisions to incorporate additional commitments. This is the main focus of the discussion that follows. The plan of the article is as follows. In second section of the article, we explain the legal regime. It roughly stands for the proposition that WTO public order, essentially the MFN clause, trumps contractual autonomy when it comes to scheduling commitments. In the third section, we move to examine the implications of this proposition for policy. The fourth section concludes.

## 2 Scheduling Commitments in the GATT/WTO

### A *Early Days (When Matters Were Relatively Simple)*

The original GATT comprised an agreement and a list of schedules of concessions that had been agreed in Geneva between April and July 1947. The schedules specified the

<sup>12</sup> Agreement on Government Procurement 1994, 1869 UNTS 508.

<sup>13</sup> The Nairobi Ministerial Declaration, WTO Doc. WT/MIN(15)/DEC, 19 December 2015, reiterates the consensus requirement when it comes to negotiations to establish new rules of the game. The final sentence of the declaration states that ‘[a]ny decision to launch negotiations multilaterally on such [new] issues would need to be agreed by all members’.

terms, conditions and other qualifications for the tariff treatment of products. GATT Article II establishes the framework for scheduling – that is, the means through which each contracting party (now WTO member) determines the treatment it will accord to the commerce of its trading partners. Contracting parties to the GATT used an agreed description for goods and inscribed the tariff ceilings (bindings) that they would not exceed for each of these goods.<sup>14</sup> The scheduling of commitments would reflect the outcome of a tariff negotiation, the subject matter of which was an exchange of tariff concessions (tariff bindings). ‘Terms and conditions’ included in the schedules would typically clarify the scope of the commitment, which, as per the Appellate Body report on *Canada – Dairy* (para 7.151), are not void of legal effect.<sup>15</sup> Importantly for the argument that we will develop below, Article II:1(a) states that a GATT contracting party ‘shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement’. Tariffs are only mentioned in Article II:1(b), suggesting that other policies may also be bound.

Following the successful conclusion of a round of negotiations, participating nations would sit down together and go through the tariff promises made. They would verify that all of the schedules reflected the negotiated agreement and then would ask the Secretariat to provide official copies. All results of a multilateral round would be incorporated in a protocol. Typically, protocols contained only tariff reductions. One exception to this rule of thumb was the protocol signed at the end of the Dillon Round, which also contained increases in bound rates resulting from negotiations under Article XXVIII of the GATT.<sup>16</sup> Protocols would enter into force once accepted by all of the parties. Because acceptance by all of the parties was becoming increasingly difficult as membership of the GATT grew, this process was abandoned in favour of a certification process.

The new process – certification – would entail that rectifications (for example, changes that did not alter the substance of a commitment) and modifications (for example, changes that did alter the substance of commitments) would enter into force absent opposition by the membership within a specified time limit.<sup>17</sup> The system of certification underwent a change once before, when we ended up with the current procedure (1980 Decision).<sup>18</sup> The 1980 Decision, to which we will return later, established that the time period within which objections could be raised should not extend beyond three months. It also established that certifications would occur on a country-by-country basis and not, as before, as one certification for all members.

<sup>14</sup> J.H. Jackson, *World Trade and the Law of the GATT* (1969) discusses this issue in detail.

<sup>15</sup> *Canada – Dairy*. When referring to disputes, irrespective whether the final report has been issued in the GATT or the WTO era, we use the official abbreviation as it appears in the WTO webpage, available at [www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_short\\_title\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_by_short_title_e.htm) (last visited 21 February 2017).

<sup>16</sup> Loose-Leaf Schedules Based on the Harmonized System Nomenclature, GATT Doc. TAR/W/55, 26 September 1985.

<sup>17</sup> Adjustment of Certain Specific Duties in Schedule XXXVII, GATT Doc. BISD 8S/25, 10 April 1959.

<sup>18</sup> Procedures for Modification and Rectification, GATT Doc. BISD 16S/16, 19 November 1968. The change, however, concerned only peripheral elements of the regime and did not alter the basic thinking behind it. Decision on Procedures for Modification and Rectification of Schedules of Tariff Concessions (1980 Decision), GATT Doc. BISD 27S/25–26, 26 March 1980.

During the early period, which roughly covers the time between the advent of the GATT and the initiation of the Kennedy Round (1964), there were hardly any disputes between parties concerning scheduled commitments. The few disputes that did arise were solved in a pragmatic manner. In 1948, for example, the question arose whether consular taxes, irrespective whether they should be scheduled or not, came under the MFN obligation. The panel on *Cuba – Consular Taxes* responded in the affirmative.<sup>19</sup> In 1949, the panel on *United States – Margins of Preferences* dealt with preferential tariff treatment that the US accorded to products of Cuban origin.<sup>20</sup> Following this complaint, the panel decided that margins of preferences are lawful to the extent that they correspond to the margins reflected in the protocol of accession. It underscored that any interested party was free to pursue this dispute in a formal manner. Nothing happened.

In 1952 and 1955, two almost identical cases arose when Greece and France, respectively, unilaterally increased their duties. In *Greece – Increase of Import Duties*, and *France – Special Temporary Import Tax*, the two panels agreed that the increases were necessary as short term solutions, and endorsed the agreement reached between Greece and France on the one hand, and affected supplying countries on the other, to moderate the tariff increase.<sup>21</sup> In 1971, in *Jamaica – Margins of Preferences*, the panel agreed to an increase of duties by Jamaica.<sup>22</sup> Jamaica had not negotiated itself its import duties, since the United Kingdom was legally entitled to do so. In a pragmatic manner, hence, and through unproblematic collective action, the GATT addressed the various scheduling issues that arose during the first 15 years or so of its existence.

## B *Unilateral Concessions and Non-Tariff Policies*

In subsequent years, new issues arose with respect to scheduling. While scheduling following tariff negotiations continued to be the norm, unilateral decisions to change tariff concessions or to undertake non-tariff policy commitments presented GATT members with novel questions. It is no exaggeration to state that to this day we are still in the dark as to where exactly WTO law stands with respect to these two issues.

### 1 *Unilateral Actions to Revise Schedules*

A GATT/WTO member may decide to unilaterally modify the content of a commitment that it has made. Although this is not an everyday occurrence, examples abound.<sup>23</sup>

<sup>19</sup> *Cuba – Consular Taxes*.

<sup>20</sup> *United States – Margins of Preferences*.

<sup>21</sup> *Greece – Increase of Import Duties; France – Special Temporary Import Tax*.

<sup>22</sup> *Jamaica – Margins of Preferences*.

<sup>23</sup> Marrakesh Agreement Establishing the WTO, Certification of Modifications and Rectifications to Schedule XV-Pakistan, WTO Doc. WT/LET/424, 16 July 2002. Note that the changes in schedules that are of interest here do not fall under the provisions of GATT, *supra* note 1, Art. XXVIII (Modification of Schedules). Art. XXVIII allows for the re-negotiation of tariff commitments, requiring members seeking to change (increase) a bound tariff to engage in negotiations with the countries with which the concession was originally negotiated and those having a principal supplying interest for the good(s) involved. This article does not apply in the current context as our focus here is not on increases in bound tariffs rates but, rather, on other changes in schedules, including potentially new commitments.



Moreover, on occasion, the outcome of bilateral negotiations has also been included in schedules and applied on a MFN basis (for example, 1997 agreements on certain distilled spirits between the European Union [EU] and the USA).<sup>24</sup> There have also been instances where preferential trade agreements (PTAs) between WTO members have led to changes in the schedules – for example, most countries that have negotiated a PTA with the USA have agreed to sign on to the ITA and subsequently modified their schedules accordingly.

Insofar as a change undermines the initial concession, any WTO member can, and presumably will, launch a dispute alleging nullification and impairment of a scheduled commitment. Less clear is what the implications are of a country deepening its liberalization commitment. Nothing in the original GATT addressed this issue, other than the MFN obligation. This permits a country to initiate a dispute in case the ‘donor’ (a liberalizing country) refuses to automatically and unconditionally accord the advantage granted to one source of production to all sources. Panels dealing with such complaints would most likely have to entertain two questions. First, the easy question: to what extent does a lower tariff level constitute an advantage? Second, the more complicated question: does scheduling the new treatment immunize a country from legal challenge?

Both ‘secondary’ law (that is, GATT/WTO decisions by committees) as well as dispute settlement case law has provided responses to these questions. In *EC – Bananas III*, the panel confronted the following facts.<sup>25</sup> During the Uruguay Round, the EU negotiated a separate deal with a few bananas producers (the so-called ‘Bananas Framework Agreement’),<sup>26</sup> which it included in its Uruguay Round schedule of concessions. Several exporters that had not signed this deal subsequently complained that it violated MFN. Recalling its earlier ‘Headnote’ jurisprudence (*US – Sugar Waiver*), the Appellate Body held in *EC – Bananas III* that schedules of concessions must be WTO consistent.<sup>27</sup> WTO members can unilaterally grant rights, but they cannot diminish their obligations towards other WTO members when scheduling their commitments.<sup>28</sup> The implication is that inclusion of an item in a schedule of concessions does not confer legality to the entry even if the whole WTO membership had the opportunity to sit down together and go through all of schedules item by item. Common reading of the schedules after a negotiating round is concluded in order to agree on the accuracy and not on the legality of concessions.

This conclusion is not affected by the fact that over the years, culminating with the 1980 Decision, a formal process has been put into place to guide changes in

<sup>24</sup> These agreements were certified in Marrakesh Agreement Establishing the WTO, Certification of Modifications to Schedule LXXX-European Communities, WTO Doc. WT/LET/178, 19 September 1997, and in Marrakesh Agreement Establishing the WTO, Certification of Modifications to Schedule XX-United States, WTO Doc. WT/LET/182, 2 October 1997.

<sup>25</sup> *EC – Bananas III*.

<sup>26</sup> The ‘Bananas Framework Agreement’ was incorporated in Council Regulation 478/95, OJ 1995 L 49, at 13 ff.

<sup>27</sup> *US – Sugar Waiver*.

<sup>28</sup> *EC – Bananas III*, paras 157–158.

schedules.<sup>29</sup> After the Kennedy Round, some GATT contracting parties submitted unilateral concessions and/or changes to concessions already made. The 1980 Decision is the legal instrument that formally allowed for unilateral changes but subjected them to a multilateral process. Changes can comprise either ‘rectifications’ or ‘amendments’.<sup>30</sup> A rectification does not affect the substance of the negotiated commitment, while an amendment does. No matter how the WTO member concerned qualifies the change, it must submit it to the WTO Secretariat’s Market Access Division. The latter will circulate it to the membership. If no objection arises within three months, it will include the change in the member’s schedule (certification). If an objection is raised, it will not. Whatever the case, a dispute can subsequently be submitted even if no one objected to the inclusion of a new concession. Certification therefore does not confer legality. This is the quintessential ruling in the Appellate Body report on *EC – Bananas III*. In case of dispute, a panel would be established to address the issue.<sup>31</sup>

If certified actions can be challenged, then this is all the more so in cases of unilateral actions that have not been certified. This issue arose for the first time in 1981 in a GATT dispute, *Spain – Unroasted Coffee*.<sup>32</sup> Spain had originally made a tariff concession without differentiating between types of unroasted coffee. It subsequently modified its negotiated concession by reserving a tariff treatment to ‘unwashed Arabia’ and ‘Robusta’ coffees that was less favourable than that reserved for ‘Colombia’ and ‘Colombia mild’ coffee (all of these types of coffee being unroasted). Whereas it kept a 0 per cent duty on the latter, it imposed a 7 per cent duty on the former. All types of coffee were classified under CCCN 09.01 (the Brussels Nomenclature), since this case preceded the advent of the HS Convention.<sup>33</sup> Brazil complained that, as a result of this change, its coffee exports to the Spanish market were being negatively affected (since Brazil was not exporting ‘mild’ coffee). Spain responded that, under the Brussels Nomenclature system, it was allowed to make sub-classifications to tariff headings, and this is exactly what it had done in this case.<sup>34</sup>

The panel did not agree with the Spanish claim, finding the Spanish measure to be inconsistent with the GATT. It held that Spain was free to make tariff classifications, provided that it did so when scheduling its commitments and not *ex post facto* without consulting its trading partners.<sup>35</sup> The panel found that there was no obligation under the GATT to follow any particular system for classifying goods and that a contracting party had the right to introduce in its customs tariff new positions or sub-positions as

<sup>29</sup> Again, the changes in schedules that are of interest here do not fall under the provisions of GATT, *supra* note 1, Art. XXVIII on the renegotiation of tariff bindings.

<sup>30</sup> 1980 Decision, *supra* note 18.

<sup>31</sup> Santana and Jackson, *supra* note 3. Note, however, that in *EU – Bananas III*, there was no ‘certification’ issue, because the Framework Agreement was in the EU schedule, which had been annexed to the GATT through the Marrakech Protocol to the GATT 1994, available at [www.wto.org/english/docs\\_legal\\_e/13-mprot.pdf](http://www.wto.org/english/docs_legal_e/13-mprot.pdf) (last visited 21 February 2017) (i.e., the 1980 procedures were not used).

<sup>32</sup> *Spain – Unroasted Coffee*.

<sup>33</sup> International Convention on the Harmonized Commodity Description and Coding System 1988, 1503 UNTS 167.

<sup>34</sup> *Spain – Unroasted Coffee*, para. 3.3 of the panel report.

<sup>35</sup> *Ibid.*, para. 4.4.



appropriate. A footnote to this paragraph reads: 'Provided that a reclassification *subsequent* to the making of a concession under GATT would not be a violation of the basic commitment regarding that concession (Article II:5)'.<sup>36</sup> In this case, nevertheless, a violation had occurred as a result of the Spanish sub-classification. This was the case because, in the panel's view, the various types of coffee were like products, and, in the absence of prior distinction across the three types, Spain was in violation of its obligations since it was treating like products in an unlike manner.<sup>37</sup>

In a 1998 ruling on *Argentina – Textiles and Apparel*, the Appellate Body faced a different case of unilateral action that occurred after certification of a national schedule and that allegedly affected the value of commitments entered.<sup>38</sup> Argentina had bound its duties on footwear during the Uruguay Round at 35 per cent. Subsequently, it had been applying to imports of footwear either an *ad valorem* duty of 35 per cent or a specific duty that was calculated on the basis of the world price. It later decided to apply specific duties only. Since, in its view, the case did not concern a change in the bound duties, it did not provide notification of the various duties it was applying (as it should have done, in accordance with the 1980 Decision). The complainant, the USA, argued that a change between different types of tariffs was not permissible. In its view, through the binding of tariffs, WTO members agreed neither to impose tariffs beyond the established ceiling nor to change the type of duty (for example, move from *ad valorem* to specific duties). The panel upheld its claim. The Appellate Body overturned this finding and held that switching between different types of duties is perfectly legitimate so long as the overall ceiling of protection is not violated.<sup>39</sup> The Appellate Body, nonetheless, did find that Argentina had violated its obligations since, following the conversion from *ad valorem* to specific duties, the level of duty exceeded the negotiated tariff ceiling.

To determine whether this was indeed the case, one would need to go back in time to the moment when the concession was negotiated and convert the rate of protection from *ad valorem* to a specific duty (keeping the price of the dutiable item constant, of course). Argentina had not notified the WTO of its measure. In fact, Argentina did not have to follow the procedures of the 1980 Decision at all since the case concerned applied and not bound duties. Argentina, nonetheless, disrespected a 1997 General Council Decision, which requested WTO members notify the organization of both its bound and applied level of duties on an annual basis.<sup>40</sup> The panel and the Appellate Body report did not insist on this failure – wrongly so, in our view.

The Appellate Body examined the consistency of the Argentine measure with Article II.1(b) of the GATT. This provision disallows the imposition of duties upon importation in excess of the bound level. The Appellate Body could have referred to Article II.3 of the GATT, which reads: 'No contracting party shall alter its method

<sup>36</sup> *Ibid.* (emphasis added).

<sup>37</sup> *Ibid.*, para. 4.10.

<sup>38</sup> *Argentina – Textiles and Apparel*.

<sup>39</sup> *Ibid.*, paras 44–55.

<sup>40</sup> General Council Decision on The Supply of Information to the Integrated Data Base, adopted on 16 July 1997, WTO Doc. WT/L/225, 8 July 1997.

of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.’ In effect, Argentina had changed its method of determining dutiable value by switching from one to another form of duty. The question to ask, then, is whether the value of concessions it had agreed to had been impaired. This issue had been raised previously, but the Appellate Body decided to totally disregard prior case law. In 1984, the GATT panel report on *EEC – Newsprint* referred to the ‘longstanding practice’ in the GATT that ‘even conversion’ from *ad valorem* to specific duties required renegotiation.<sup>41</sup> By opening the door to unilateralism in this context, instead of ruling that this was a matter for renegotiation under Article XXVIII of the GATT procedures, the Appellate Body adopted an interpretation that was hardly supported by logic and practice.<sup>42</sup> The relevance of this case to the subject of this article is that WTO members have leeway in determining the specific policy instruments that they employ as long as these do not reduce the value of a concession.

There is one more issue we need to tackle before we move to discuss non-tariff concessions. A trend started in the Tokyo Round that gained pace during the Uruguay Round, whereby some countries would not negotiate using agreed descriptions of products (embedded in the Harmonized System) but, instead, used their own national 8-, 10-, 12- and sometimes 13- and 14-digit classifications. This creates the following issue. Assume that at the 10-digit classification Home distinguishes between shoes produced by companies satisfying certain social or labour standards and those that do not. Assume further, that the tariff treatment for the former is lower than that for the latter. Foreign produces shoes that do not satisfy the standards, and challenges the distinction, arguing that the two pairs of goods are like and, consequently, that Home violates the MFN clause by according lower tariff treatment to goods produced in Third that satisfy the social standards. Will Foreign prevail?

Surprisingly, the considerable extent of similar classifications notwithstanding, we still lack jurisprudence on this score. In *EC – Tariff Preferences*, a dispute involving differential treatment of developing countries, the Appellate Body held that conditioning the tariff treatment upon ‘objective criteria’ (a term that unfortunately remains undefined), is WTO consistent.<sup>43</sup> In this case, the EU treated imports of textiles originating in Pakistan better than those originating in India because Pakistan had agreed to participate in the fight against drugs trafficking. It is uncertain whether the Appellate Body would extend the logic of this jurisprudence to 8- and 10-digit classifications. Preferences for developing countries do not appear in schedules. The Committee on Trade and Development (CTD) will be notified, but this is where the buck stops. For the rest, those who feel aggrieved may litigate, although the incentives to do so might be lacking.<sup>44</sup>

<sup>41</sup> *EEC – Newsprint*, para. 50.

<sup>42</sup> These cases are discussed in more detail in P.C. Mavroidis, *The Regulation of International Trade* (2016), vol. 1.

<sup>43</sup> *EC – Tariff Preferences*.

<sup>44</sup> Grossman and Sykes, ‘A Preference for Development: The Law and Economics of GSP’, 4 *World Trade Review* (2005) 41, discuss this question in greater detail.

## 2 Non-Tariff Commitments

GATT schedules of concessions apply to tariffs. What about non-tariff commitments? The fact that it is tariffs that are routinely consolidated in schedules of concessions does not mean that NTMs cannot be consolidated as well. The report of the 1955 Review Working Party on Other Barriers to Trade states:

The Working Party also agreed that there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters such as subsidies, which might affect the practical effects of tariff negotiations; provided that the results of such negotiations should not conflict with other provisions of the Agreement.<sup>45</sup>

Early examples of concessions pertaining to NTMs that were enumerated in schedules include both subsidies and the treatment of policy instruments such as import licensing.<sup>46</sup> Before the 1979 Tokyo Round codes of conduct were negotiated, multilateral disciplines for these policy areas were quite limited. Schedules filled a gap. The WTO membership formally accepted the scheduling of NTMs during the Uruguay Round negotiations (1986–1993). The agreed format of the schedules used in the Uruguay Round comprised of four parts:

- Part I is sub-divided into two sections: Section 1 includes all agricultural tariff concessions, whereas section 2 covers tariff concessions on nonfarm goods. Section 1 is in turn subdivided into two parts, one reflecting tariff concessions, the other applying to tariff quotas.
- Part II includes historic preferential tariffs from the early GATT days (not the preferential rates that are applied in free trade areas or customs unions, as these are not considered to be tariff concessions). This component of the schedules is empty for all WTO members, since no historic preferential rates exist anymore.
- Part III reflects commitments on nontariff measures, e.g., obligations regarding import licensing.
- Finally, Part IV comprises nontariff commitments on farm goods, e.g., commitments with respect to domestic support and export subsidies.<sup>47</sup>

The 128 original members of the WTO, as well as those members that subsequently acceded to the organization, have structured their schedules according to the format laid out in this document. Acquiescence therefore is uncontested. While NTMs can be included under both Part III and Part IV of a WTO member's schedule of concessions,<sup>48</sup>

<sup>45</sup> Review Working Party on Other Barriers to Trade, GATT Doc. BISD 3S/222, 3 March 1955, paras 14ff.

<sup>46</sup> 1961 Working Party Report on Operation of the Provisions of Article XVI, GATT Doc. BISD 10S/201, 21 November 1961, paras 24–27.

<sup>47</sup> Preparation of the Uruguay Round Schedules of Concessions on Market Access, Note by the Secretariat, GATT Doc. MTN.GNG/MA/W/25, 25 December 1993. On this issue, see also WTO Secretariat, *A Handbook on Reading WTO Goods and Services Schedules* (1993).

<sup>48</sup> The Marrakech Protocol to the GATT 1994, *supra* note 31, formally acknowledges the existence of Part III of the schedules by providing: '6. In cases of modification or withdrawal of concessions relating to nontariff measures as contained in Part III of the schedules, the provisions of Article XXVIII of GATT 1994 and the "Procedures for Negotiations under Article XXVIII" adopted on 10 November 1980 (BISD 27S/26–28) shall apply. This would be without prejudice to the rights and obligations of members under GATT 1994.'

Part IV commitments are confined to farm goods and are therefore *sui generis*.<sup>49</sup> Part III commitments are not. The following text is included in the 1993 document under the heading ‘Non-tariff concessions’: ‘Nontariff concessions on products other than agricultural products are to be included in Part III of Schedules. Information on the tariff item number, the description of products and the type of concessions should be indicated in this part of the Schedules.’<sup>50</sup>

The wording of the 1993 document permits WTO members to list whatever NTM commitments they deem appropriate to schedule under Part III. A cursory perusal of the Uruguay Round schedules suggests that commitments listed under Part III typically concern import licensing and sometimes export taxes. But the content of what can be listed under Part III is not at all prejudged. Not even an indicative list of the types of measures that might be scheduled has been agreed by WTO members. Indeed, there is even flexibility in regard to the format of the schedules. Thus, WTO members asked Russia to include a new ‘Part V’ in its schedule to reflect specific concessions on export taxes.<sup>51</sup> We return to the policy implications of the structure of the schedules of concessions that are used by WTO members in the third section of this article.

### *C Protocols of Accession and WTO Legality*

Protocols of accession in the early GATT years simply listed the tariff lines on which the acceding country made concessions. Over the years, things changed. Protocols of accession became elaborate documents that features both tariff- as well as non-tariff policy concessions.<sup>52</sup> Various factors contributed to this development, but two stand out. First, the sheer volume of protocols of accession increased substantially for accessions post-1995. The countries that acceded to the WTO included many former non-market economies. Incumbents felt that they had to impose some basic disciplines that would ensure that the commitments made by acceding nations would not be affected (undercut) by the idiosyncratic features of transition economies. Second, incumbents also felt that they should be compensated for the extent of bound liberalization that had been achieved over the course of GATT history. They therefore sought to accelerate and expand the extent of policy commitment bindings for the new kids on the block.

The result was that many accession candidates had to accept conditions of entry that do not apply to incumbents. China, for example, had to bind many of its export competition policies and address the issue of trading rights in China.<sup>53</sup> Such commitments

<sup>49</sup> The GATT, *supra* note 1, used different terminology than the subsequently negotiated Uruguay Round Agreement on Agriculture 1994, 1867 UNTS 410. The GATT refers to ‘non-tariff concessions’, whereas the Agreement on Agriculture makes reference to ‘commitments limiting subsidization’. This raises a question whether agriculture subsidy commitments are ‘concessions’ that can, therefore, be renegotiated under Article XXVIII. This is a matter that remains to be clarified through case law.

<sup>50</sup> WTO Secretariat, *supra* note 47.

<sup>51</sup> We are grateful to Roy Santana for these points.

<sup>52</sup> Charnovitz, ‘Mapping the Law of WTO Accession’, in M.E. Janow, V. Donaldson and A. Yanovich (eds), *The WTO Governance, Dispute Settlement and Developing Countries* (2008) 855.

<sup>53</sup> China’s Protocol of Accession, WTO Doc. WT/ACC/CHN/49, 1 October 2001.

qualify as WTO+ since WTO members did not have to observe similar requirements. The WTO Appellate Body has adjudicated disputes whereby the conformity of a clause embedded in a protocol of accession with the multilateral rules was challenged. In its case law, it does not put into question the lawfulness per se of these provisions. Thus, it allowed for contractual autonomy in this respect. Case law suggests that there is nothing wrong with WTO+ provisions. In *China – Raw Materials*, and in *China – Rare Earths*, the Appellate Body, using contextual arguments (for example, whether the contractual will was to link clauses included in the protocol of accession to the GATT system of general exceptions in case an assumed obligation has not been respected), effectively found that there was nothing wrong with accepting an obligation that no WTO incumbent had previously accepted.<sup>54</sup>

### D Deciding on the Legality of Schedules: WTO Public Order

Where does the discussion so far lead us? First, it is clear that in *EC – Bananas III*, the Appellate Body saw a hierarchy between core obligations of the GATT and the scheduling of concessions. Schedules must conform to the disciplines of the GATT/WTO, and any deviations from these disciplines must be agreed multilaterally. This is the first clear pronouncement in the direction of a WTO public order that all negotiated agreements must observe.

Second, the foundational core discipline – MFN – is central. The EU bananas regime violated MFN. It was negotiated between a subset of the membership without acquiring the consent of other interested and affected parties. As a result, the EU applied one import regime to bananas originating in countries that had signed the Framework Agreement, and a different, less favourable regime to the rest of the WTO membership. In this case, the EU could not contractually avoid the bite of MFN. It should, for example, have looked for an exception in say Article XX of the GATT to justify its bananas regime.<sup>55</sup>

Third, contractual autonomy has been largely respected when it comes to protocols of accession. It would be difficult to do otherwise. The MFN question does not arise since the acceding country must apply the same regime towards the whole WTO membership. It would be odd to do the opposite. How could WTO members challenge the consistency of an agreement (the protocol) that they have jointly authored and signed off on? Panels and the Appellate Body can find comfort in the legal maxim *non venire contra factum proprium*, which outlaws similar challenges.

Fourth, WTO members can schedule non-tariff policy concessions using the format that has been used since the Uruguay Round for listing their commitments. In fact, in principle, any sort of non-tariff concession can be entered into a schedule since the WTO legal regime does not impose any limits on the content of schedules and explicitly provides the opportunity for WTO members to make non-tariff commitments. By virtue of the Appellate Body report on *EC – Bananas III*, WTO members may grant rights to other WTO members but cannot diminish existing rights. It follows that if

<sup>54</sup> *China – Raw Materials*; *China – Rare Earths*.

<sup>55</sup> The European Union (EU) also invoked Art. XXIV of GATT, but to no avail.

they make non-tariff commitments they cannot violate MFN, the cornerstone of the GATT/WTO edifice. Whether the ‘objective criteria’ case law will inform the understanding of MFN remains an open question.

Fifth, scheduling does not confer legality. WTO members can challenge any scheduled items. The legal benchmark for deciding on similar complaints will be the WTO public order, as explained above. Panels and the Appellate Body could further find useful inspirations in the ‘objective criteria’ case law under *EC – Tariff Preferences*.<sup>56</sup> While this is still tomorrow’s music, it has important implications, as it means that multilateral scrutiny of new commitments made by WTO members is limited to the exercise of transparency – the scrutiny cannot be used as a mechanism to ‘approve’ (or reject) WTO+ commitments. The legality of such commitments is ultimately a matter for the Dispute Settlement Understanding (DSU).<sup>57</sup>

Perhaps surprisingly, the legality of granting new rights as opposed to diminishing existing rights is an open-ended, unanswered question. Leaving aside the ‘objective criteria’ case law, MFN needs a benchmark. Case law has repeatedly stated that assessing whether there is discrimination under Article I of the GATT requires a response to the question whether two goods are alike. This can be complicated even for tariffs. For example, what is the benchmark for likeness when dealing with 8- and 10-digit classifications? Assume that Home were to subdivide any 6-digit entry that it has bound at 20 per cent to two 8-digit entries: one, let us call it environment friendly, where it imposes a 0 per cent binding, and the other, environment unfriendly, where the 20 per cent binding stays as is. Through this new classification, Home is granting an advantage to all producers of the environment-friendly entry. At the same time, it confers a disadvantage on goods originating in WTO members that are environment unfriendly. Is this classification illegal per se? Can it be argued that it relies on ‘objective criteria’? Should Home be looking for justification in Article XX of the GATT? Should the WTO law on this score continue the practice of the 1940s and the 1950s where all tariff bindings were expressed at the 6-digit level? These questions remain unanswered. With this unsatisfactory legal state of affairs as background, we proceed to our policy analysis in what follows.

### 3 Potential Implications

In this section, we first explore the legality of ongoing market access liberalization initiatives. We are interested in one key question: does the possibility of scheduling non-tariff concessions on a MFN basis make consensus redundant? We recognize that this is a rather narrow question that abstracts from many other issues that confront efforts to negotiate new rules of the game for trade-related policies. These include consideration of whether all WTO members must participate in an end result or whether it is enough that a critical mass of countries do so. There are important questions regarding the design of deliberations to consider the need for possible WTO+ rules for a given

<sup>56</sup> *EC – Tariff Preferences*.

<sup>57</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes 1994, 1869 UNTS 401.



policy area, including issues concerning inclusiveness, participation and transparency. Similar questions arise if a group of countries eventually decides to launch negotiations to agree on a new set of policy disciplines. Should these be open to countries that have indicated they are unlikely to join a club? Should all WTO members be kept fully informed of the negotiations? Should the WTO Secretariat service the talks as it would do for multilateral negotiations? We abstract from these very important considerations for the purposes of this article. The question we want to focus on here is whether a group of countries that has, or wants to, come to a binding agreement on a WTO+ set of rules that are implemented on a non-discriminatory basis can simply agree to modify their schedules accordingly, without having to obtain the approval of the WTO membership as a whole.

### ***A Scheduling the Results of MFN Club Negotiations***

A specific example is useful to illustrate matters. WTO members are currently negotiating an Environmental Goods Agreement (EGA).<sup>58</sup> Insofar as the EGA involves reducing tariffs for specific products it must be applied on a MFN basis – that is, it needs to be a CMA along the lines of the ITA. However, in principle, the specifics of what could be negotiated in such an agreement might extend to non-tariff policies. An example would be an agreement to apply the national treatment principle to environmental subsidies. While this is not on the table in the current EGA talks, even a pure tariff-only deal may have non-tariff policy dimensions and implications.

Assume that Home has bound its duties on cement at 10 per cent and agrees as part of the EGA to bind its duties on cement produced with renewable energy at 0 per cent. Assume further that it agrees to do so on a MFN basis – as required by Article 1 of the GATT. Home, by virtue of the 1980 Decision on scheduling mentioned above, will notify the WTO Secretariat of the change. It may characterize it as a modification under paragraph 3 of the 1980 procedures or as an amendment, but, at this stage, Home's characterization is immaterial. The Secretariat will circulate the new Home schedule to the WTO membership. It might or might not receive objections. If Foreign, for example, does not participate in the EGA and produces cement with fossil fuels, it might challenge Home's dual tariff on cement, arguing that 'dirty' and 'clean' cement are like goods. If Home imports clean cement at 0 per cent from Third, but imposes a 10 per cent duty on Foreign, Foreign may claim a violation of MFN. But even if Foreign does not object during the three-month period, and the new schedule is certified, nothing stops Foreign from requesting the establishment of a panel to deal with this issue. Recall that in *EC – Bananas III*, the panel and the Appellate Body were dealing with a certified schedule. It did not stop the Appellate Body from establishing the inconsistency of the EU regime with WTO rules.

<sup>58</sup> See Environmental Goods Agreement, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1116> and <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/July/US-and-WTO-Partners-Announce-Launch-of-Negotiations-for-Enviro-Goods-Agreement> (last visited 21 February 2017), for background information on this ongoing negotiation.

A panel would have to address various questions in approaching this matter; indeed, it will have its hands full dealing with issues that have not been addressed before in case law. The difference in tariff treatment for two goods coming under the same six-digit classification will suffice for Foreign to argue there is a *prima facie* inconsistency of Home's measures. Home will base its 0 per cent tariff on a newly elaborated tariff binding (8- or 10-digits, it is immaterial). Similar bindings are not agreed, so the question, in all likelihood (that is, assuming application by analogy of the Appellate Body report on *EC – Tariff Preferences*) will be whether the two goods are like.<sup>59</sup>

The panel will have to decide if an advantage has been diminished or not. Is the 0 per cent treatment denied to a like good? Of course, it can decide that all sub-classifications are illegal *per se*. This would be wrong, since Article 3.3 of the HS Convention allows for sub-classifications. Panels could be influenced by WTO case law concerning likeness under Article III of the GATT. This is so because, unless Home in our example, allows for the two types of cement, when produced domestically, to be sold in similar conditions, it will be granting on its cement an advantage beyond the customs duty. It will thus be circumventing the basic GATT obligation to allow for only one form of protection: customs duties. If it does as expected, then *EC – Asbestos* would dictate a response to the effect that 'reasonable consumers' might take into account risks associated with consumption of the product.<sup>60</sup>

Although it is impossible to be definitive here,<sup>61</sup> legitimate arguments could be advanced to treat the two goods as unlike. If this is the case, then differential treatment should not be an issue. If not, Home will have to look for exception under Article XX of the GATT. The panel might find it opportune to decide that the criterion established (environmental pollution) is an 'objective' criterion (and, thus, borrow from the case law under *EC – Tariff Preferences*).<sup>62</sup> If not, it is the end of the story, but, if yes, then the question will be whether it matters that the WTO membership has given its agreement to the EGA or not. By backwards induction, anticipating a positive resolution of the dispute, signatories of the EGA might prefer not to request authorization to sign the agreement. Once they have reached agreement on items under negotiation, they can simply request the WTO Secretariat to circulate their new commitments to the membership. The rest will depend on whether non-participants wish to litigate.

The foregoing discussion focused on the case of differential tariff treatment for products depending on whether they are environmentally friendly. While seemingly simple, it illustrates that only case law will determine whether such agreements among a club of WTO members are WTO legal. Does analogous reasoning apply to instances where WTO members agree to WTO+ rules for a given policy area? Many of the policy areas that have been suggested as candidates for WTO+ rule making will apply, by their very nature, to all traded products – examples include competition policy disciplines, rules restricting the use of investment incentives or other types of

<sup>59</sup> *EC – Tariff Preferences*.

<sup>60</sup> *EC – Asbestos*.

<sup>61</sup> Mavroidis, *supra* note 42, provides an extensive discussion of the shortcomings of case law in this respect.

<sup>62</sup> *EC – Tariff Preferences*.

subsidies, an agreement on public governance of global value chains or initiatives to promote international regulatory cooperation. Agreements on such policy areas often will apply, by their nature, to all products; others may be limited to specific sectors (for example, sectoral regulatory cooperation initiatives). Assume that participating countries conclude an agreement and incorporate the results of their negotiation in their WTO schedule of concessions. Assume further, as must be the case, that the presumption is that they commit to implementing said agreement on a MFN basis and, thus, accept that the agreement is enforceable through the DSU. What then? In such cases, the type of complication that arises with differential tariff treatment of like goods does not arise. Thus, in principle, it may be easier to implement non-tariff commitments than differential tariff commitments.

What then constrains the ability of clubs to explore, negotiate and agree to new rules of the game? Clearly, a binding constraint is that MFN must apply – that is, the results of agreements that are scheduled cannot be applied in a discriminatory manner. If discrimination is deemed to be necessary to prevent free-riding, WTO members must either pursue the Annex 4 plurilateral agreement route or conclude PTAs with each other.<sup>63</sup> But, if the MFN constraint does not bind, in the sense that governments are happy to apply what they negotiate to all WTO members, then they can simply schedule their new agreements by reference. Insofar as a non-participating WTO member perceives the agreement to undercut its rights or negotiated concessions it can invoke the DSU, leaving it to panels and the Appellate Body to make a determination whether such nullification has occurred. This possibility creates an incentive for club members to ask for approval of the WTO membership of a new club agreement, but the key factor here is that non-participants cannot block other WTO members from moving forward and scheduling additional commitments. In this respect, while the GATT differs from the GATS, in that the latter makes life much simpler by including a provision under which WTO members can make additional commitments on either a unilateral or concerted basis (Article XVIII of the GATS), in practice, the absence of such a provision in the GATT does not preclude members from making additional commitments, either unilaterally or more realistically, on a concerted basis.

Of course, this does not imply that non-participants should stand by while clubs pursue new agreements. As is the case for non-MFN plurilateral agreements under Annex 4 of the WTO, MFN club-based cooperation will have implications for outsiders. Even if the outcome of a club negotiation is applied on a MFN basis, non-participants may object to the specifics of what has been agreed by a club. Recall in this respect our discussion of the EGA. Those not producing environmental goods will be hurt by tariff reductions on competing environmental goods, even if the latter are applied on a MFN basis. The example of the GPA demonstrates that those not at the table initially may never join an agreement, in part because they did not have a say in designing the rules. While a strong case can be made that the GPA satisfies the Pareto criterion and has improved world welfare, if the aim of club members is to develop

<sup>63</sup> In Hoekman and Mavroidis, *supra* note 2, we make a case that greater recourse to plurilateral agreements is preferable from a systemic perspective than engaging in ever more preferential trade agreements.

rules that they believe are in the interest of all WTO members to apply, any potential club should carefully consider the processes and approaches that are used to negotiate additional rules of the game. Conversely, non-participants should seek to ensure that at the very least they are cognizant of what a club is doing and have the opportunity to participate in the deliberations. As has been argued for Annex 4 plurilaterals, WTO members who want to move forward on multilateral rule-making could do much to address concerns of those who are not ready to participate by establishing a code of conduct that lays out clear guidelines and principles to assure transparency and openness of both deliberation and negotiation processes.<sup>64</sup>

### **B A Menu of Cooperative Club Options**

WTO members have many options they can use to push forward on new rule-making on a club basis. These include critical mass-based tariff reduction agreements such as the ITA, where a subset of countries agree to reduce duties on some products and extend this to all WTO members, CMAs on services policies, such as the Agreements on Basic Telecommunications or Financial Services in the GATS, plurilateral Annex 4 agreements like the GPA, where some benefits are extended only to signatories, and CMAs on non-tariff policies that are scheduled through listing the results of negotiations in Part III of the schedules of participating WTO members.

Which of these options like-minded countries may want to pursue will depend on many factors. A key consideration will be the importance accorded to minimizing free-riding. In many cases, an approach premised on negotiating agreements that apply universally to all WTO members is likely to be most appropriate from a systemic perspective. The Trade Facilitation Agreement (TFA) illustrates that an agreement on the rules of the game in a given area that apply to all WTO members need not mean everyone does everything on the same timeframe or that all of the rules apply unconditionally to all members.<sup>65</sup> Incorporating mechanisms that make implementation of generally applicable commitments conditional on capacity constraints being addressed, assistance being provided and so on may allow more TFA-like deals to be concluded. But a TFA-type approach is conditional on a consensus that multilateral rules should be adopted. This will not be case for some (perhaps many) areas of policy. Going down the MFN club path can be an effective half-way house for a group of like-minded nations to move forward in a specific policy area.

A major advantage of the MFN-club approach from the perspective of participants is that non-participants cannot block the scheduling of non-tariff policy commitments. Because plurilateral agreements under Annex 4 of the WTO are an exception to MFN, they require the agreement of all WTO members in order to be lawfully established.<sup>66</sup> MFN is the benchmark for the legality of scheduled commitments that reflect any (new) agreement between a set of countries. If a club has no desire or intent to

<sup>64</sup> Hoekman and Mavroidis, 'Embracing Diversity: Plurilateral Agreements and the Trading System', 14 *World Trade Review* (2015) 101.

<sup>65</sup> Agreement on Trade Facilitation, WTO Doc. WT/L/931, 15 July 2014.

<sup>66</sup> Hoekman and Mavroidis, *supra* note 64.

violate MFN – that is, implementation of all new obligations that club members agree to will benefit all WTO members equally – there is no need to go through the Annex 4 route. Nor is there formally a need to establish a new multilateral agreement or, if the matter is covered by an existing multilateral WTO agreement, for club members to amend the relevant agreement. While the WTO members involved in a club might privilege a request for authorization of what they agree to in order to avoid (reduce the scope for) challenges later on, this is not necessary. Scheduling does not confer legality, nor does *ex ante* multilateral scrutiny of what is being scheduled by a club of WTO members acting in a concerted manner.

Of course, simply including new policy commitments for non-tariff measures in existing schedules of concessions is not a panacea. An important consideration is that the scheduling of new disciplines will allow use of the DSU to enforce what has been agreed by a club. Since schedules are binding commitments that apply on a MFN basis, one consequence of using the scheduling route for committing to new WTO+ rules is that non-participating countries will be able to contest instances where WTO club members that make commitments do not implement them. This is something that the club will have to accept. More generally, an issue that will need to be addressed concerns the availability and resource costs associated with the support functions that are provided by the WTO Secretariat. Ensuring that any additional costs for the WTO Secretariat are covered by the relevant club is likely to be necessary to ensure that non-members are not able to argue they are negatively impacted by an MFN club and, on this basis, oppose what the club proposes to do.

In principle, the best way forward for WTO members with an interest in considering the pursuit of MFN clubs for new policy disciplines affecting trade in goods would be to propose the development of an analogue to GATS Article XVIII. As noted previously, this permits WTO members to schedule additional commitments in regard to trade-related services policies. This has been used, for example, as a means of incorporating the results of negotiations on basic telecommunications, which resulted, *inter alia*, in an agreement on regulatory principles in this sector, the so-called ‘Telecommunications Reference Paper’.<sup>67</sup> Only 82 out of 162 current WTO members have committed to the principles laid out in the Reference Paper, which include matters such as putting in place an independent regulator and ensuring that interconnection fees are cost based. Signatories to the Reference Paper are a MFN club: if countries sign up to these additional commitments, they are legally binding – that is, enforceable – and, thus, any GATS member, including those that have not signed up to apply the principles, may initiate dispute settlement proceedings against a member that has signed the Reference Paper.

Adding a provision to the GATT that would provide an analogous function to Article XVIII of the GATS would be the ‘cleanest’ way of creating a mechanism through which WTO members could incorporate MFN clubs pertaining to policies affecting trade in goods. While we believe that this would be beneficial in providing a framework for

<sup>67</sup> Negotiation Group on Basic Telecommunications, available at [www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm) (last visited 21 February 2017).

club-based cooperation looking forward, our analysis of the legal status quo suggests that WTO members need not wait for such a process to be initiated and concluded. Both substantive club-based discussions to explore areas for potential negotiation and the pursuit of efforts to agree to new disciplines can be launched already under the current rules and provisions. Indeed, doing so may generate the political attention and engagement that will be needed for WTO members to consider if and how a GATS Article XVIII analogue could be included in the GATT, thereby provide a supporting framework for new MFN clubs.

## 4 Concluding Remarks

Whether a subset of countries can form agreements on new WTO+ rules in the absence of consensus became a high-profile question in 2014. The Bali ministerial declaration called for a Protocol of Amendment to be adopted before 31 July 2014 to incorporate the new TFA into the WTO. The TFA had been successfully negotiated in Bali and agreed to by all members. In the event, the adoption of the Protocol – essentially a technical formality – was blocked by India at the July 2014 WTO General Council meeting. The Indian refusal to adopt the Protocol had nothing to do with the substance of the text but reflected India’s assessment that a veto could be used to make more rapid progress on addressing its concerns regarding its freedom to pursue its food stockpiling and farm support programs.<sup>68</sup> Given that this was a matter that had been discussed extensively in Bali, resulting in agreement on a timeline and process of deliberation to address the matter, the attempt to re-open a package deal that had been agreed by consensus in Bali was not well received by many WTO members.<sup>69</sup>

The situation that confronted the WTO membership in regard to the incorporation of the Protocol gave rise to the question whether it was possible for the majority to move forward with the TFA in the absence of consensus. Some WTO members reportedly were considering how the TFA might be transformed into a plurilateral agreement if the stalemate could not be overcome, but they were unclear how this could be done in legal and technical terms.<sup>70</sup> It was clear that an attempt to make the TFA an Annex 4 plurilateral agreement was not an option because this would also require consensus. In any event, India eventually decided to accept the Protocol so the issue became moot. Assume, however, for the purposes of discussion that no agreement on this had emerged. As there is nothing in the TFA that entails discrimination, the above discussion suggests that WTO members wanting nonetheless to implement the

<sup>68</sup> ‘India Blocks WTO Deal on Customs Rules as Deadline Nears’, *Reuters*, available at [www.reuters.com/article/us-wto-india-idUSKBN0FT2RE20140724](http://www.reuters.com/article/us-wto-india-idUSKBN0FT2RE20140724) (last visited 21 February 2017).

<sup>69</sup> International Centre for Trade and Sustainable Development, ‘WTO Members Weigh Options as India Pushes Food Security Link on Trade Facilitation Deal’, 18(27) *Bridges* (2014), available at [www.ictsd.org/bridges-news/bridges/news/wto-members-weigh-options-as-india-pushes-food-security-link-on-trade](http://www.ictsd.org/bridges-news/bridges/news/wto-members-weigh-options-as-india-pushes-food-security-link-on-trade) (last visited 21 February 2017).

<sup>70</sup> Buzurmuremyi and Drobnyak, ‘A Look into the WTO Trade Facilitation Agreement Implementation Status’ 4(9) *Bridges* (2015), available at [www.ictsd.org/bridges-news/bridges-africa/news/a-look-into-the-wto-trade-facilitation-agreement-implementation](http://www.ictsd.org/bridges-news/bridges-africa/news/a-look-into-the-wto-trade-facilitation-agreement-implementation) (last visited 21 February 2017).



TFA could have done so by incorporating the agreement into Part III of their GATT schedules of concessions.

The 2015 Nairobi WTO Ministerial Conference has created an opening for countries to discuss the subjects that are an integral element of the Doha Round outside of the framework and modalities established by Doha Development Agenda (DDA). It also created a window for WTO members to begin to explore new issues. These were important developments for the trading system, particularly the continued relevance of the WTO as a mechanism to deliberate on the need for new rules of the game for trade-related policies and as a forum for nations to undertake negotiations to do so. Whether WTO members decide to actively pursue new approaches to rule-making and how they do so will determine if Nairobi is a turning point for the WTO.

The Nairobi Declaration reiterates that multilateral negotiations to establish new rules of the game need to be agreed by all members. The final sentence of the declaration states: 'Any decision to launch negotiations multilaterally on such [new] issues would need to be agreed by all members.' The discussion above suggests that consensus is not needed for new agreements. Of course, universal TFA-type agreements may well be welfare superior to cooperation that is limited to a club of countries. Many, if not most, of the new non-DDA policy areas that have been suggested for rule-making in recent years – for example, investment or policies pertaining to the digital economy and data flows – are best pursued on a universal basis. The TFA illustrates that it is possible to agree on rules that apply to all WTO members and to address differences in implementation capacities. But it must also be recognized that the current reality is one where veto players have repeatedly attempted to pursue blocking and linkage strategies that have precluded the majority from concluding Pareto-sanctioned deals.

Clubs are an unavoidable part of the international landscape – the revealed preference for PTAs makes this very clear. PTAs are not going away – there are many reasons why countries have incentives to pursue deeper integration initiatives that do not extend to all WTO members. But when it comes to addressing the trade and transactions costs created by differences in regulatory practices and internalizing the spillovers created by unilateral action in specific regulatory areas – for example, rules that impact on digital trade and data flows – PTAs do not offer good solutions. MFN clubs may not be first-best either, but they are likely to be superior in welfare terms to PTAs. There are no formal constraints in the WTO that prevent WTO members from exploring the MFN club option – agreeing to WTO+ rules and incorporating them into their schedules in a concerted manner. Consensus is not required as long as deals are applied on a non-discriminatory basis and do not undercut existing rights of non-signatories, including provisions incorporated in existing multilateral WTO agreements. The binding constraint is political will – the need for critical mass coalitions that see it in their self-interest to work on a multilateral basis as opposed to a preferential, discriminatory one. The prospects for such bottom-up initiatives may be better than is often perceived by observers of the WTO. The successful outcome of the 2015 climate change conference in Paris, which was premised in part on a bottom-up, club-based approach, may motivate countries to do the same in the trade context.