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## A 'Critical Mass' Approach to Negotiations in the WTO: A Case Study Analysis

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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## **ABSTRACT AND KEYWORDS**

The thesis examines the viability of the ‘critical mass’ approach to negotiations as a proper substitute for conventional negotiating formats in present and future World Trade Organization (WTO) trade negotiations. The thesis provides an overview of the traditional negotiating formats in the WTO and its predecessor, the General Agreement on Tariffs and Trade of 1947 (GATT 1947). A case study approach is adopted in the thesis to explain the concept of the critical mass-based negotiating modality in the WTO context. The primary case studies are the existing WTO Information Technology Agreement, the WTO Basic Telecommunication Agreement, the Reference Paper, the WTO Financial Services Agreement, and the projected WTO Agreement on Fisheries Subsidies. The thesis concludes that due to various requirements implicit in its model, the ‘critical mass’ technique may not be a suitable substitute negotiating format for every present and future WTO trade negotiation.

Keywords: World Trade Organization, Critical Mass Agreement, Joint Statement Initiatives, Information Technology Agreement, Basic Telecommunication Agreement, Reference Paper, Financial Services Agreement, Fisheries Subsidies.

## **SUMMARY FOR LAY AUDIENCE**

The World Trade Organization (WTO) Agreement, which succeeded the General Agreement on Trade and Tariffs of 1947 (GATT 1947), was concluded in 1994. The WTO Agreement's institutional form took shape in the WTO as an international organization that administers the regulation of trading activities between member states. The WTO Agreement replicates most of the GATT 1947 but is silent as to the method by which trade negotiations are to be conducted. Some of the methods that have been used effectively require unanimous or near-unanimous approval, causing problems in the ability of the WTO membership to negotiate or extend successful trade agreements over the years. As a result of institutional paralysis partly caused by traditional negotiating modalities, the 'critical mass' approach has been suggested as a possible way forward for present and future WTO negotiations. Through case study analysis, this thesis examines to what extent a critical mass-based approach to trade negotiations can apply and be useful in the WTO negotiating context generally. The thesis concludes that due to various requirements implicit in its model the 'critical mass' approach may not be a suitable substitute negotiating format for every present and future WTO trade negotiation.

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## **LIST OF ABBREVIATIONS**

|       |   |
|-------|---|
| ACP   | African, Caribbean, and Pacific Group of States |
| ASEAN | Association of Southeast Asian Nations          |
| AFS   | Agreement on Fisheries Subsidies                |
| BRIC  | Brazil, Russia, India and China                 |
| BTA   | Basic Telecommunication Agreement,              |
| CMA   | Critical Mass Agreement                         |
| CTE   | Committee on Trade and Environment              |
| CPT   | Consumer Project on Technology                  |
| DDA   | Doha Development Agenda                         |
| DG    | Director-General                                |
| EC    | European Communities                            |
| EU    | European Union                                  |
| FOGS  | Functioning of the GATT System                  |
| FSA   | Financial Services Agreement                    |
| GATT  | General Agreement on Tariffs and Trade          |
| GATS  | General Agreement on Trade in Services          |
| GBT   | Group on Basic Telecommunications               |

|          |  |
|----------|--|
| IISD     | International Institute for Sustainable Development  |
| IPOA-IUU | International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing |
| IT       | Information Technology   |
| ITA      | Information Technology Agreement   |
| ITO      | International Trade Organization   |
| LDC      | Least-Developed Country  |
| MC       | Ministerial Conference   |
| MFN      | Most-favoured-nation   |
| MSY      | Maximum Sustainable Yield  |
| MTO      | Multilateral Trade Organization  |
| MTS      | Multilateral Trading System  |
| NGBT     | Negotiating Group on Basic Telecommunications  |
| NGOs     | Non-governmental organizations   |
| NGR      | Negotiating Group on Rules   |
| NGTF     | Negotiating Group of Trade Facilitation, Doha Development Round  |
| NT       | National Treatment   |
| NTBs     | Non-tariff Barriers  |
| OECD     | Organisation for Economic Co-operation and Development   |

|        |  |
|--------|--|
| PTA    | Preferential Trade Agreement                       |
| PA     | Plurilateral Agreement                             |
| S&DT   | Special and Differential Treatment                 |
| SOFIA  | The State of the World's Fisheries and Aquaculture |
| TNC    | Trade Negotiating Committee                        |
| UNCTAD | United Nations Conference on Trade and Development |
| UR     | Uruguay Round                                      |
| US     | United States                                      |
| QUAD   | United States, European Union, Japan and Canada    |
| WTO    | World Trade Organization                           |

## **CHAPTER ONE**

### **1. INTRODUCTION**

#### **1.1 Background to the Study**

*“Trade is important for the 21<sup>st</sup> century, it is important for prosperity. It is important for resilience. It is important for sustainable growth. And the WTO is right at the heart of this”*

- Dr Ngozi Okonjo-Iweala (WTO Director-General, 2021)

The importance of trade in human existence and survival cannot be overstated. The understanding that every country is dependent on other countries for certain goods and services has always been emphasized through cross-border interactions where countries exchange goods and services for mutual benefit. To ensure that countries are committed to their trading obligations, international organizations have been formed at the regional and global level.

The World Trade Organization (WTO) is the international organization that regulates trading activities among its members through the WTO Agreement<sup>1</sup> and other associated trade agreements negotiated under its aegis and that of its predecessor, the General Agreement on Tariffs and Trade of 1947 (‘GATT 1947’).<sup>2</sup>

The WTO Agreement originates in the GATT 1947, a treaty concluded between 23 governments in October 1947 that sought to promote stability in international trade relations. GATT 1947 was

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<sup>1</sup> Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154, 33 ILM 1144 (entered into force 1 January 1995) [WTO Agreement].

<sup>2</sup> General Agreement on Tariffs and Trade, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948) [GATT 1947].

in place for 48 years from 1948-1994. In that era, trade concessions were negotiated by GATT member countries in a series of formal multilateral negotiations known as “Rounds”.

GATT 1947 was initially drafted with a focus on tariff matters and quotas.<sup>3</sup> The drafters who designed GATT 1947 foresaw that the most effective way to promote stability in international trade was to oblige countries to ‘bind’ – or fix – their tariffs at individually negotiated levels through reciprocal negotiations between pairs of countries. Article XXVIII bis of GATT 1947 provides that tariff reduction negotiations should be periodically held on a “reciprocal and mutually advantageous basis” among the contracting parties.<sup>4</sup> However, GATT 1947 did not specify how the reciprocity resulting from these negotiations should be measured or determined among the contracting parties. The process and guidelines to determine reciprocity and the particular method of securing trade concessions in each negotiating round was left to the estimate of the contracting parties.<sup>5</sup>

The centerpiece of GATT 1947 was the requirement in GATT Art. II that members should not exceed individual countries’ bound tariffs on imports.<sup>6</sup> An additional requirement was the obligation in GATT Art. I for members to extend their best, or “Most-Favoured-Nation” (MFN),

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<sup>3</sup> After the WWII, major trade barriers included tariffs imposed by governments, the quantitative restriction or quotas which limits the quantity of specified goods allowed across the border, and the internal restrictions on exported goods in terms of taxes such as sales tax. These trade barriers were the major focus of the envisaged trade agreement which eventually became the GATT 1947. Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (USA: Butterworth Legal Publishers, 1990) at 67 [Hudec, *The GATT Legal System and World Trade Diplomacy*]; Robert E. Hudec, *Enforcing International Trade Law* (USA: Butterworth Legal Publishers, 1993) at 3 [Hudec, *Enforcing International Trade Law*].

<sup>4</sup> Reciprocity is loosely defined as the practice of making an action conditional upon an action by a counterpart. See Bernard Hoekman & Michel Kostecki (eds), *The Political Economy of the World Trading System*, 3rd ed (Oxford: Oxford University Press, 2010) at 161.

<sup>5</sup> WTO, “Art. XXVIII bis; Analytical Index of the GATT”, online: WTO <[https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/gatt1994\\_art28\\_bis\\_gatt47.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art28_bis_gatt47.pdf)>.

<sup>6</sup> See also John H. Jackson, *World Trade and The Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* (Indianapolis: Bobbs-Merill Company Inc, 1969) at 201 [Jackson, *Law of GATT*]

tariff or treatment to the remainder of the GATT membership.<sup>7</sup> The obligations in GATT Arts. I and II were complemented by the National Treatment (NT) obligation in GATT Art. III to treat imports no less favourably than domestically produced goods and the obligation in GATT Art. XI to eliminate quantitative restrictions (i.e. quotas) on imports.<sup>8</sup> A scholar sums up the GATT 1947 aim for world trade liberalization as trying to “... prohibit the application of quantitative restrictions, to allow regulation of import (and export) through transparently administered non-discriminatory [MFN] tariffs applied at the border, and then to work for the progressive reduction of these tariffs through successive rounds of negotiations.”<sup>9</sup> An idea that underpinned GATT 1947 tariff concessions by members was that tariff reduction negotiations should be carried on the principle of reciprocity and the benefits extended on an MFN basis to every GATT 1947 member.

GATT 1947 concessions in the early rounds were undertaken in a negotiating framework that originally followed an “offer and request” format involving bargaining between pairs of countries, which was tempered by awareness of the MFN requirement and possibility of free-ridership.<sup>10</sup> In essence, pairs of countries originally negotiated tariff concessions *inter se* but always did so

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<sup>7</sup> *Ibid* at 249-270; John H. Jackson, William J. Davey & Alan O. Skyes, *Legal Problems of International Economic Relations, Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations* 5th ed (St. Paul MN: West Publishing Co, 2008) at 467-490 [Jackson et al].

<sup>8</sup> Jackson, *Law of GATT*, *supra* note 6 at 273-294; Jackson et al, *supra* note 7 at 537-586; Kevin Kennedy, “GATT 1994” in Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer, eds, *World Trade Organisation: Legal, Political and Economic Analysis* Vol. 1 (United States: Springer, 2005) at 114 [Kennedy, “GATT 1994”]; Hoekman, & Kostecki, *supra* note 4 at 199-203.

<sup>9</sup> Anwarul Hoda, ed, *Tariff Negotiations and Renegotiations under the GATT and the WTO: Procedures and Practices*, 2nd ed (Cambridge: Cambridge University Press, 2018) at 2.

<sup>10</sup> An “offer and request” format implies that at each negotiating round, each negotiating party would make a “request” in the form of a list of the trade concessions it desires from other negotiating parties, majorly countries that are substantial importers of the formers’ goods. Subsequently, each negotiating party will make an “offer” list consisting of the concessions they are willing to grant if other negotiating parties accept their request list. Negotiating parties then begin to negotiate bilaterally until a concession list is agreed upon. Every bilateral tariff concession benefit is applied to all other GATT 1947 members on an MFN basis. Carl VanGrasstek *The History and Future of the World Trade Organization* (Geneva: WTO, 2013) at 314-316. A “free-rider” in the WTO is a casual term used to infer that a country that does not make any trade concessions nonetheless benefits from tariff cuts and concessions made by other countries in negotiations under the MFN principle: WTO, Glossary Terms, online: <[https://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm)>.

‘looking over their shoulder’ at other countries who might benefit from the concessions granted by virtue of MFN. This dilemma neatly encapsulates the problem of ‘free-ridership.’ Free-ridership was particularly problematic because it allowed countries to “free-ride” on the commitments made by other countries without necessarily making any commitments of their own. Over the next four decades, the growth of the GATT membership also led to an increase in complexity of negotiations conducted via a traditional “offer and request” approach.<sup>11</sup>

As a result, in the Kennedy Round of GATT negotiations (1963-1967) a “linear technique” for negotiating tariff reductions was introduced, which employed a 50% cut as a “working hypothesis”, or starting point, for negotiations but largely exempted agricultural products.<sup>12</sup> Industrial tariffs fell substantially through this technique, but non-tariff barriers (NTBs) like anti-dumping, subsidies, and safeguards became problematic. To address these issues, there was the negotiation of the first "side code" (on anti-dumping) to bring greater discipline to NTBs.<sup>13</sup>

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<sup>11</sup> Jackson, *Law of GATT*, *supra* note 6 at 224; Hoda, *supra* note 9 at 32, *Ibid*, VanGrasstek at 316.

<sup>12</sup> GATT, Meeting of Ministers, *Conclusions and Resolutions Adopted at Meeting of Ministers* (21 May 1963), GATT Press Release 794 (29 May 1963), online: WTO <<https://docs.wto.org/>> at 12-14, [Kennedy Ministerial Declaration]; GATT, Trade Negotiations Committee, *Resolution adopted on 6 May 1964*, GATT Doc TN 64/27 (11 May 1964), (online) <[https://www.wto.org/gatt\\_docs/English/SULPDF/91880148.pdf](https://www.wto.org/gatt_docs/English/SULPDF/91880148.pdf)> [Resolution adopted on 6 May 1964]; Jackson, *Law of GATT*, *supra* note 6 at 223; Hoda, *supra* note 9 at 33-34. For detailed history on the preparatory, negotiating process and the adopted Kennedy Round Agreements, see Bernard Norwood “The Kennedy Round: A Try at Linear Trade Negotiations” (1969) 12:2 *JL & Econ* 297; Gilbert Winham, *International Trade and the Tokyo Round Negotiation* (Princeton: Princeton University Press, 1986) at 60-67; John B Rehm, "Developments in the Law and Institutions of International Economic Relations: The Kennedy Round of Trade Negotiations" (1968) 62:2 *Am J Intl L* 403; Harry G. Johnson "The Kennedy Round." (1967) 23:8 *The World Today* 326.

<sup>13</sup> *Ibid*, Winham at 69; See also, Kenneth W Dam, *The GATT: Law and International Economic Organization* (Chicago, University of Chicago Press 1970) at 174-177. The Kennedy Round Anti-Dumping Code came into force on 1 July 1968, and it is formally referred to as "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade," its provisions are reproduced in 24th Sess, 15th Supp BISD (1968) 24 online: WTO <[https://www.wto.org/english/docs\\_e/legal\\_e/kennedy\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/kennedy_e.pdf)> at 24.



Notwithstanding this, the problem of free-ridership persisted. Also, the “linear technique” did not address the phenomena of tariff peaks and escalations.<sup>14</sup>

A potential solution to the problem of tariff peaks was the “formula method” of negotiation introduced in the subsequent Tokyo Round (1973-1979).<sup>15</sup> Under the "formula method," a formula was applied as a starting point for tariff reductions.<sup>16</sup> However, the formula technique had the potential to decrease tariffs in some areas but not others.<sup>17</sup> In addition, the basic issue of free-ridership continued.

The Tokyo Round resulted in a number of side codes formally separate from GATT with a variable membership. These side codes mainly focused on the problem of NTBs, including an extended anti-dumping code.<sup>18</sup> These side codes were entered into on a voluntary, take-it-or-leave-it basis. When some members accepted the side codes following the Tokyo Round but others did not, a pronounced asymmetry arose that later provoked disagreement within the GATT membership.<sup>19</sup>

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<sup>14</sup> Tariff peaks are also referred to as “exceptionally high tariffs.” These are tariffs of 15% or more, and they mainly apply to products exported by developing countries such as textiles, clothing, and some agricultural products. Tariff escalation occurs if tariffs rise with stages of further processing. For instance, a country may set low tariffs on imported materials used by a domestic industry to reduce the cost of production and then set higher tariffs on finished products to protect the goods produced by the industry. When an importing country escalates its tariffs, it becomes difficult for countries producing raw materials to process and manufacture value-added products for export. WTO, Market Access: Unfinished Business - Post Uruguay Round Inventory and Issues, (2001) Special Studies, No. 6 Economic Research and Analysis Division, World Trade Organization (WTO), Geneva. 1 at 12 online: <[https://www.wto.org/english/res\\_e/publications\\_e/special\\_studies6\\_e.htm](https://www.wto.org/english/res_e/publications_e/special_studies6_e.htm)>. The linear tariff cut technique could not address these tariff peaks. VanGrasstek, *supra* note 10 at 317; Hoekman & Kosteck, *supra* note 4 at 168, 196-198. See also, Bernard Hoekman et al, “Eliminating Excessive Tariffs on Exports of Least Developed Countries”, (2002) 16:1 The World Bank Econ Rev 1.

<sup>15</sup> GATT, *Ministerial Declaration* (14 September 1973), GATT/1134, online: WTO <<https://docs.wto.org/>> [Tokyo Ministerial Declaration]; See generally, Winham, *supra* note 12.

<sup>16</sup> The formula negotiating techniques is also called the 'harmonization' or 'non-linear' formula.

<sup>17</sup> See VanGrasstek, *supra* note 10 at 313-319; Patrick Love & Ralph Lattimore, *International Trade: Free, Fair and Open?* (Paris: OECD Publishing, 2009) at 83; Winham, *supra* note 12 at 18.

<sup>18</sup> For all the Tokyo Round side codes, see WorldTradelaw.net online: <<https://www.worldtradelaw.net/>>.

<sup>19</sup> Hudec, *Enforcing International Trade Law*, *supra* note 3 at 121-123.

As international trade began to expand and develop in the postwar era, the GATT 1947's limitations became apparent.<sup>20</sup> As mentioned, free-ridership continued to be problematic. The limitations of GATT 1947 resulted in the clamor for another negotiating round. To this end, the Uruguay Round (1986-1994) (UR) was launched in 1986.<sup>21</sup>

The WTO Agreement was concluded at the end of the UR to address some of the above-mentioned issues and make improvements in the functioning of the GATT 1947 system.<sup>22</sup> All three of the negotiating techniques mentioned above – offer-and-request, linear cut and formula approaches – were employed or contemplated in the Round. However, in such a sprawling set of negotiations another technique was also engaged in to conclude a final deal. A “single undertaking” negotiating principle was followed for the adoption of all the negotiated trade agreements. This approach provides that “nothing is agreed until everything is agreed.”<sup>23</sup> It mandates that every GATT 1947 member is to accept every negotiated trade commitment in the UR as a single integrated package. The single undertaking method was introduced to promote deal-cutting between different issue areas under negotiation and limit the free-ridership that had plagued trade agreements negotiated in previous rounds.

The new WTO Agreement consolidated existing GATT 1947 obligations into a “single undertaking”, thereby replacing the patchwork that had arisen under GATT 1947, the Tokyo side

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<sup>20</sup> Jackson, *Law of GATT*, *supra* note 6 at 515-531.

<sup>21</sup> GATT 1947, GATT Punta Del Este Declaration, Ministerial Declaration of 20 September 1986, online: <<https://docs.wto.org/>> [UR Ministerial Declaration]

<sup>22</sup> For a list of all the agreements negotiated at the UR, see Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 15 April 1994, 1867 UNTS 14, 33 ILM 1143. reproduced in WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts* (15 April 1994), online: WTO: <[https://www.wto.org/english/res\\_e/publications\\_e/legal\\_texts\\_e.htm](https://www.wto.org/english/res_e/publications_e/legal_texts_e.htm)> (entered into force 1 January 1995) [Results of the Uruguay Round].

<sup>23</sup> Robert Wolfe, “The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor” (2009) 12:4 J Intl Econ L 835 [Wolfe, “The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor”].

codes, and extended basic GATT disciplines beyond goods to certain service and intellectual property commitments.<sup>24</sup> GATT's dispute settlement system was also streamlined and brought forward, along with a new feature, the possibility of appellate review of dispute settlement results, designed to ensure accuracy and finality in dispute settlement results.<sup>25</sup> Finally, the WTO was constituted as a stand-alone organization under international law. Like the GATT 1947, the WTO Agreement established the WTO as a negotiating forum but did not specify or favour a particular means of negotiation among WTO members.<sup>26</sup>

The entry into force of the WTO Agreement in 1994 was a monumental achievement. Its timing was also fortuitous. The Cold War had just ended, and there was a sensed need for new global arrangements that would allow countries and individuals to develop peacefully under the rule of law.

The successful conclusion of the UR also suggested that future rounds of international trade negotiations could likewise be concluded based on a single undertaking. To further this aim, the WTO membership began to advocate for the initiation of another negotiating round. To this end the Doha Development Round (DDA/Doha Round) did eventually get underway in December 2001 with an ambitious mandate that foresaw further opening of agricultural and manufacturing markets, expanded coverage of services and new disciplines in intellectual property.<sup>27</sup>

Over time, however, it became difficult to conclude the Doha Round. Commentators began to point out how much trade-related growth was not always well distributed between and within

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<sup>24</sup> WTO Agreement, *supra* note 1 at Art. II.

<sup>25</sup> *Ibid*, Art. III:3.

<sup>26</sup> *Ibid*, Art. III:2.

<sup>27</sup> WTO, *Ministerial Declaration* (14 November 2001), WTO Doc WT/Min (01)/Dec/1, online: <<http://docs.wto.org>> [Doha Ministerial Declaration].

member countries. In the Doha Round's contentious atmosphere there seemed to be growing ambivalence about the value of interdependence. The great sense of commonality and common purpose that marked the early years of the WTO began to dissipate. Concern about free-ridership also festered. In the WTO doubt and difference translated into a divergence of views about the negotiating mandate and proper way forward in the Doha Round, a development which was conveyed in increasingly indefinite final pronouncements at biennial WTO Ministerial Conferences (MC).<sup>28</sup> The divergence became significant enough that after the 2015 Nairobi Ministerial the Doha negotiations were indefinitely suspended.<sup>29</sup>

One contributing factor to the current WTO institutional paralysis is the practice of consensus. As under GATT 1947, the organization's principal decision-making rule follows the practice of consensus.<sup>30</sup> Essentially, the consensus principle requires that decisions and rules should be unanimously agreed upon by all WTO Members present at a formal meeting. The consensus principle allows equal participation of all member countries in WTO rules and decision-making

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<sup>28</sup> Thus, at the Geneva Ministerial in 2011 Trade Ministers' Elements for Political Guidance in the negotiations recognized "that [WTO] Members need to more fully explore different negotiating approaches." WTO, Ministerial Conference, *Elements for Political Guidance* (1 December 2011), WTO Doc WT/MIN (11)/W/2, online: WTO <<https://docs.wto.org/>> [MC of 1 December 2011]. At the Bali MC in 2013 agreements were announced on trade facilitation and public stockholding for food security purposes but no mention was made of any "single undertaking". WTO, *Bali Ministerial Declaration* (11 December 2013), WTO Doc WT/MIN (13)/DEC, online: WTO <<https://docs.wto.org/>>.

<sup>29</sup> At the Nairobi MC in 2015 the Final Communiqué noted that "[m]any Members reaffirm the [Doha negotiations ...] Other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations." WTO, *Nairobi Ministerial Declaration* (19 December 2015), WTO Doc WT/MIN (15)/DEC, online: WTO <<https://docs.wto.org/>>. It was after this statement that the Doha negotiations were indefinitely suspended. Finally, at the Buenos Aires Ministerial in 2017 Joint Statement Initiatives (JSIs) were agreed to on in areas of E-commerce, Investment Facilitation, Services Domestic Regulation and Micro, Small and Medium-Sized Enterprises (MSMEs), but there was no Final Communiqué and even a stand-in "Chairperson's Statement" could not be agreed." WTO, Ministerial Conference, *Address by Mr Roberto Azevêdo WTO Director-General* (held on 13 December 2017), WTO Doc WT/MIN (17)/74, online: WTO <<https://docs.wto.org/>>. [WTO DG's address of 13 December 2017].

<sup>30</sup>WTO Agreement, *supra* note 1 at Art. IX:1.

regardless of economic status or population size. The practice of consensus is important to agreement, but over time it has been described as a source of inefficiency and deadlock.<sup>31</sup>

Since the suspension of the Doha Round the WTO has not been able to negotiate and conclude new trade agreements due to pre-existing negotiating techniques and methods. Trade experts and academic writers have suggested several options as to how the negotiations can be modified so that new agreements can be concluded in future.

One possible option is the use of a 'critical mass' approach (CMA) to negotiations.<sup>32</sup> A CMA exists when a subset of the WTO members – or 'critical mass' - agrees among itself to specific sector disciplines that will apply on a non-discriminatory basis to all WTO members.<sup>33</sup> WTO CMAs apply on an MFN basis. In the CMA context, a non-discriminatory or MFN basis means that every agreement arrived at through a CMA negotiation will benefit all WTO member states even if non-participants are not a party to the initial negotiation and adoption of such agreements. This extension of benefits occurs despite the fact that obligations will be limited to signatories.

In addition, CMAs do not require reciprocity among every WTO member. Unlike the GATT/WTO multilateral trade negotiation formats of offer-and-request, linear cut, and formula methods that envisage at least minimal reciprocity among all the GATT/WTO members, a CMA requires buy in only from participants negotiating the proposed agreement. An argument in favor of a 'critical

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<sup>31</sup> Bernard Hoekman, "Proposal for WTO Reform: A Synthesis and Assessment" (2011) Policy Research Working Paper 5525 7.

<sup>32</sup> For the purpose of this thesis, 'critical mass' and Critical Mass Agreement (CMA) may be used interchangeably.

<sup>33</sup> Bernard Hoekman & Charles Sabel, "Open Plurilateral Agreements, International Regulatory Cooperation, and the WTO" (2019) Paper No. RSCAS 2019/10, , online: *Cadmus, European University Institute Research Repository* <[https://cadmus.eui.eu/bitstream/handle/1814/60905/RSCAS\\_2019\\_10.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/60905/RSCAS_2019_10.pdf?sequence=1&isAllowed=y)>; Gary C. Hufbauer & Jeffrey J. Schott, "Will the World Trade Organization Enjoy a Bright Future?", (2012) Policy Brief 12 – 11 Peterson Institute for Intl Econ 7; Kimberly A. Elliott, "The WTO and Regional/Bilateral Trade Agreements" in *Handbook of International Trade Agreements, Country, Regional and Global Approaches* (London: Routledge, 2018) at 19.

mass' negotiating technique is that decisions taken among sub-sets of the WTO membership could facilitate the adoption of a forward-moving agenda and would not compromise the WTO multilateral trading system's integrity and coherence.<sup>34</sup>

## 1.2 Problem Statement

The 'critical mass' approach was instrumental in the successful negotiation of some WTO trade agreements in past, namely: the WTO Information Technology Agreement of 1996 (ITA)<sup>35</sup>, the WTO Agreement on Basic Telecommunication of 1997 (BTA) including the Telecommunications Reference Paper<sup>36</sup> and the Financial Services Agreement of 1996 (FSA).<sup>37</sup> The successes of these previous CMAs have been a motivation for the call for more 'critical mass' approaches in WTO trade negotiations.

However, there have been diverging views on the extent of the suitability of the 'critical mass' method as a substitute for traditional WTO multilateral negotiating formats of offer-and-request, linear cut, formula and single undertaking approaches. According to Hoekman, CMAs should be limited to trade negotiation in certain subjects but cannot be extended to policy areas such as industrial policy or subsidies.<sup>38</sup> For Wolfe, "as trade policy moves behind the border, it is difficult to consider a critical mass-based approach for regulatory changes engaged in by only a subset of

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<sup>34</sup> Patrick Low, "WTO Decision-Making for the Future" (2011) WTO Staff Working Paper, No. ERSD-2011-05 1 at 8, online: World Trade Organisation <[https://www.wto.org/english/res\\_e/reser\\_e/ersd201105\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201105_e.pdf)>.

<sup>35</sup> Agreement on Trade in Information Technology Products, Implementation of the Ministerial Declaration on Trade in Information Technology Products, Note by the Secretariat, WTO Doc G/L/159/Rev.1 (26 March 1996), online: WTO <<https://docs.wto.org/>> [ITA].

<sup>36</sup> *Fourth Protocol to the General Agreement on Trade in Services*, 15 April 1997, 2061 UNTS 214, 32 ILM 354, WTO Doc S/L/20 (entered into force on 5 February 1998) [GATS Fourth Protocol /BTA].

<sup>37</sup> *Fifth Protocol to the General Agreement on Trade in Services*, 3 December 1997, WTO Doc S/L/45 (entered into force on 1 March 1999) [GATS Fifth Protocol /FSA].

<sup>38</sup> "Revitalizing Multilateral Governance at the World Trade Organization", Bertelsmann Stiftung, ed, (Report of the High-Level Board of Experts on the Future of Global Trade Governance, 2018) 1 at 36, online: Bertelsmann Stiftung <<https://www.bertelsmann-stiftung.de/en/publications/publication/did/revitalizing-multilateral-governance-at-the-world-trade-organization/>>.

WTO."<sup>39</sup> Again, the major concern here appears to be free-ridership. According to Bollyky, CMAs may not be used to deepen or extend commitments covered under MFN provisions of WTO agreements other than those on goods and services.<sup>40</sup>

Cottier adds that because the impact of critical mass in rule-making requires careful consideration, it is essential to identify areas where critical mass negotiations may occur and those where it would be precluded.<sup>41</sup> One major issue that limits a CMA's coverage is free-ridership caused by MFN treatment. According to Hufbauer, "[t]he unconditional MFN principle has always enjoyed more affection in the textbooks than in the daily life of commercial policy."<sup>42</sup>

Is the 'critical mass' negotiating approach limited in scope and coverage? Are there some domains where a critical mass-oriented approach to negotiations is particularly appropriate or well-suited? The opinions of these commentators profile the limits of the 'critical mass' approach in the WTO negotiations. One scholar concludes that due to the free-ridership challenge and the lack of a defined extent of coverage of a CMA, the practicability of a CMA for trade agreement negotiation in the WTO should be examined on a case-by-case basis.<sup>43</sup>

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<sup>39</sup> Wolfe, "The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor", *supra* note 23 at 850-851.

<sup>40</sup> Thomas J. Bollyky, *A Role for the World Trade Organization on Regulatory Coherence*, The E15Initiative, Strengthening the Global Trade and Investment System for Sustainable Development Geneva (ICTSD & WEF, August 2015) 1 at 2, online: e15initiative <<https://e15initiative.org/wp-content/uploads/2015/09/E15-Regulatory-Coherence-Bollyky-Final.pdf>>.

<sup>41</sup> Thomas Cottier, "A Two-Tier Approach to WTO Decision Making" in Debra P. Steger, ed, *Redesigning the WTO for the 21st Century* (Canada: CIGI & Wilfrid Laurier University Press, 2010) 43 at 59.

<sup>42</sup> Gary C. Hufbauer, "Should Unconditional MFN Be Revived, Retired or Recast?" in R.H. Snape ed, *Issues in World Trade Policy* (UK: Palgrave Macmillan, 1986) 33; See also Warren F. Schwartz & Alan O. Sykes, "Toward a Positive Theory of the Most Favored Nation Obligation and Its Exceptions in the WTO/GATT System" (1996) 16 *Intl Rev L & Econ* 27.

<sup>43</sup> Raymond Saner, "Plurilateral Agreements: Key to Solving Impasse of WTO/Doha Round and Basis for Future Trade Agreements within the WTO Context" Raymond Saner, (2012) 1 CSEND Policy Brief No 7 at 26 online: CSEND <<http://www.csend.org/csend-policy-briefs/item/310-csend-policy-briefs>>.

### 1.3 Research Objective

The thesis seeks to examine the viability of a critical mass-based approach for WTO trade negotiations. To determine a CMA suitability for negotiating an agreement in a trade sector, a number of issues should be addressed:

- a. Whether assembling a ‘critical mass’ is possible.
- b. Whether there is a “champion” country willing to use the threat of market closure or other means to extract greater commitments from other WTO members.
- c. Whether the resulting critical mass is high enough and commands adequate institutional power in the concerned trade sector.
- d. Whether the issue of free ridership is non-consequential.

As previous WTO CMAs will illustrate, these questions should be cumulatively answered in the affirmative for a CMA negotiating arrangement to be possible in a trade sector.

This thesis will attempt a case study analysis of previous WTO CMAs including the WTO ITA, the BTA, the Reference Paper, the FSA, and a projected WTO Agreement on Fisheries Subsidies (AFS). This thesis will conclude that due to various requirements implicit in its model the ‘critical mass’ negotiating type may not be a suitable alternative to traditional types of trade negotiations in every present and future WTO trade negotiation.



#### **1.4 Scholarly Contribution**

As indicated, the WTO negotiating arm has broken down and there have been several proposals on how to proffer a solution to this. In this thesis the ‘critical mass’ negotiating approach is proposed as a way forward. However, there has been no detailed assessment of the ‘critical mass’ approach aside of commentators’ examination of the ‘critical mass’ as way to overcome the issue of free-ridership in a CMA arrangement. As this thesis will show, there are other factors that should be considered before a ‘critical mass’ approach can be applied in a WTO trade agreement negotiation. The above-mentioned CMA questions are the original contribution made by this thesis to existing literature on the concept of ‘critical mass’ in the WTO negotiation.

#### **1.5 Research Methodology**

The research undertaken in this thesis pursues more than one methodology through the different chapters. The research undertaken is primarily a case study analysis. To achieve this, the research will employ historical, doctrinal, empirical, and comparative methodologies.

The research will begin with a historical analysis of the significant events and happenings that surrounded international trade activities before the establishment of the GATT 1947, especially the economic effect of the Second World War (WWII), an examination of the shortcomings of the GATT 1947 and its eventual replacement by the WTO Agreement. This historical background will provide a clearer perspective and background for understanding the rationale for various negotiating techniques and other practices employed in decision- and rule-making adopted under GATT 1947, and later, the WTO Agreement.

With this background in mind, the research will examine the primary texts of the GATT and WTO Agreement. In this case, the examination of the primary texts will provide a foundation for

evaluating the multilateral trading system of the WTO and explain the benefits and drawbacks of some of the major principles and practices that it now observes, including the practice of consensus. In addition, secondary sources, including the opinion of text writers and journal articles about CMAs and other forms of plurilateral agreement (PA) will be reviewed. This literature review is pertinent because it provides exegesis for contemporary features and problems of the WTO trading system, the listed alternatives to a multilateral approach for trade negotiations, and the extent to which plurilateral alternatives can avoid current pitfalls.

Furthermore, a case study analysis is undertaken of WTO agreements concluded based on a ‘critical mass’ negotiation approach including the ITA, the BTA, the Reference Paper, and the FSA. These will be compared and applied to ongoing negotiations concerning the AFS.

Through these methodologies, an appraisal of what a CMA entails, an analysis of its extent of coverage in current international trade arrangements, and its limitations in contributing to future agreements in the WTO Agreement, will be assessed.

## **1.6 Thesis Structure/Organization of Chapters**

This thesis consists of five chapters. This opening chapter provides an introduction to the background study; the research objective; and how the research objective will be achieved. Chapter Two will provide a historical analysis of significant events that gave rise to today’s international trading system. The historical analysis will explain the original formation of GATT 1947; the WTO Agreement as its successor in 1994; an assessment of some of the multilateral trade negotiating formats that were used during the GATT era; and the GATT/WTO’s multilateral trading system’s limitations.

Chapter Three will analyze the concept of a WTO CMA and previous WTO CMAs, including the ITA, the BTA, the Reference Paper, and the FSA. Chapter Four will examine the practicability of the ‘critical mass’ method in ongoing negotiations over a WTO AFS. Chapter Five will provide qualifications and observations pertaining to the use of a ‘critical mass’ negotiating method, concluding that it may not be applicable in every type of trade agreement negotiation in the WTO.

## **CHAPTER TWO**

### **2. THE WTO – BACKGROUND AND NEGOTIATIONS**

#### **2.1 Introduction**

The World Trade Organization (WTO) is an international organization that regulates trading relations between its members.<sup>44</sup> The WTO Agreement came into force in 1995 to replace the General Agreement on Trade and Tariffs (GATT) of 1947.<sup>45</sup>

This chapter examines the GATT and its transition to the WTO Agreement. It provides a brief analysis of some of the multilateral trade negotiation rounds concluded to date and some of the underlying principles and practices governing GATT/WTO arrangements and their shortcomings. The WTO Agreement and its limitations are understood better when considered from the perspective of a historical analysis. This analysis is pivotal to understanding the WTO Agreement both as a treaty and an institution and its current limitations. The historical study will also serve as the foundation for subsequent thesis chapters.

#### **2.2 The Emergence of GATT 1947**

The GATT 1947 was an international trade agreement regulating trading activities among its contracting parties (or members) until it was replaced by the WTO Agreement in 1994. The GATT 1947 provided the substratum on which the WTO Agreement was later formed and operates to date. The GATT came into force in 1947 after a projected International Trade Organization (ITO) failed to materialize. To examine the formation of the GATT 1947 without mentioning an ITO

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<sup>44</sup> WTO Agreement, *supra* note 1.

<sup>45</sup> GATT 1947, *supra* note 2.

seems impossible because, according to Jackson, "The preparatory work for GATT is unusually full and complex.... and ... it is 'mingled' with that of the ITO."<sup>46</sup>

### **2.2.1 The International Trade Organization**

After the Second World War (WWII), countries gathered in the international community to assess the contribution of economic factors to the rise of political extremism in the 1930s, the devastating effect of the war on international trade and to avoid economic uncertainty. International actors were keen to establish an international institution that would prevent another Great Depression and the unilateral protectionist policies of the then industrialized states that had been implemented in the 1930s.<sup>47</sup>

The first step towards reorganizing the international economic order came about in 1944 at the Bretton Woods Conference.<sup>48</sup> At the Conference two international organizations were created, namely: the International Monetary Fund and the International Bank for Reconstruction and Development (the World Bank or IBRD).<sup>49</sup> The IMF was designed to stabilize the international monetary system while the IBRD was designed to promote reconstruction and development. However, a third policy area of concern during the Bretton Woods Conference was international trade. During the Conference international actors noted that governments ought to agree on ways of reducing international trade obstacles and promoting beneficial international commercial

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<sup>46</sup> For the GATT 1947 preparatory work, negotiation, and policy, see Jackson, *Law of GATT*, *supra* note 6 at 35–57; Hudec, *GATT Legal System and World Trade Diplomacy*, *supra* note 3; Hudec, *Enforcing International Trade Law*, *supra* note 3 at 289.

<sup>47</sup> Kennedy, "GATT 1994", *supra* note 8 at 91; Thomas J. Dillon, "The World Trade Organization: A New Legal Order for World Trade?" (1995) 16:2 *Mich J Intl L*. 349 at 351.

<sup>48</sup> 44 countries set up the Bretton Conference to agree on new rules for the post-WWII international monetary system; it is formally known as the United Nations Monetary and Financial Conference: US Department of State Archive online: <<https://2001-2009.state.gov/r/pa/ho/time/wwii/98681.htm>>.

<sup>49</sup> Jackson, *Law of GATT*, *supra* note 6 at 40.

relations. During this time, the US and UK were also working on proposals for an ITO. In 1945 the US released a draft of its proposals which foresaw the creation of an ITO to administer international trade relations.<sup>50</sup>

When the US made formal proposals for an ITO, the United Nations (UN) established a UN Economic and Social Council (ECOSOC) to coordinate international economic cooperation.<sup>51</sup> In February 1946 during the ECOSOC first session, the US proposed a resolution at the UN, Conference on Trade and Employment. The US proposal aimed to prepare a Charter for the ITO and to address other issues.<sup>52</sup> According to the US resolution, UN members were to set up a Preparatory Committee and hold several sessions to prepare an ITO Charter.<sup>53</sup>

During one of the sessions of the Preparatory Committee for the ITO Charter in London in 1946 the Committee suggested that an interim arrangement – referred to as "GATT" - would be necessary to "safeguard the value of tariff concessions" made during the ITO negotiating sessions.<sup>54</sup> Consequently, for this purpose a separate working group composed of the US, UK and a handful of other countries began to negotiate the original GATT. In other words, the GATT was to contain all the existing tariffs negotiations that had been extended to that time and to include some protective clauses that would prevent tariff commitment evasion.<sup>55</sup> The text of the GATT was concluded in Geneva in October 1947, with entry into force set for 1 January 1948.

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<sup>50</sup> *Ibid.*

<sup>51</sup> Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031; TS No. 993; 3 Bevens 1153 Art. 61 [UN Charter]; *Ibid* at 41.

<sup>52</sup> UN, ECOSO Resolution 13, U.N. Doc. E/22 (1946) cited in Jackson, "*Law of GATT*", *supra* note 6 at 41 n 23.

<sup>53</sup> *Ibid* at 40-46.

<sup>54</sup> *Ibid* at 43; Hudec, *The GATT Legal System and World Trade Diplomacy*, *supra* note 3 at 49.

<sup>55</sup> Jackson et al, *supra* note 7 at 218.

Negotiations for GATT 1947 ran in parallel with those of the wider the U.N. Conference on Trade and Employment. Consistent with its narrower purpose and limited number of participants, GATT 1947 was regarded as a fallback in case the Conference results were unacceptable. The Conference was scheduled to wrap up in Havana at the beginning of 1948.

At the Havana Conference in 1948, the Final Act for the ITO was signed as part of the Charter.<sup>56</sup> The Charter is often referred to as the Havana Charter. The Charter was not limited to tariffs issues; it addressed and regulated tariffs and other areas such as employment and many other trade-related matters. However, the ITO was envisaged as the central UN organization that would regulate international economic relations among international actors, including GATT members. Unfortunately, the ITO was considered too ambitious and never came into force because the US and the UK opposed it.<sup>57</sup>

Because the ITO never came into force, GATT 1947 emerged as the chief instrument to regulate international trade. It is noteworthy that the US was a significant force in the proposed ITO, the GATT 1947 and many other major international trade agreements that were concluded after the WWII. The US's importance came about because it was the "dominant economic power" after the WWII.<sup>58</sup> This allowed it to be a first-mover in many issue areas and in promoting negotiations of specific interest to it.

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<sup>56</sup> UN, Havana Charter for an International Trade Organization, 24 March 1948, UN Doc. ICITO 1/ 4 (1948); UN Doc. E/CONF 2/78, online: <[https://www.wto.org/english/docs\\_e/legal\\_e/havana\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/havana_e.pdf)>.

<sup>57</sup> For details on why the US refused to the ITO, see William Diebold, *The End of the ITO* (Princeton, New Jersey: Princeton Essays, 1962) 1; Hudec, *The GATT Legal System and World Trade Diplomacy*, *supra* note 3 at 60; see also, Richard N. Gardner, *Sterling-Dollar Diplomacy: Anglo-American Collaboration in The Reconstruction of Multilateral Trade* (USA: Oxford University Press, 1956) at 378-379; Jackson et al, *supra* note 7 at 219.

<sup>58</sup> Stephen Woolcock, "Evolution of the International Trading System" in Stephen Woolcock & Kenneth Heydon, eds, *The Ashgate Research Companion to International Trade Policy* (Routledge, 2012) 48; Jackson, *Law of GATT*, *supra* note 6 at 32; *Ibid*, Gardner at 102; Jackson et al at 216.

### 2.2.2 The GATT 1947

The GATT was signed by 23 contracting parties at Geneva in October 1947.<sup>59</sup> It was never intended to become an international organization, as explained above. Instead, it was supposed to be an interim arrangement that would eventually be integrated into the proposed ITO.<sup>60</sup> GATT Art. XXIX provides that all of the GATT's provisions except for the MFN principle would cease to function once the ITO was established. Some scholars refer to the GATT as a contract because it was an agreement between "Contracting Parties" and not as a "constitution" in the classic manner of the foundational instrument of an international organization.<sup>61</sup>

Countries involved in GATT 1947 were styled 'Contracting Parties' and administrative arrangements for the treaty remained deliberately modest. This modesty was due to the failure of the ITO and an institutional desire to low-profile. For the first two decades of GATT 1947's existence the treaty's secretariat was housed in a small villa, Le Bocage, on the grounds of the UN headquarters in Geneva and generally elicited little outside scrutiny.

The negotiations that had been undertaken among a small group of countries for the establishment of GATT 1947 reduced tariffs among members. These reductions were individualized and reciprocal in the sense that countries each agreed to certain reductions traded-off against their

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<sup>59</sup> The contracting parties that first signed the GATT 1947 were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom, and the United States.

<sup>60</sup> The GATT was intended to be an agreement that "would depend on the ITO for institution support such as decisions, dispute settlement, membership obligations". John H Jackson, *Sovereignty, the WTO and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006) at 93.

<sup>61</sup> Raymond J. Ahearn & Ian F. Fergusson, "World Trade Organization (WTO): Issues in the Debate on Continued US Participation" (2010) CRS Report for Congress R41291 1 at 3.



trading partners and then extended these reductions to the remainder of the GATT's membership via the MFN principle.<sup>62</sup>

GATT 1947 also contained a dispute settlement mechanism. This was operationalized under GATT Art. XXIII. Under that provision a system of panels arose to determine whether national measures “nullified or impaired” GATT trade commitments based on individual complaints brought by members. Where a violation of the treaty was found, a panel could make a recommendation of compliance or a ruling on a point of GATT law. A defendant country was then under an obligation to comply, which it normally did by withdrawing the impugned legislation or measure.<sup>63</sup> GATT Art. XXIII:2 also mentions the possibility of a plaintiff state seeking an authorization to suspend the application of concessions against the wrongdoer. However, this retaliatory option proved awkward and was rarely pursued.<sup>64</sup>

On its face, GATT dispute settlement appeared – and often operated – in a bilateral fashion ‘contractually’. It usually involved disputes between pairs of countries. Retaliation through selective market closure was possible though infrequently invoked. GATT dispute settlement helped to resolve certain differences between members but did so only in a piecemeal fashion and unevenly. Its regular operation was also hampered by decision-making rules.

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<sup>62</sup> Norwood, *supra* note 12 at 297-298.

<sup>63</sup> Hudec, *The GATT Legal System and World Trade Diplomacy*, *supra* note 3 at 107.

<sup>64</sup> In *Netherlands-Measures of Suspension of Obligations to the United States (complaints by Netherlands) (1953)*, 1st Supp BISD at 32 [*US – Dairy Products*], the Netherlands was authorized by a GATT panel to take counteraction against US restrictions on Dutch dairy exports to the US. The counteraction was limited in several ways. In particular, retaliation was authorized only after time-consuming procedures within GATT that lasted several months and was only prospective, meaning it did not cover injury sustained before the authorization. After six years of authorization the Netherlands' retaliation was allowed to lapse at the first sign of amendment to the US legislation. *US – Dairy Products* was the only instance in GATT's 48-year history when such procedures were invoked and applied. *Ibid* at 196-197.

GATT 1947's regular practice of decision-making was one of consensus, a practice which offered a defendant country the opportunity to block an unfavorable panel report when it came up for adoption. Approximately one-quarter of the 121 panel reports issued in the GATT 1947 era were blocked.<sup>65</sup>

## **2.3 GATT 1947 Negotiating Techniques**

### **2.3.1 Pre-Kennedy Round**

The negotiations that resulted in GATT 1947 foresaw further periodic rounds of international trade negotiations. During the GATT era (1947-1994) seven rounds of multilateral trade negotiations were undertaken and completed. These were Geneva (1947), Annecy, France (1949), Torquay, United Kingdom (1950-51), Geneva (1955-56), Dillon (1960-61), Kennedy (1964-67), Tokyo (1973-79), and Uruguay (1986-1994) respectively. The first five rounds were devoted primarily to tariff reductions. Governments bargained between themselves concerning only import tariff reductions and for the removal of quantitative restrictions. The sixth and seventh rounds addressed both tariff and NTBs in international trade.<sup>66</sup> The conclusion of the UR in 1994 marked the end of the GATT 1947 era and ushered in the WTO Agreement as its successor.

As explained, the drafters of the GATT 1947 projected that the most effective way to promote stability in international trade was to oblige countries to 'bind' – or fix – their tariffs through bilateral reciprocal negotiations among countries. GATT Art. XXVIIIbis provides that tariff reduction negotiation should be held on a "reciprocal and mutually advantageous basis." The two principles that guided the GATT 1947 negotiations among contracting parties were the principle

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<sup>65</sup> Hudec, *Enforcing International Trade Law*, *supra* note 3 at 289.

<sup>66</sup> The Kennedy and Tokyo Rounds will be discussed in subsequent sections.

of reciprocity and MFN.<sup>67</sup> The GATT 1947 did not provide specificity on how reciprocity should be measured among contracting parties. The process and guidelines to determine reciprocity and the methods of concessions were left to the discretion of the contracting parties in each negotiating rounds.<sup>68</sup> However, based on the principle of reciprocity every GATT member was required to make at least minimal concessions to benefit from other countries' concessions.

Until the Kennedy Round, GATT 1947 tariff cuts commitments and concessions were undertaken in a negotiating framework that originally followed an "offer and request" format that involved bilateral concessions among the negotiating parties. These negotiations generally took the form of specific reciprocity. No government was required to grant unilateral concession or grant a concession without receiving adequate concessions in return.<sup>69</sup> These concessions among the pairs of countries were then applied on an MFN basis to the remainder of the GATT 1947 membership.<sup>70</sup>

### 2.3.2 The Kennedy Round

The Kennedy Round was the sixth multilateral trade negotiation round of the GATT 1947 era.<sup>71</sup> It resulted in eight multilateral trade agreements.<sup>72</sup> The round was launched by the adoption of a

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<sup>67</sup> *Supra* note 9.

<sup>68</sup> *Supra* note 5.

<sup>69</sup> Hoda, *supra* note 9 at 29. On the issue of reciprocity during the GATT multilateral trade negotiation rounds, see also, Hoda at 61-77.

<sup>70</sup> *Ibid* at 28-29.

<sup>71</sup> After the European Economic Community (EEC) was created, the US panicked that, with the European integration under a single market, American exporters and their products might be shut out of the European Market. As a result, President Kennedy pushed for establishing new authority to negotiate trade agreements that would minimize US foreign duties by 50 percent. The US Congress agreed to President Kennedy's request, which gave rise to the Trade Expansion Act of 1962 (TEA). The TEA provisions were to be exercised through negotiations with other countries to reduce trade restrictions on a mutually advantageous basis. In furtherance of this, the Kennedy administration proposed a round of international trade negotiations among the GATT members. Winham, *supra* note 12 at 60-84; Norwood, *supra* note 12 at 299; Woolcock, *supra* note 58 at 50-51.

<sup>72</sup> The Kennedy Round Agreements included an Agreement on Grains, Anti-Dumping Code, Agreement on American Selling Price on chemical products, Agreement on Tariff Reductions, and the other four agreements were the protocols for the accession of Argentina, Iceland, Ireland, and Poland to the GATT organization. Rehm, *supra* note 12.

resolution at the 1963 Ministerial Conference at Geneva.<sup>73</sup> During the Kennedy Round, the GATT 1947 contracting parties employed a new method for tariff negotiation different from that of the traditional ‘offer and request’ method. The Ministerial Conference that launched the Round adopted a “substantial linear tariff reductions” approach to trade tariff cuts.<sup>74</sup> The tariff negotiation in the Kennedy Round was to be conducted on an MFN basis and on the principle of reciprocity among the negotiating participants.<sup>75</sup>

The linear tariff reduction approach was adopted for a number of reasons. First, with the increase in the GATT 1947 membership it became time-consuming and cumbersome to continue the bilateral ‘offer and request’ item-by-item negotiations.<sup>76</sup> Second, the disparity in tariff levels between countries became a major issue. As tariff levels decreased in most countries it became difficult to determine the measure of reciprocity required from each GATT member to ensure a balance in trade agreement negotiations, especially from countries with low tariffs *vis a vis* countries with higher tariffs.<sup>77</sup>

To address these issues, the linear tariff reduction was to be equal for all participants, and in cases there were "significant disparities in tariff levels," the reduction would be based upon “special rules of general and automatic application.”<sup>78</sup> In other words, there were certain minimum exceptions allowed in the application of the linear tariff reduction formula. For instance, the Trade Negotiating Committee (TNC) that administered the negotiations agreed that the linear reduction

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<sup>73</sup> Kennedy Ministerial Declaration, *supra* note 12. The Kennedy Round did not begin until 1964 among 22 countries termed as the negotiating parties. The negotiation was monitored by an established Trade Negotiating Committee (TNC). The TNC is a WTO committee that is usually set up to monitor and supervise negotiating meetings during multilateral trade rounds. Kennedy Ministerial Declaration, *supra* note 12 para B at 13.

<sup>74</sup> *Ibid* at para A (4) at 12.

<sup>75</sup> *Ibid* at para A (1).

<sup>76</sup> Jackson, *Law of GATT*, *supra* note 6 at 224; Hoda, *supra* note 9 at 30-32, VanGrasstek, *supra* note 10 at 316.

<sup>77</sup> *Ibid*, Hoda at 33.

<sup>78</sup> Kennedy Ministerial Declaration, *supra* note 12 at para A (4) at 12.

for tariffs on industrial products would be 50 percent, except concerning “overriding national interest issues”.<sup>79</sup> In turn, the “overriding national interest issues” exception was to be determined through a "confrontation and justification" (“c and j”) process in the negotiations themselves.<sup>80</sup>

In addition, a form of flexibility was given to developing countries and LDCs. It was agreed that developed countries should not expect to receive ‘full’ reciprocity from developing countries and LDCs.<sup>81</sup> In the end, developing countries and LDCs were to make ‘contributions’ according to their level of development and trade needs.<sup>82</sup>

During the Kennedy Round, NTBs became a major trade issue. In essence, lower tariffs exposed other forms of trade protectionism. Hence, aside from tariff negotiations the round attempted to address specific NTBs.<sup>83</sup> The major non-tariff agreement negotiated in the Kennedy Round was the Anti-Dumping Code.<sup>84</sup> The code was necessitated by EC and Canadian complaints against the US’s prolonged anti-dumping actions.<sup>85</sup> The US also complained about other countries' lack of transparent anti-dumping procedure and Canada's lack of an injury test in its own anti-dumping

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<sup>79</sup> Resolution adopted on 6 May 1964, *supra* note 12 para A (1) (i), (4).

<sup>80</sup> *Ibid* at para A (4). The “c and j” is the process employed by countries who do not wish to be bound by the 50 percent linear tariff reduction modality. These countries will be confronted and required to justify the reason for exception based on “overriding national interest issues”. Countries including Canada, EEC, United Kingdom, the US were exempted from the 50 percent linear tariff reduction modality based on the “overriding national interest issues.” These countries resorted to the “offer and request” negotiating method in their concessions. Johnson, *supra* note 12 at 327; Hoda, *supra* note at 33-34; Rehm, *supra* note 12 at 411.

<sup>81</sup> Kennedy Ministerial Declaration, *supra* note 12 at para A (8) at 13.

<sup>82</sup> Resolution adopted on 6 May 1964, *supra* note 12 at para D.

<sup>83</sup> *Ibid* at para C.

<sup>84</sup> The Kennedy Round Anti-Dumping Code is formally referred to as "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade," and generally known as International Agreement on Anti-dumping (“IAA”). Its provisions are reproduced in 24th, 15th Supp BISD (April 1968) 24.

<sup>85</sup> Winham, *supra* note 12 at 69; Rehm, *supra* note 12 at 427. See also, Kenneth W Dam, *The GATT: Law and International Economic Organization* (Chicago, University of Chicago Press 1970) at 174-177; Patrick F. J. Macrory “The Anti-Dumping Agreement” in Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer, eds, *World Trade Organization: Legal, Political and Economic Analysis*, Vol II (United States: Springer, 2005) 494-496 [Macrory, “The Anti-Dumping Agreement”].

practices.<sup>86</sup> Some form of international discipline on anti-dumping action was therefore deemed advisable.

After the Kennedy Round Anti-Dumping Code was negotiated, the US Congress passed a bill prohibiting the US Tariff Commission from implementing the Code because it was negotiated without "explicit consent from the Congress."<sup>87</sup> The US Congress' failure to implement the Kennedy Round Anti-Dumping Code was instrumental in spurring the negotiating of a formal GATT anti-dumping code during the subsequent Tokyo Round.

The Kennedy Round was also flawed in several respects. First, the "offer and request" type of negotiation which the round sought to eliminate was applied by most developed countries after or in addition to the linear cut. Second, the linear cut agreed to during the Round was itself deficient. The linear tariff reduction technique resulted in a uniform cut of the entire country's tariff schedules in the same proportion. This meant that all tariffs, both high and low, were cut at the same rate, thereby leaving tariff disparities intact.<sup>88</sup> In other words, tariff imbalance still remained because the linear cut could not address the issue of tariff disparity.<sup>89</sup>

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<sup>86</sup> *Ibid.* Hudec notes that "[i]n the Kennedy Round negotiations, governments wanting to tighten and refine the discipline on the use of anti-dumping duties ... resorted, in 1967, to a separate agreement. ... Although only the major developed countries and a few others signed, the signatories were pleased with the way the code approach had worked." Robert E. Hudec, *Developing Countries and the GATT Legal System* (UK: Gower Publishing Company, 1987) at 82 [Hudec, *Developing Countries and the GATT Legal System*].

<sup>87</sup> The US Congress claimed that the US negotiators were only authorized to negotiate tariff reductions and not NTBs. Winham, *supra* note 12 at 69; Macrory, "The Anti-Dumping Agreement", *supra* note 85 at 495.

<sup>88</sup> Hoekman & Kostecki, *supra* note 4 at 168.

<sup>89</sup> A commentator adds that the issue of tariff disparity continued after the Kennedy Round because no consensus could be reached during the round on the criteria to apply to secure higher reductions in products with high tariff levels. Hoda, *supra* note 9 at 33.

As tariff levels continued to decrease in most countries, the difficulty in determining the measure of adequate reciprocity that these ‘low-tariff countries’ could offer to achieve further concessions from countries with high tariffs persisted.

In addition, the linear technique could only be used to reduce fixed tariffs for trade liberalization. Complex trade measures including agricultural tariffs and NTBs that were not quantifiable could not be addressed through the linear tariff reduction negotiating method.<sup>90</sup>

Furthermore, there was the thorny issue of free-ridership, in which a number of countries benefitted from concessions without themselves making concessions. The issue of free-ridership continued to be problematic after the Kennedy Round.

### **2.3.3 The Tokyo Round (1973-1979)**

To address the limitations of the Kennedy Round, the Tokyo Round was launched.<sup>91</sup> The Tokyo Round Declaration was adopted at the conclusion of the 1973 Ministerial Conference in Tokyo.<sup>92</sup> The Tokyo Round was the seventh multilateral trade negotiation Round in the GATT era and it achieved substantial implementation by 1980.

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<sup>90</sup> Jackson, *Law of GATT*, *supra* note 6 at 225, 229, 246; Norwood, *supra* note 12 at 317. For agricultural tariffs, the “offer and request” method was adopted. Regarding NTBs talks, the round could not go far because of the challenges in getting the negotiating parties to agree on same rules change. The major NTB successfully negotiated, anti-dumping code, was not eventually ratified by the US Congress. Robert Koopman et al, “The Value of the WTO” (2020) 42 J of Policy Modelling 829 at 833.

<sup>91</sup> The Tokyo Round was led by the US Through the Williams Commission in 1971, the US proposed the need for a new international trade negotiation round that would encompass varying issues including tariff and essentially, non-tariff measures, monetary matters dealing with balance-of-payments adjustments, amongst other trading issues. Winham, *supra* note 12 at 92; Hudec, *Enforcing International Trade Law*, *supra* note 3 at 24.

<sup>92</sup> Tokyo Ministerial Declaration, *supra* note 15. The representative of 102 countries, including GATT members and non-members were present at the meeting, and they unanimously adopted the Tokyo Declaration at the end of the Conference. *Ibid*, Winham at 91.

The Tokyo Round featured GATT 1947's core principles of reciprocity and MFN. The Tokyo Declaration stated that "the negotiations shall be conducted on the basis of the principles of mutual advantage, mutual commitment and overall reciprocity, while observing the most-favoured-nation clause, and consistently with the provisions of the General Agreement relating to such negotiations."<sup>93</sup>

The Tokyo Round negotiations aimed to "conduct negotiations on tariffs by employment of appropriate formulae of as general application as possible."<sup>94</sup> The introduction of the "formula" method negotiation was to ensure harmonization in tariff reduction, particularly higher tariff peaks that the linear tariff reduction method could not address. In other words, instead of equal tariff reduction across board as in a linear cut, a formula approach meant that the higher the tariff, the larger the reduction.<sup>95</sup>

To achieve a tariff negotiation based on an "appropriate formula" at the start of the Tokyo Round negotiation, the negotiating parties proposed several tariff cutting formulas for the round's tariff reduction on industrial products.<sup>96</sup> Eventually, the Tokyo Round negotiation adopted the "Swiss Formula" for tariff cuts.<sup>97</sup> However, the Swiss formula was useful for cutting tariffs in some areas but not others.<sup>98</sup>

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<sup>93</sup> The developing countries were to make contributions consistent with their "individual development, financial and trade needs." *Ibid*, Tokyo Ministerial Declaration at para 5.

<sup>94</sup> *Ibid* at para 3(a). For the preparatory and analysis of Tokyo Round and the "side codes", see Winham, *supra* note 12 at 91-127; Jackson et al, *supra* note 7 at 235-237.

<sup>95</sup> Hoda, *supra* note 9 at 35; Love & Lattimore, *supra* note 17 at 83; See also VanGrasstek, *supra* note 10 at 313-321.

<sup>96</sup> *Ibid*, Hoda at 1, 34-35.

<sup>97</sup> The Swiss formula was proposed by Switzerland hence, the name "Swiss Formula". In the Tokyo Round, agricultural products were negotiated through "request and offer" resulting in an item-by-item method.

<sup>98</sup> The GATT tariff negotiations and concessions ("cut" and "bind" tariffs) are concerned with the countries' bound tariffs (i.e. the maximum they are permitted to impose rather than applied tariffs (i.e. those actually imposed on imports) In the case of the formula negotiating approach, The difference between a country's bound tariffs and its applied tariffs is known as "waters". One limitation of the formula negotiation approach is that because the focus is



For NTBs, the general aim of the Tokyo Round negotiations was to “reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under more effective international discipline.”<sup>99</sup> However, the formula method employed during the round could not address NTBs because of their unquantifiable and unmeasurable nature. Instead, disciplines on NTBs were negotiated in form of bilateral discussions among some WTO members, most of whom were developed countries.

The Tokyo Round resulted in nine agreements and four understandings. The nine agreements were explicitly referred to as "side codes", with seven of these being focused on NTBs including an extended anti-dumping code.<sup>100</sup> The “side codes” were adopted as stand-alone treaties with a

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on bound rates, if the formula or coefficient is applied to a country’s schedule of concession that has a large “water” (a country with a substantial difference between its applied tariffs and bound tariffs in a sector) there may be little or less reduction in the tariffs except such a country decides to increase its applied tariffs in that sector. Due to this limitation, the Swiss formula made shallow cuts or no cuts in certain sectors including textiles, footwear, leather goods. See VanGrasstek, *supra* note 10 at 313-319; Love & Lattimore, *supra* note 17 at 83; Winham, *supra* note 12 at 18.

<sup>99</sup> Tokyo Ministerial Declaration, *supra* note 17 at para 3(b).

<sup>100</sup> *Supra* note 18; Jackson et al, *supra* note 7 at 235-237; The nine side codes of the Tokyo Round pertained to subsidies and countervailing measures, technical barriers to trade, import licensing procedures, government procurement, customs valuation, antidumping (replacing the Kennedy Round Code), and agreements on bovine meat, dairy, and trade in civil aircraft. *Agreement on Technical Barriers to Trade*, 35th Sess, 26th Supp BISD (1980) 8 [Technical Barriers to Trade Code]; *Agreement on Interpretation and Application of Articles VI, XVI and XXIII*, 35th Sess, 26th Supp BISD (1980) [Subsidies and Countervailing Duties Code] 56; *Agreement on Implementation of Article VII*, 35th Sess, 26th Supp BISD (1980) 116; *Agreement on Government Procurement*, 35th Sess, 26th Supp BISD (1980) 33; *Agreement on Implementation of Article VI*, 35th Sess, 26th Supp BISD (1980) 171; *Arrangement Regarding Bovine Meat*, 35th Sess, 26th Supp BISD (1980) 84; *International Dairy Arrangement*, 35th Sess, 26th Supp BISD (1980) 91; *Agreement on Import Licensing Procedures*, 35th Sess, 26th Supp BISD (1980) 154; *Agreement on Trade in Civil Aircraft*, 35th Sess, 26th Supp BISD (1980) 162. For details of the Tokyo Subsidies and Countervailing Duties Code, see John D. Greenwald, “Negotiating Subsidies in the GATT/WTO: The Tokyo Round, What Shapes the Law?” in Luca Rubini and Jennifer Hawkins ed, *Reflections on the History, Law, Politics and Economics of International and European Subsidy Disciplines*, (Florence: European University Institute, 2016) at 37-40.

dispute settlement mechanism for each.<sup>101</sup> GATT members were allowed to choose which side codes they would adhere to.<sup>102</sup>

In the main, developing countries did not sign on to the side codes.<sup>103</sup> After the side codes became operational, some members accepted the side codes but others did not, causing the fragmentation that elicited disagreement within the GATT membership.<sup>104</sup> Initially, non-signatories were denied certain benefits, including limited participation in the organs and committees set up to implement the codes. Also, non-signatories were exempted from substantive benefits, including market access benefits extended under two of the side codes involving government procurement and subsidy/countervail matters. In addition, the Technical Barriers to Trade Code was implemented in a way that only its parties received notifications of new or changed standards.

National implementation of the side codes was also subject to peculiarities. Thus, the US implementation of the Subsidies and Countervailing Duties Code allowed only parties to the Code to benefit from the requirement of an injury test in US countervailing duty actions.

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<sup>101</sup> One of the reasons for the independent dispute settlement mechanism for each side code was because the side codes were adopted outside the scope of the GATT 1967. It was impossible for the GATT dispute system to adequately enforce most of the side codes especially the NTBs.

<sup>102</sup> The side codes were an attempt to circumvent the GATT 1947's cumbersome amendment procedures, which required approval by at least two-thirds of GATT members. GATT 1947, *supra* note 2 at Art. XXX. Hudec notes that before the Tokyo Round negotiations (1973-1979) "the GATT had experimented in a few cases with making changes in rules by means of separate side agreements" including an amendment prohibiting export subsidies for non-primary products in 1954-55, the GATT Multi-fibre Arrangement of 1974, and the Kennedy Round anti-dumping code. Robert Hudec, *Developing Countries and the GATT Legal System*, *supra* note 86 at 81.

<sup>103</sup>Hudec notes that "[o]f the 65 or so developing countries in the GATT, only a handful signed the Tokyo Round codes." *Ibid* at 88.

<sup>104</sup> For instance, the creation of the Tokyo Round side codes raised the issue of whether GATT's unconditional MFN obligation required that improvements in trade access granted to other code signatories had to be extended to other GATT members who were not signatories. Winham, *supra* note 12 at 355; Hudec, *Enforcing International Trade Law*, *supra* note 3 at 123; John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations* 2nd ed (Cambridge: MIT Paper Press, 1989) at 144 [Jackson, *The World Trading System*]; Manfred Elsig, "WTO Decision-Making: Can We Get a Little Help from the Secretariat and the Critical Mass?" in Debra P. Steger ed, *Redesigning the WTO for the 21st Century* (Canada: CIGI & Wilfrid Laurier University Press, 2010) 67 at 76-77.

Nevertheless, non-signatories still sought benefits under the Codes. Through the GATT Decision of 28 November 1979, these benefits were extended to every GATT 1947 member. Yet, once again free ridership continued to be a major and sensitive issue in the GATT.<sup>105</sup>

### 2.3.4 The Uruguay Round

#### 2.3.4.1 Introduction

The UR was the last negotiating round that occurred during the GATT 1947 era. The UR was the most protracted round of the GATT era. It is referred to as "the most ambitious and comprehensive of all Rounds."<sup>106</sup> The UR's Final Act was formally adopted on April 15, 1994, at the Marrakesh Ministerial Conference in Morocco, where 111 participating countries signed it.<sup>107</sup> The Final Act makes clear that the WTO Agreement contains the "GATT 1994", a treaty encapsulating the reformulated GATT 1947, eighteen trade agreements, and the Ministerial Decisions and Declarations adopted by the TNC on December 15, 1993.<sup>108</sup>

An overview of the Round will give an insight into the rationale for the WTO Agreement's establishment and how it addressed some of the problems identified above.<sup>109</sup> The brief analysis will also give a foundation to the thesis's subsequent discussion.

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<sup>105</sup> Hudec, *Enforcing International Trade Law*, *supra* note 3 at 123.

<sup>106</sup> Memory Dube, "The Way Forward for the WTO: Reforming the Decision-Making Process" (2012) Occasional Paper No 118 South Africa Inst of Intl Affairs 1 at 8.

<sup>107</sup> Results of the Uruguay Round, *supra* note 22. The 16 Ministerial Decisions and Declarations (Understandings) clarifies the certain position in some of the adopted Agreements including the GATT 1947.

<sup>108</sup> To review all agreements negotiated at the UR, See *Ibid*.

<sup>109</sup> For a detailed analysis of the UR preparatory work and negotiations, see John Croome, *Reshaping the World Trading System: A History of The Uruguay Round*, 2nd ed, (Geneva: WTO 1999) reproduced online: <<https://www.hse.ru/data/2011/12/05/1271919456/Reshaping%20e.pdf>>; Gilbert R. Winham, "An Interpretative History of The Uruguay Round Negotiation" in *World Trade Organisation: Legal, Political and Economic Analysis*, Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer, eds, Vol. 1 (United States: Springer, 2005) 4-25 [Winham, "An Interpretative History of The Uruguay Round Negotiation"].

### 2.3.4.2 The UR Negotiations

In June 1981, some of the GATT 1947 contracting parties, including the US, began to meet to discuss the global economic situation and means of improving the GATT 1947 multilateral trade system. As international trade began to expand and develop in the postwar era, the GATT 1947's limitations became apparent. The GATT 1947's institutional limitations were part of the reasons for the UR multilateral trade negotiations.<sup>110</sup> Some of the GATT 1947's limitations included its "provisional" nature; the undefined relationship between the GATT 1947 and other Bretton Woods agreements; the difficulties of its amendment process; and shortcomings in the GATT dispute settlement mechanism.<sup>111</sup>

After numerous deliberations during the subsequent years at various GATT ministerial conferences, the GATT contracting parties launched another round, christened the Uruguay Round at Punta del Este, Uruguay, in 1986.<sup>112</sup> A TNC was subsequently set up for the UR multilateral trade negotiation.

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<sup>110</sup> John H. Jackson, *Restructuring the GATT System* (New York: Council on Foreign Relation Press for the Royal Institute of International Affairs, 1990) at 45-47 [Jackson, "Restructuring the GATT System"]; Jackson et al, *supra* note 7 at 220-222; Jackson *Law of GATT*, *supra* note 6 at 515-531; Patrick Low, *Trading Free: The GATT and US Trade Policy* (Brookings Institution, 1993) at 242-252; Winham, *supra* note 12 at 9-15; Gardner, *supra* note 57 at 379-380.

<sup>111</sup> *Ibid.* According to the GATT Secretariat, issues brought before GATT dispute panels were "too wide in scope, and too important in terms of national policy, to be dealt with effectively by the semi judicial panel procedures" in GATT. As a result, developed countries sought solutions to specific industries' problems by negotiating trade-restrictive agreements outside the GATT rules framework especially on NTBs. Croome, *supra* note 109 at 4. Baldwin notes, "trade liberalization can be likened to the draining of a swamp: as the water level (average tariff levels) falls due to successful pumping efforts, rocks, stumps and all manner of other obstacles (NTBs) become visible." Robert Baldwin, *Nontariff Distortions of International Trade*, "Washington DC: Brookings Institution, 1970) cited in Adam Heal & Giovanni Palmioli, "Trade and Non-tariff Measures: Impacts in the Asia-Pacific Region" (2015) 1 Emerging Issues in Trade and Investment ST/ESCAP/2719 (UN, 2015) 1 at 13, online: UNESCAP <<https://www.unescap.org/sites/default/files/NTM%20Flagship%20-%202025%20May.pdf>>.

<sup>112</sup> UR Ministerial Declaration, *supra* note 21.

The UR was meant to correct GATT's deficiencies and address new subjects.<sup>113</sup> The UR was originally projected to end in 1990. However, in July 1990 GATT's Director-General stated that the TNC had assembled only "a compendium of positions, rather than draft agreements."<sup>114</sup> At the 1990 Ministerial Conference in Brussels, the negotiating parties agreed to extend the Round's deadline so that they could "reconsider and reconcile their positions in some key areas of the negotiations."<sup>115</sup>

After the Brussels MC was concluded, negotiations among the TNC began again in July 1991. In December 1991 a "*Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*" was consolidated.<sup>116</sup> This Draft was referred to as the "Dunkel Draft" after Arthur Dunkel, the Swiss administrator who served as GATT's DG from 1980-1993. The Dunkel Draft was not accepted as the UR Final Act by the GATT negotiating parties because of the lack of clarity in the aim and purpose of its agricultural coverage.<sup>117</sup> Instead, after protracted negotiations the UR was concluded in 1993. The Round had lasted for almost seven years.

### 2.3.4.3 The UR Negotiating Modalities

At the launch of the UR, the UR Ministerial Declaration did not specify the negotiating method to be adopted by the contracting parties.<sup>118</sup> Tariff matters were to be negotiated by "appropriate methods, to reduce or, as appropriate, eliminate tariffs including the reduction or elimination of

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<sup>113</sup> Issues discussed at the UR ranged from the liberalization of Tropical Products, Tariffs, NTBs, Safeguards, Subsidies & Countervailing measures, Textiles & Clothing, Agriculture, and the multilateralization of the Tokyo Codes, among other matters. Negotiations on three new trade areas were also introduced, namely Trade in Services, Trade-Related Aspects of Intellectual Property Rights, and Trade-Related Investment Measures.

<sup>114</sup> Croome, *supra* note 109 at 156.

<sup>115</sup> *Ibid* at 247. One of the major areas of disagreement between the negotiating parties, especially the EC and the US, was in the agriculture sector. This rift was settled after the Blair Accord between them.

<sup>116</sup> *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* (adopted on 20 December 1991) GATT No MTN.TNC/W/FA, [Dunkel Draft].

<sup>117</sup> Croome, *supra* note 109 at 149.

<sup>118</sup> UR Ministerial Declaration, *supra* note 21 at para D.

high tariffs and tariff escalation...”.<sup>119</sup> For NTBs, the aim was to “reduce or eliminate non-tariff measures, including quantitative restrictions, without prejudice to any action to be taken in fulfillment of the rollback commitments.”<sup>120</sup> The negotiating format for each sector to be negotiated at the UR was, to an extent, left to the discretion of the contracting parties.<sup>121</sup>

Although the UR Ministerial Declaration did not make explicit provision for reciprocity in tariff negotiations, it stated that “Negotiations shall be conducted in a transparent manner, and consistent with the objectives and commitments agreed in this Declaration and with the principles of the General Agreement in order to ensure mutual advantage and increased benefit to all participants.”<sup>122</sup>

After several deliberations, the UR adopted a combined approach of both formula and request and offer negotiating formats for tariffs on industrial products.<sup>123</sup> A zero-for-zero tariff elimination was also applied to certain sectoral negotiations including a proposed agreement on IT products, negotiations on construction equipment, and distilled spirits.<sup>124</sup>

As a result of the free-ridership of most developing countries and LDCs in previous rounds, the UR Ministerial Declaration introduced a “single undertaking” negotiating tool.<sup>125</sup> Part 1(B)(ii) of the UR Declaration states, “The launching, the conduct and the implementation of the outcome of

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<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> See Hoda, *supra* note 9 at 36-40, 56-60.

<sup>122</sup> UR Ministerial Declaration, *supra* note 21 at para B (i).

<sup>123</sup> The UR negotiating parties adopted an average 30% general tariff reduction target on industrial products, but the distribution among tariff lines was then negotiated bilaterally on a request–offer basis. Joseph Francois & Martin Will, “Formula Approaches for Market Access Negotiations” (2003) 26:1 *The World Economy* 2; VanGrasstek, *supra* note 10 at 315.

<sup>124</sup> *Ibid.*, VanGrasstek at 315-316; Francois & Will at 2.

<sup>125</sup> The single undertaking negotiating techniques was first introduced to the GATT 1947 multilateral trade negotiations in the UR.

the negotiations shall be treated as parts of a single undertaking..."<sup>126</sup> The idea of a single undertaking means that virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately. According to VanGrasstek, the UR Ministerial Declaration adopted the single undertaking method because the US and other developed countries wanted to avoid the free-ridership of developing countries. The free-ridership issue was best "remedied [by] tying the full range of agreements in a round into an indivisible deal."<sup>127</sup>

On the other hand, developing countries wanted a trade round that would take into account their needs in agriculture and other trade sectors of concern to them. With the single undertaking and the consensus decision-making principle, developing countries would be able to refuse any package that did not include matters of significant importance to them. This way every party envisaged a "win-win" situation.

The UR's chief accomplishment was the conclusion of the WTO Agreement, which succeeded GATT 1947. The WTO Agreement will be briefly examined below.

## **2.4 The World Trade Organization**

### **2.4.1 Introduction**

As explained, the WTO Agreement came into force as part of the Final Act signed at Marrakesh in April 1994.<sup>128</sup> The WTO as an international organization was formally established by virtue of

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<sup>126</sup> UR Ministerial Declaration, *supra* note 21 Part 1(B)(ii).

<sup>127</sup> VanGrasstek, *supra* note 10 at 308.

<sup>128</sup> The WTO's establishment as an international organization was not initially proposed during the preparatory work for the UR multilateral trade negotiations. The UR Ministerial Declaration did not also include a new institutional organization. However, the Ministerial Declaration included a group saddled with the responsibility to negotiate the "Future of the GATT System." (FOGS). This group was known as the "FOGS group". During the last negotiation session in 1989, some governments, including the EC and Canada, started to deliberate on the possibility of a new institutional organization to replace the GATT and to administer the expected results from the UR negotiations. After much deliberation, the EC proposed a new international organization with a trade-related mandates named the

the WTO Agreement.<sup>129</sup> As mentioned, the WTO Agreement created a single institutional framework that consolidated previous areas of coverage in a single instrument and created a new package of obligations among WTO member states.

The WTO Agreement administers the multilateral trading system (MTS) that now encompasses the GATT 1994 (i.e. the amended and reformulated GATT 1947) and other multilateral trade agreements concluded under the UR.<sup>130</sup> In a number of instances, it also brings forward a number of principles and practices observed under GATT 1947. This includes the GATT 1947's practice of consensus in decision-making. Hence, WTO Art. IX:1 provides that the "WTO shall continue the practice of decision-making by consensus followed under GATT 1947."

#### **2.4.2 The Consensus Principle**

In ordinary parlance, consensus is a group's unanimous decision to adopt or reject a decision or an act. Consensus is the most common negotiating and decision-making form in most international organizations.<sup>131</sup> Under the WTO Agreement, Art. IX consensus is deemed to exist "if no Member,

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"Multilateral Trade Organization". The MTO was not actively welcomed among the GATT members except Canada and India. The proposal for an MTO did not go very far, partly because the US initially opposed it. At that point Professor John Jackson stepped forward to propose a new international trade institution in 1990. Professor Jackson advocated for the creation of a "World Trade Organization with a "charter" or "constitution" for global trade" and gave a more detailed account of the organization's need and scope. Towards this aim, a draft of the WTO Agreement, including its institutional provisions, was included in the 1991 Dunkel Draft. At the UR's conclusion the WTO's establishment as an international organization was agreed to, thus remedying the failure of the ITO four decades before. Jackson et al, *supra* note 7 at 225; Jackson, *Restructuring the GATT System*, *supra* note 110 at 52; Croome, *supra* note 109 at 235-237; William J. Davey, "Institutional Framework" in Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer, eds, *World Trade Organisation: Legal, Political and Economic Analysis*, Vol. 1 (United States: Springer, 2005) at 55-56; Robert L. Howse, "The House That Jackson Built: Restructuring the GATT System", Book Review of Jackson, "Restructuring the GATT System", *supra* note 110 (1999) 20 Mich J Intl L 107 at 108.

<sup>129</sup> WTO Agreement, *supra* note 1 at Art. 1; During the adoption of the Results of the Uruguay Round, the GATT 1947 members agreed that the WTO, as an institution, become operational from January 1, 1995.

<sup>130</sup> WTO Agreement, *supra* note 1 at Art. II. The MTS is established in the Marrakesh Agreement's preamble; Annex 1 (A-C) WTO Agreement.

<sup>131</sup> See generally, Autumn Lockwood Payton, "Consensus Procedures in International Organizations" EUI Working Paper MWP 2010/22.



present at the meeting when the decision is taken, formally objects to the proposed decision."<sup>132</sup>

The consensus principle aims to allow all states' equal participation regardless of their population, size, or economic status. Since all WTO actors must apparently consent to an agreement before it is adopted, in theory there is no room for sidelining any WTO actor. Ehlerman opines that a consensus-based decision enjoys broad support and secures implementation because both the "power stakeholders and the minorities are in cooperation."<sup>133</sup> Cottier refers to the consensus rule as the "most democratic form of decision-making."<sup>134</sup>

At a glance, the consensus principle seems like a leveler among the WTO developed and developing countries because no decision will be taken unless all countries agree to it. Before the WTO Agreement's conclusion, the consensus principle succeeded because GATT 1947's founding countries were a group of like-minded members that had the same trade liberalization goals. These countries had the mutual understanding that tariff reduction among GATT member states furnished a common benefit for all.<sup>135</sup>

At the same time, the consensus principle creates a lowest common denominator whereby negotiations will have to proceed and achieve results in the most diluted form. It also privileges holdouts, who may be tempted to withhold approval in order to secure narrow advantages. In

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<sup>132</sup> WTO Agreement, *supra* note 1 at Art. IX.

<sup>133</sup> Claus-Dieter Ehlermann & Lothar Ehring, 'Decision-making in the World Trade Organisation: Is the Consensus Practice of the World Trade Organisation Adequate for Making, Revising and Implementing Rules on International Trade?' (2005) 51 J Intl Econ L 1 at 51–75.

<sup>134</sup> Manfred Elsig, & Thomas Cottier, "Reforming the WTO: The Decision-Making Triangle Revisited" in T. Cottier & M. Elsig, eds, *Governing the World Trade Organization: Past, Present and Beyond Doha* (Cambridge: Cambridge University Press, 2011) 289 at 297. It should be noted that formally, during the GATT period, decision-making in the WTO is foreseen to take place by means of voting, but voting rules are rarely invoked and decisions normally occur by consensus except for accession and waivers. The voting system is provided in the GATT 1947 Article XXV (3) & (4). However, the WTO Agreement codified the consensus principle. Art IX:1 of the WTO Agreement provides "Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter shall be decided by voting."

<sup>135</sup> Amos Saurombe & HIV Nkanbinde, "Reforming the Multilateral Decision-Making Mechanism of the WTO: What is the Role of Emerging Economies" (2013) 16:5 OER/PELJ 432 at 436.

addition, with the WTO membership having increased to 164 countries today it is nearly impossible to find agreement among such a widespread and diverse membership.

In addition, it is worth considering that most developing countries involved in the GATT 1947 were at an early stage of their independence. They had not invested in GATT/WTO participatory roles and later were mostly contented with their WTO membership title. A scholar rightly puts, "At most, independent African countries identified with their former colonial masters; hence decisions were taken in their support."<sup>136</sup> As such, the GATT 's practice of consensus was a reflection of a particular degree of accord that does not have easy parallel in the more complex reality of the WTO era. In current arrangements the range of commitments required by WTO membership is substantial. To insist on a consensus among all the WTO members for this wide range of commitments at every negotiation is not practicable.<sup>137</sup>

#### **2.4.3 The WTO Negotiating Modality**

The WTO Agreement Art. III enumerates the functions of the WTO.<sup>138</sup> One of these is the negotiation of trade agreements. WTO Art. III:2 provides:

*The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.*

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<sup>136</sup> *Ibid* at 439.

<sup>137</sup> On the difficulty of the consensus principle, Pascal Lamy (when he was still the European trade commissioner) stated that "There is no way to structure and steer discussions amongst [WTO] Members in a manner conducive to consensus," Anup Shah "WTO Meeting in Cancun, Mexico, 2003" *Global Issues* (18 September 2003), online: <[www.globalissues.org/article/438/wto-meeting-in-cancun-mexico-2003](http://www.globalissues.org/article/438/wto-meeting-in-cancun-mexico-2003)>.

<sup>138</sup> WTO Agreement, Art. III provides for the functions of the WTO to include implementation, administration, and operation to further the objectives of the WTO Agreement and other multilateral trade agreements.

Simply put, the WTO serves as a forum where its parties negotiate multilateral trade agreements. However, the WTO Agreement does not go on to specify which method of negotiation is to be used in the negotiations themselves. Instead, as mentioned, since the WTO's establishment different negotiating format have been utilized in the negotiation of international trade agreements among the WTO members.<sup>139</sup>

Nevertheless, the example of the single undertaking approach to negotiations initiated during the UR remains important, at least as a legacy matter.<sup>140</sup> Thus, WTO Agreement Art. XII provides that any state that intends to join the WTO must accept the WTO Agreement and its annexures without any reservations. Although the single undertaking approach does not have a formal legal manifestation in the WTO Agreement, it was applied in the Doha Round launched in the 2001 Doha Ministerial Conference.<sup>141</sup> The single undertaking approach is always referred to as "nothing is agreed until everything is agreed."<sup>142</sup> It provides that all commitments must be accepted as a whole package among all WTO members. This is to prevent "cherry-picking" by members and to ensure uniformity of obligations among the membership generally, thereby minimizing the free-ridership problem

## 2.5 Features of the Multilateral Trading System

Aside the consensus principle and the notion of the treaty as a single undertaking, the WTO Agreement also continues to apply other GATT 1947 principles and practices in its trade

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<sup>139</sup> Some trade agreements have been negotiated based on their acceptance by all WTO members; some have been negotiated among a part of the WTO members; and the formula method have also been applied in some other trade negotiations.

<sup>140</sup> WTO Agreement Art. II:2 provides that all agreements and legal instruments annexed to the WTO Agreement are an integral part of the Agreement. WTO Agreement, *supra* note 1.

<sup>141</sup> The Doha Round will be discussed below.

<sup>142</sup> Wolfe, "The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor", *supra* note 23; Dube, *supra* note 106 at 15-16.

negotiations, adoption, and implementation. A brief examination of these principles will provide the necessary foundation for subsequent discussions in the thesis. These principles include:

### **2.5.1 Non-Discrimination**

One of the WTO Agreement's tenets is to ensure inclusivity. The aim is to create an institution that ensures its members do not engage in unfair trade practices or treat a member's goods, services or intellectual property better than other members' goods, services and intellectual property. The GATT/WTO non-discrimination principle features two prongs, namely:

#### **2.5.1.1 Most-Favoured Nation**

GATT Art. I provides that "... any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."<sup>143</sup> The purpose of the MFN principle is to reduce trade friction and avoid trade distortion caused by conditional trade policies. GATT provisions allow for a broad MFN treatment among all members. In this way, international actors do not have to "depend on the individual participants' economic or political clout" for trading liberalization.<sup>144</sup>

MFN treatment helped to eliminate discrimination and promote fairness among GATT and now WTO members. In particular, developing countries and LDCs benefit from the ease of market access afforded by developed countries. But for the MFN treatment, developing countries and

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<sup>143</sup> GATT 1947, *supra* note 2 at Art. I (1-4); See generally, Jackson, *Law of GATT*, *supra* note 6 at 249-270; Jackson et al, *supra* note 7 at 467- 490; Kennedy, "GATT 1994" *supra* note 8 at 100-106. For the MFN Treatment exceptions, see GATT 1947, *supra* note 2 at Art. XX and XXIV; Jackson et al, *supra* note 7 at 490-516.

<sup>144</sup> *Ibid.*

LDCs would not have been privy to these benefits. MFN is enshrined in virtually every international trade agreement after the GATT 1947 and present WTO trade agreements.<sup>145</sup>

### 2.5.1.2 National Treatment

The second prong of the non-discrimination principle in the GATT/WTO is National Treatment (NT).<sup>146</sup> NT has two facets. First, in terms of fiscal discrimination members should not impose extra taxes or internal charges on imported like products or similar or substitutable products.<sup>147</sup> Second, in terms of broad regulatory discrimination NT provisions stipulate that imported products should be treated no less favorably than domestic like products.<sup>148</sup> The essence of the NT commitment is to eliminate domestic trade policies and regulations that protect domestic markets and adversely affect imported like products.<sup>149</sup>

### 2.5.2 Special and Differential Treatment

Originally, most GATT 1947 members were developed countries but today most WTO members are developing countries. In recognition of this evolution, the WTO multilateral trading system allows for the principle of Special and Differentiated Treatment (S&DT).<sup>150</sup> As such, certain

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<sup>145</sup> See also, General Agreement on Trade in Services, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (entered into force 1 January 1995) Art. V, VII [GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, 1869 UNTS 299, 33 ILM 1197 (entered into force 1 January 1995) Art. 4 [TRIPs Agreement].

<sup>146</sup> For details on the NT's provision in GATT/WTO, see *supra* note 8.

<sup>147</sup> GATT 1947, *supra* note 2 at Art. III (2).

<sup>148</sup> *Ibid* at Art. III (4).

<sup>149</sup> The National Treatment is also provided in GATS, *supra* note 145 at Art. XVII.

<sup>150</sup> The S&DT provision was provided for after the Tokyo Round through the GATT 1947 enactment of the “Enabling Clause” officially called “Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries” which grants preferential market access to developing countries; For details on the WTO S&DT and its history, see, Kevin Kennedy, “Special and Differential Treatment of Developing Countries” in Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer, eds, *World Trade Organisation: Legal, Political and Economic Analysis* Vol. 1 (United States: Springer, 2005) at 1525.

countries whose economy, according to the GATT 1947 Article XVIII (1), "can only support low standards of living and [is] in the early stages of development" are granted certain flexibilities.

Countries that benefit from S&DT are developing countries and LDCs. Both are allowed to deviate temporarily from certain GATT provisions in selected instances.<sup>151</sup> Countries that fall into these categories are not expected to adhere to the principle of reciprocity in the same way as developed countries.

Qualifications for developing country status have not been explicitly defined by the GATT/WTO, although the WTO Preamble refers to developing countries and LDCs. Enjoyment of developing country status in the WTO is self-identification.<sup>152</sup> A country can unilaterally declare itself to be a developing country without any contention or need to prove that status. However, the WTO Agreement defines an LDC by reference to the U.N.'s definition. WTO Art. XI:2 accepts the U.N.s' designation of a country as least-developed for purposes of the WTO Agreement.<sup>153</sup>

The WTO classifies S&DT provisions in six categories. These are:<sup>154</sup> 1) provisions aimed at increasing trade opportunities; 2) provisions that require WTO members to safeguard the interests of developing country members; 3) the idea of flexibility of commitments from developing countries; 4) transitional implementation periods; 5) technical assistance; and 6) provisions relating to measures to assist LDC members.

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<sup>151</sup> GATT 1947, *supra* note 2 at Art, XVIII (4) (a).

<sup>152</sup> WTO "Who are the developing countries in the WTO?" online: WTO <[https://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm)>.

<sup>153</sup> According to the UN, "Least developed countries (LDCs) are low-income countries confronting severe structural impediments to sustainable development" online: <<https://www.un.org/>>.

<sup>154</sup> WTO, Committee on Trade and Development, *Concerns Regarding Special and Differential Treatment Provisions in WTO Agreements and Decisions* (16 February 2000), Note by the Secretariat, WTO Doc WT/COMTD/W/66, online: WTO <<https://docs.wto.org/>>.

The foregoing are some of the fundamental principles and practices that defined the GATT 1947 trade agreement negotiation process and that are now operative under the WTO Agreement.

As explained, the WTO has launched only one negotiating round since its establishment in 1995. That round was launched at the 2001 MC in Doha and was suspended in 2015. A concise analysis of the negotiating modalities and an update of progress under the Doha Round is also imperative for a better understanding of the subsequent chapters in the thesis.

## **2.6 The Doha Development Agenda**

The Doha Round was the ninth multilateral trade negotiation round in GATT/WTO history. The Round was launched at the 2001 Ministerial conference in Doha.<sup>155</sup> It was expected to be concluded on 1 January 2005, and it involved 21 discrete subjects or items including agriculture and food security, non-agricultural market access, services, electronic commerce, TRIPS, and S&DT. The Doha Round was formally called the "Doha Development Agenda" (DDA or Doha Round).

### **2.6.1 Description of the Doha Development Agenda**

One reason for a new round in 2001 included the proliferation of regional trade agreements and the challenge that this represented to the WTO system. Since the conclusion of the WTO Agreement in 1994 there had been a degree of competition posed to its primacy by the conclusion of regional trade arrangements. At the same time, developing countries and non-governmental organizations (NGOs) perceived that the WTO Agreement was not a fair and balanced

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<sup>155</sup> Doha Ministerial Declaration, *supra* note 27.

arrangement and the only way to correct the imbalance arising from the UR was through the launch of a new round.<sup>156</sup>

However, developed countries also wanted an expansion in coverage involved in some of the UR negotiations. For instance, talks on agriculture and services could be further expanded only through another multilateral trade negotiation round that would involve cross-issue linkages and trade-offs.<sup>157</sup> In addition, the US and other Organization for Economic Co-operation and Development (OECD) members saw the need for a new round as a way to increase economic opportunities and trade with developing countries.<sup>158</sup> Other countries considered that a new round would also make up for the failure to reach an agreement on a Multilateral Agreement on Investment and other new disciplines, including competition policies, especially in the aftermath of the failed Seattle Ministerial Conference in 1999.<sup>159</sup>

Thus, with varying agendas, the WTO members launched the Doha Round in 2001.

### **2.6.2 Post-Doha Development Agenda Declaration**

After the Doha Round launch in late 2001, negotiations began in the different committees set up for each subject under negotiation. These committees were monitored by the WTO TNC, which oversaw progress as a whole.

The Doha Round progressed only very slowly, punctuated by the WTO Ministerial Conferences at two-year intervals. The Doha Round stumbled on a number of occasions, notably at Cancún,

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<sup>156</sup> Hoekman & Kostecki, *supra* note 4 at 140.

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*



Hong Kong and twice in Geneva.<sup>160</sup> The 2003 Cancún MC was supposed to be for "stock-taking," where WTO members were to discuss the way forward. Unfortunately, the Cancún MC ended in a deadlock because members could not agree on agricultural matters and the so-called "Singapore issues" (Trade and Investment, Trade and Competition Policy, Transparency in Government Procurement, and Trade Facilitation) identified at the time of the Singapore Ministerial Conference in 1996.<sup>161</sup>

In addition, at the Geneva Ministerial in 2011 the Trade Ministers' Elements for Political Guidance document appeared to call into question the idea of a single undertaking by noting that WTO could "advance negotiations, where progress can be achieved, including focusing on the elements of the Doha Declaration that allow Members to reach provisional or definitive agreements based on consensus earlier than the full conclusion of the single undertaking."<sup>162</sup> Despite the idea that agreements might be concluded in a piecemeal way as stated by the Trade Ministers in the 2011 Geneva MC, negotiations in Doha Round listed subjects were not brought to a successful conclusion, except for the Trade Facilitation Agreement (TFA) concluded at the 2013 Bali MC.<sup>163</sup>

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<sup>160</sup> Peter Pedersen, "The WTO Decision-Making Process and Internal Transparency" (2006) 5:1 World Trade Rev 103 at 118-123; Davey, *supra* note 128 at 63; Stuart Harbinson, "The Doha Round: "death-defying agenda" or "don't do it again"?" (2009) European Centre for International Political Economy (ECIPE) Working Paper, No. 10/2009 1 at 6-9; For details of the Cancun Conference breakdown and post-Cancun negotiations, see Pedersen at 118-125; Robert E. Baldwin, "Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies" (2006) 29:6 World Economy 677.

<sup>161</sup> WTO (2019), "Doha Agenda" online: <[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/doha1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm)>.

<sup>162</sup> MC of 1 December 2011, *supra* note 28.

<sup>163</sup> *Protocol Amending the WTO Agreement* (General Council Decision of 27 November 2014), WTO Doc WT/L/940, online: WTO <<http://docs.wto.org>>. The TFA came into force in 2017 and included provisions for the expedition of the movement, release and clearance of goods, including goods in transit among other things.

Given the lack of agreement, the Doha negotiations were indefinitely suspended after the Nairobi MC in 2015.<sup>164</sup>

### **2.6.3 The Doha Development Agenda Round Negotiating Modality**

Deliberation on negotiating formats for tariff cuts contained in the Doha Round began after the 2001 Doha MC. At the 2005 Hong Kong MC, WTO members agreed to select a negotiating modality before April 30, 2006.<sup>165</sup> On April 21, 2006, the WTO DG, Pascal Lamy announced that there was no consensus for agreement on negotiating modalities.<sup>166</sup> Eventually, the WTO members agreed to a formula-based tariff reduction approach and a “request and offer” process for negotiation on services trade liberalization.<sup>167</sup> As mentioned, the Doha Round was suspended indefinitely in 2015.

### **2.6.4 The Single Undertaking Principle**

Due to the single undertaking principle's success in the UR, scholars began to promote the idea of it as a suitable practice for the multilateral trading system. For Siebert, “packaging advantages into one bundle is a promising approach...”<sup>168</sup> Wolfe added that the single undertaking is the only mechanism that ensures an “appropriate aggregation” of issues and participants between

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<sup>164</sup> *Supra* note 29. For reasons on the Doha Round failure, see generally, Robert Wolfe, “First Diagnose, Then Treat: What Ails the Doha Round?” (2015) 14: 1 *World Trade Rev* 7; Hufbauer & Schott, *supra* note 33 at 3; Hoekman & Kostecki, *supra* note 4 at 141.

<sup>165</sup> US Congress, Report for Congress, “World Trade Organization Negotiations: The Doha Development Agenda” (2012) Congressional Research Service 1 at 5.

<sup>166</sup> *Ibid.*

<sup>167</sup> The WTO members agreed that (at least) two coefficients would be used for the formula-based tariff reductions, one for developed countries and another for developing nations. The different coefficients were adopted so that developed countries would reduce their tariffs proportionally in accordance with the notion of S&DT. Hoekman & Kostecki, *supra* note 4 at 143.

<sup>168</sup> Horst Siebert, “What Does Globalization Mean for the World Trading System?”, in Edward McWhinney, ed, *From GATT to the WTO, The Multilateral Trading System in the New Millennium*, (Kluwer Law International B.V., 2000) 137 at 158.

developing and developed countries.<sup>169</sup> The single undertaking practice allows trade-offs among GATT/WTO members. Alongside the consensus principle, a single undertaking ensures that every actor benefit in some way from every WTO round.

To be sure, the Doha Round had adopted the concept of a single undertaking negotiation tool as had featured in the UR. Thus, the Doha Ministerial Declaration stated:

*With the exception of the improvements and clarifications of the Dispute Settlement Understanding, the conduct, conclusion and entry into force of the outcome of the negotiations shall be treated as parts of a single undertaking. However, agreements reached at an early stage may be implemented on a provisional or a definitive basis. Early agreements shall be taken into account in assessing the overall balance of the negotiations.*<sup>170</sup>

Despite the benefits of a single undertaking approach, the certainty of it enabling the conclusion of a successful round in the WTO remains questionable. The single undertaking was initially designed to facilitate an equitable global agreement in the specific and contingent circumstances of the UR and address the core issue of free-ridership. However, it may no longer be a useful negotiating tool. Instead, the idea of a single undertaking has become a way for countries to hold the negotiations hostage for selfish individual gain. The multilateral trading system has now become a herculean task in seeking agreement rather than a means of unification within the agreed framework of the WTO Agreement. According to Croome, the package approach to trade negotiations is “like a convoy of ships [since] a big negotiation covering a range of subjects takes time to assemble and, once on the move, can only progress at the pace of its slowest element. Its

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<sup>169</sup> Robert Wolfe, “Global Trade as a Single Undertaking: The Role of Ministers in the WTO” (1996) 51:4 Intl J 690 at 697.

<sup>170</sup> Doha Ministerial Declaration, *supra* note 27 at para 47.

agenda is usually overloaded; it is easily held hostage to doubts or delays in a key participating country.”<sup>171</sup>

Emphasizing the deficiencies of a single undertaking approach Pascal Lamy stated, “It is absurd to push, as the EU has done, to impose rules in complex areas such as competition and investment on countries so poor that some cannot even afford WTO diplomatic representation. If such rules have any place in the WTO, all but its richest members should be free to opt in or out of them. Refusing such flexibility will only lead to a repetition of the deadlock that sank Cancun.”<sup>172</sup> Unlike in the UR, in the Doha Round countries - particularly developing countries - were reluctant to negotiate agreements that they were incapable of implementing in the form of a single undertaking.<sup>173</sup>

As indicated, for several reasons, including the single undertaking approach to negotiations, the Doha Round failed and was indefinitely suspended in 2015.<sup>174</sup>

## 2.7 WTO Joint Statement Initiatives

In light of the failure of the Doha Round and general paralysis in WTO negotiations, some WTO members undertook a relatively new negotiating approach to trade agreements and rules outside the WTO in 2017.<sup>175</sup> These initiatives are referred to as "Joint Statement Initiatives" (JSIs). JSI

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<sup>171</sup> Croome, *supra* note 109 at 344; Miguel Rodriguez Mendoza “Toward “Plurilateral Plus” Agreements” in Ricardo Meléndez-Ortiz et al ed, *The Future and the WTO: Confronting the Challenges. A collection of short essays* (Geneva, Switzerland: ICTSD, 2012) at 33.

<sup>172</sup> *Financial Times* (September 23, 2004) cited in Andrew Cornford “Variable Geometry for the WTO: Concept and Precedents”, (May 2004), UNCTAD Discussion Paper No 171 1 at 2, online: *UNCTAD* <[https://vi.unctad.org/resources-mainmenu-64/digital-library?view=show&doc\\_name=osgdp20045\\_en](https://vi.unctad.org/resources-mainmenu-64/digital-library?view=show&doc_name=osgdp20045_en)>.

<sup>173</sup> WTO, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, “The Future of the WTO: Addressing Institutional Challenges in the new Millennium” (2004) 1 at 62, online: *World Trade Organization* <[https://www.wto.org/english/thewto\\_e/10anniv\\_e/future\\_wto\\_e.htm](https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm)> [Sutherland Report].

<sup>174</sup> *Supra* note 29.

<sup>175</sup> WTO, Communication by the Co-coordinators of the JSIs, online: WTO, <[https://www.wto.org/english/news\\_e/news20\\_e/jsec\\_18dec20\\_e.pdf](https://www.wto.org/english/news_e/news20_e/jsec_18dec20_e.pdf)>.

proponents aim "to initiate forward-looking, results-oriented negotiations or discussions on issues of increasing relevance to the world trading system."<sup>176</sup> So far, the JSI has been used as a negotiating tool with respect to cutting-edge issues not regulated within the WTO, including regulatory policies on E-commerce<sup>177</sup>, Investment Facilitation for Development<sup>178</sup>, Services Domestic Regulation<sup>179</sup>, and Micro, Small, and Medium-sized Enterprises (MSMEs).<sup>180</sup>

Basically, JSIs are proposed rules negotiated among some WTO "like-minded" members without adherence to the consensus principle. Although the initial communication that launched these JSIs did not specifically mention how MFN would apply to negotiated results, one of the crucial points for discussion in JSI negotiations is how MFN provisions will apply in the implementation stage.<sup>181</sup>

One option is for JSI benefits to apply to all WTO members automatically in the same way as a

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<sup>176</sup> *Ibid* at 1. The JSIs are open to all WTO members, "as many as are willing to participate."

<sup>177</sup> WTO, MC, *Joint Statement on Electronic Commerce* (13 December 2017), WTO Doc WT/MIN (17)/60, online: WTO <<https://docs.wto.org/>>. The JSI E-Commerce seeks to negotiate new rules that will govern the production, distribution and marketing of goods and services through digital trade.

<sup>178</sup> WTO, MC, *Joint Ministerial Statement on Investment Facilitation for Development* (13 December 2017), WTO Doc WT/MIN (17)/59, online: WTO <<https://docs.wto.org/>>. This JSI seeks to facilitate trade among WTO members by developing regulatory policies that will guide Foreign Direct Investment among WTO members.

<sup>179</sup> WTO, MC, *Joint Ministerial Statement on Services Domestic Regulation* (13 December 2017), WTO Doc WT/MIN (17)/61 online: WTO <<https://docs.wto.org/>>. The Services Domestic Regulation JSI aims to increase international services trade by improving the transparency and predictability of WTO members' domestic services authorizations, including licensing procedures. See also, Government of Canada, "WTO JSI on Domestic Regulation", online: *Canada.ca* <[https://www.international.gc.ca/world-monde/international\\_relations-relations\\_internationales/wto-omc/domestic-interieure.aspx?lang=eng](https://www.international.gc.ca/world-monde/international_relations-relations_internationales/wto-omc/domestic-interieure.aspx?lang=eng)>.

<sup>180</sup> WTO, MC, *Joint Ministerial Statement -Declaration on the Establishment of a WTO Informal Work Programme for MSMEs* (13 December 2017), WTO Doc WT/MIN (17)/58, online: WTO <<https://docs.wto.org/>>. The MSMEs JSI aims to discuss and identify "horizontal and non-discriminatory solutions" to ensure greater participation of MSMEs in international trade.

<sup>181</sup> Commentators have proposed four options by which the MFN provision may apply. The first option is to adopt the JSIs as plurilateral agreements that benefit only participants. The second option is that JSIs would extend some benefits to all WTO members but the benefits of specific provisions within each could be limited only to the signatories of the JSIs. The third option would be to extend some benefits to the whole WTO membership while other benefits in specific provisions or sectors would be extended only to members (either a party to the JSI or not), meeting certain conditions. The fourth option would be to extend the JSIs benefits only to signatories, and then, some additional benefits would be extended only to JSI signatories that meet certain conditions. See, generally, Fiama Angeles, Roy Riya & Yarina Yulia, "Shifting from Consensus Decision-Making to Joint Statement Initiatives: Opportunities and Challenges" (WTO Capstone Project, 2020), online: *Institutional Repository* <<https://repository.graduateinstitute.ch/record/299033?ln=en>>.

CMA.<sup>182</sup> Hence, JSI proponents opine that if the JSIs apply on an MFN basis then JSI results could be implemented and incorporated under the WTO without the need for consensus among WTO members.

However, some WTO members, notably India and South Africa, have pointed out that "open" plurilateral agreements of a JSI-type – regardless of how they apply - are "legally inconsistent" with the multilateral trading system of the WTO as long as there is no adherence to the consensus principle.<sup>183</sup>

The JSI communication expressly states that they are to be open to every interested WTO member.<sup>184</sup> There is also the possibility of the JSIs' benefits being extended to all WTO members, including non-participants. In this connection it is worthwhile inquiring whether JSIs conform to WTO Agreement principles? Are India and South Africa correct in their arguments concerning the WTO-inconsistency of JSIs?

On the surface JSIs seem to be a logical way forward for the WTO in negotiating trade agreements, especially in new areas not regulated by the WTO Agreement. Nevertheless, India and South Africa's argument is premised on the need to distinguish between rulemaking/amendment and modification of Schedules of Concessions in the WTO Agreement. On the one hand, from the treaty's express provisions it would appear arguably correct that rule amendment or

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<sup>182</sup> *Ibid.* If JSIs will apply their benefits to all WTO members unconditionally, there is the need to have all major players and a 'critical mass' of participants to attenuate the issue of free-ridership like the WTO previous CMAs.

<sup>183</sup> WTO, General Council, *The Legal Status of 'Joint Statement Initiatives' and their Negotiated Outcomes* (19 February 2021), WTO Doc WT/GC/W/819 online: WTO <<https://docs.wto.org/>> [India and South Africa Joint Statement, 2021]; See also, WTO, General Council, *Communication from Plurinational State of Bolivia, Cuba, Ecuador, India, Malawi, Oman, South Africa, Tunisia, Uganda And Zimbabwe* (22 July 2019), WTO Doc WT/GC/W/778/Rev.1 at para 2.4, online: WTO: <<https://docs.wto.org/>>; "India, South Africa: Plurilaterals' Legally Inconsistent' with WTO Rules", *Inside US Trade News* (22 February 2021); "WTO Debate over Plurilateral Talks Moves to Services Committee", *Inside US Trade News* (5 March 2021).

<sup>184</sup> *Supra* note 176.

implementation of new rules in the WTO requires consensus. On the other hand, both GATT 1994 and GATS provide express procedures on how WTO members can unilaterally improve or modify their schedules of commitments concerning market access and national treatment for goods and services.

For example, with respect to the modification of WTO members' schedules on goods, GATT Art. XXVIII provides:

*A contracting party (hereafter in this Article referred to as the "applicant contracting party") may, by negotiation and agreement with any contracting party with which such concession was initially negotiated and with any other contracting party determined by the CONTRACTING PARTIES to have a principal supplying interest\* (which two preceding categories of contracting parties, together with the applicant contracting party, are in this Article hereinafter referred to as the "contracting parties primarily concerned"), and subject to consultation with any other contracting party determined by the CONTRACTING PARTIES to have a substantial interest\* in such concession, modify or withdraw a concession\* included in the appropriate schedule annexed to this Agreement.*

Likewise, GATS Art. XXI provides for modification of each members' service schedule:

*A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.<sup>185</sup>*

However, there is no provision for schedule modification in any other WTO multilateral agreement like, for example, the TBT or SPS Agreements. In other words, there are no provisions on how WTO members can unilaterally amend regulatory policies through additional commitments in their schedules. The WTO Agreement states that an amendment to the Multilateral Trade Agreements contained in its Annex 1A (WTO Agreement Annex 1A) must meet certain conditions. These

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<sup>185</sup> GATS, *supra* note 145 at Art. XXI (1)(3).

conditions include the specification of an amendment proposal from a WTO member, consensus or two-third majority (through voting) for the Ministerial Conference to submit the proposed amendment to the WTO members for acceptance, and a quorum for implementing such amendment.<sup>186</sup>

The contents of the JSIs being negotiated involve amendments to existing rules and new regulatory matters. To incorporate the proposed JSIs into the WTO, there will be a need for the WTO Agreement amendment which would require a consensus among WTO members. As such, assuming the proposed JSIs will be MFN-complaint, the JSIs may still contravene the WTO Agreement's multilateralism through failure to adhere to adoption-by-consensus.

On another note, GATS Art. XVIII provides, "Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI [market access] or XVII [national treatment], including those regarding qualifications, standards or licensing matters."<sup>187</sup>

The GATS explicitly provides additional commitments outside market access and national treatment if such additional commitments relate to trade in services. From the above-quoted provision on additional commitments, JSIs on Domestic Services Regulation and some provisions of the E-Commerce relating to trade services could be linked to service schedules because they address trade in services. Hence, if MFN-compliant, JSI final agreements may be incorporated into members' service schedules without any difficulty.

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<sup>186</sup> WTO Agreement, *supra* note 1 at Art. X:1,5. "Amendments includes dilution, elaboration of existing rules, or addition of new rules that may or may not alter the rights and obligations of Members." India and South Africa Joint Statement 2021, *supra* note 183 at 4.

<sup>187</sup> GATS, *supra* note 145 at Art. XVIII.



At the moment, with 164 members the WTO Agreement consensus provision for rulemaking and amendment seems to be cumbersome and insurmountable. As a result, it might be challenging to achieve a consensus for the JSIs. Are there other ways to incorporate the JSIs into the WTO Agreement without consensus among the WTO members? Should the WTO members insist on a strict application of the WTO provisions on amendment *vis a vis* the JSIs or should they proceed without consensus and allow the WTO Agreement to evolve and adapt? These questions remain controversial and debatable among WTO members. The various dilemmas raised by JSIs, however, profile the continuing need for other forms of agreement that are more traditionally encountered in WTO negotiations, notably CMAs.

## **2.8 Conclusion**

This chapter examined the WTO Agreement and its predecessor, the GATT 1947, and the negotiating methods employed in a number of their multilateral negotiation rounds. This chapter also analyzed some of the WTO Agreement practices and principles, and how they contribute to the WTO's current negotiating deadlock.

The negotiating arm of the WTO, and the WTO as a whole has been struggling for a long time with the Doha Round's suspension, the failure of those above-mentioned traditional negotiating methods in a multilateral context, the challenge of achieving specific reciprocity and balanced concessions exchange among the WTO members in an environment that does not allow for quantification, the single-undertaking approach problem and the challenge of consensus decision-making.<sup>188</sup> Attention has been turned to other negotiating methods and formats. As opined by one

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<sup>188</sup> On the difficulty in the WTO negotiating role challenges, Roberto Azevedo, the former WTO DG, noted at the WTO General Council meeting in September 2013, "Our negotiating arm is struggling. We all know that this is just one part of the work that we do here. We all know that. But the WTO, as we know, has been defined by what we have

scholar, ““Variable geometry,” plurilateral and “critical mass” techniques should be considered. WTO Members should attempt to accommodate different perspectives and different speeds while maintaining the overall integrity of the system.”<sup>189</sup> In addition, on a number of newer issues like services and those arising from digital technologies and data localization requirements defying easy quantification, quantitative approaches that are inherent in strictly reciprocal negotiations are mismatched. Recent areas of concern lend themselves to the adherence to regulatory standards rather than the achievement of tradeoffs. For these reasons, the next chapter examines the other means of trade negotiation adopted by WTO members. These include closed and open plurilaterals, and in particular in the context of the latter, the ‘critical mass’ approach to negotiations in the WTO.

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been doing in the negotiating front. This is how the world sees us. There is no escaping that. It doesn't matter how much we say that we do more than negotiate, that we have a number of other things going on here, which are extremely important to the world even though the world doesn't know it. People only see us as good as our progress on Doha. That is the reality. And the perception in the world is that we have forgotten how to negotiate. The perception is ineffectiveness. The perception is paralysis. Our failure to address this paralysis casts a shadow which goes well beyond the negotiating arm, and it covers every other part of our work. It is essential that we breathe new life into negotiations.” WTO, General Council, *Azevêdo Launches "Rolling Set of Meetings" Aimed at Delivering Success in Bali* (9 September 2013), online: WTO <[https://www.wto.org/english/news\\_e/news13\\_e/gc\\_09sep13\\_e.htm](https://www.wto.org/english/news_e/news13_e/gc_09sep13_e.htm)>.

<sup>189</sup> Harbinson, *supra* note 160 at 20; Saner, *supra* note 43 at 25; Marianne Schneider-Petsinger, “Reforming the World Trade Organisation: Prospect for Transatlantic Cooperation and the Global Trade System” (2020) Research Paper for Chatham House 28-30, online: Chatham House <<https://www.chathamhouse.org/sites/default/files/publications/research/2020-09-11-reforming-wto-schneider-petsinger.pdf>>.

## **CHAPTER THREE**

### **3. THE CONCEPT OF 'CRITICAL MASS' IN WTO NEGOTIATIONS**

#### **3.1 Introduction**

The 'critical mass' approach to trade negotiations is one of the proposed alternatives to traditional WTO negotiating formats profiled in earlier chapters. The 'critical mass' method is a form of negotiating technique that requires agreement among only a subset of WTO members amounting to a sufficient number – or "critical mass" - of the WTO members in a specific trade or service sector.

This chapter examines the 'critical mass' negotiating format in the WTO context, the difference between a CMA and other types of WTO trade negotiating methods agreements, and previous CMAs negotiated in the WTO. Through the example of prior WTO 'critical mass' agreements, the suitability of the critical mass-based negotiating format to present and future trade negotiations in the WTO will be considered. This chapter will give an explanation that will help to further the understanding of the 'critical mass' approach in WTO trade negotiations and serve as a foundation for the thesis' subsequent chapters and conclusion.

#### **3.2 Difference between a CMA and other Forms of WTO Trade Agreements**

Members of the WTO have utilized alternatives aside from a critical mass-based approach for trade negotiation within and outside the WTO framework. These alternatives will be briefly examined, in particular focusing on how they differ from a CMA.

### 3.2.1 Multilateral Trading Agreements

In international law, treaties are a source of law identified in Art. 38(1)(a) of the Vienna Convention on the Law of Treaties and are classically arranged in three categories: bilateral, plurilateral and multilateral.<sup>190</sup> A bilateral treaty is an agreement between two countries. A plurilateral treaty is an agreement among a subset of countries. Finally, a multilateral treaty is an agreement among many or all countries.

The WTO Agreement is a multilateral treaty which extends certain obligations immediately and unconditionally to the entire WTO membership. However, it also contains within its framework constituent agreements that are plurilateral (i.e. among a subset of the WTO membership) and bilateral (i.e. among two members). These plurilateral and bilateral accords within the broad envelope of the WTO Agreement are often the only realistic way in which agreement on certain discrete topics like government procurement or technical standards can be reached but can also serve as 'kernels' for wider agreement among the membership in future.

CMAs are similar to multilateral trade agreements because they apply on an MFN basis to all WTO members. However, CMAs are distinct from multilateral trade agreements in three ways. First, CMAs do not require reciprocity of concessions among all WTO members. Instead, there is a need for reciprocity among the "critical mass" of the WTO members in the negotiating group. Second, CMAs are issue-specific. Unlike the single undertaking principle that requires an agreement on all cross-linked issues in multilateral trade negotiations, CMAs specifically address a particular sector. Furthermore, CMAs do not automatically incorporate S&DT principles. Rather than granting flexibility to developing countries and LDCs as part of the WTO multilateral trade

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<sup>190</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

agreements, CMAs usually exempt members who are not technically capable of implementing the trade obligations and extend the benefit of such agreements automatically instead.

### 3.2.2 Plurilateral Agreements (PAs)

PAs are another type of trade agreement agreed upon among WTO members. Similar to the CMAs, PAs are sector-specific and allow for the accession of other WTO members. Also, PAs do not have S&DT provisions. Unlike CMAs that have no statutory provision, Article X:9 of the WTO Agreement provides for PAs. The CMAs are different from PAs because the former's benefits are applied on an unconditional MFN basis to other non-signatories, while the latter's benefits are exclusively limited to participants.<sup>191</sup>

In addition, the adoption of PAs requires the consensus of all WTO members.<sup>192</sup> However, CMAs do not require a consensus among WTO members before they come into force. One of the reasons for the consensus requirement for PAs is because PAs limit or exclude non-participants from their benefits. In other words, the MFN provision does not apply in PAs. Hence, to avoid agreements that are fragmentary or erode the inclusivity of the WTO Agreement, it is pertinent to make sure such PAs entered into are not unfair to non-participants and to international trade at large. Like the multilateral trading system, the PA consensus criterion limits the possibility of negotiating PAs within the WTO. PAs are found in Annex 4A of the WTO Agreement and include the Agreement on Government Procurement (GPA).<sup>193</sup>

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<sup>191</sup> WTO Agreement, *supra* note 1 at Art. II:3.

<sup>192</sup> *Ibid* at Art. X:9.

<sup>193</sup> Agreement on Government Procurement, 15 April 1994, WTO Agreement, *Annex 4(b)*, 1915 UNTS 103 (entered into force 1 January 1996) [GPA].

### 3.2.3 Preferential Trade Agreements (PTAs)

PTAs are agreements negotiated and agreed upon outside the WTO framework. The GATT 1994 Art. XXIV foresees the negotiation of PTAs among members of "custom unions" or "free trade areas."<sup>194</sup> PTAs are negotiated based on the criteria or standards set by countries that agree to negotiate a PTA. Like PAs, PTAs apply on a non-MFN basis. In contrast to CMAs and PAs, PTAs do not have an accession clause. In most instances PTAs do not foresee that other countries that were not part of the original negotiation and adoption process will join later. In addition, PTAs may not be sector-specific, as in the case of PAs and CMAs. PTAs may involve varying issues and commitments. An example of a PTA is the United States-Mexico-Canada Agreement (USMCA),<sup>195</sup> formerly known as the North American Free Trade Agreement (NAFTA)<sup>196</sup>, between the US, Canada, and Mexico. The USMCA addresses several issues, including digital trade, environment, financial services, intellectual property, and others that are not expressly dealt with in the WTO Agreement.<sup>197</sup> In addition, no other country can accede to the USMCA.

### 3.3 Status of a CMA in the WTO

As indicated, WTO members have adopted several modalities to trade negotiations under the WTO Agreement. Unlike other mentioned trade negotiation methods, the critical mass-based negotiating type is not agreed upon by consensus. Rather, the agreement comes about because a critical mass of member countries agree to disciplines in a certain area or subject and these benefits are extended to other members who are not part of the critical mass.

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<sup>194</sup> GATT 1994, *supra* note 2 at Art. XXIV (8) (a-b).

<sup>195</sup> *United States-Mexico-Canada Agreement*, (entered into force 1 July 2020), online: USTR <<https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>>. The USMCA is also called "Canada-United States-Mexico Agreement" (CUSMA), according to the Canadian Acronym.

<sup>196</sup> *North American Free Trade Agreement*, August 1992, 32 ILM 289, 605 (entered into force 1 January 1994).

<sup>197</sup> *Ibid.*

What is the legal status of a CMA in the WTO? Does the WTO Agreement explicitly or impliedly provide for the 'critical mass' negotiating method? As mentioned, a CMA is not expressly provided for in the WTO Agreement or other agreements negotiated under WTO auspices, although as will be discussed, a number of agreements achieved within the WTO framework were concluded on the basis of critical mass considerations.

Like the argument for JSIs, GATT 1994 and the GATS provides for modification of members' schedules on goods and services as well as regulatory issues on services without a consensus.<sup>198</sup> Thus, the CMA can be said to derive its status from these WTO Agreements. In addition, one of the GATT/WTO tenets is to ensure inclusivity. An overarching aim is to create a legal framework that encourages inclusiveness, transparency and eliminates discriminatory practices among its members. As existing CMAs discussed below will show, in pursuit of these objectives CMAs are open and applied on an MFN basis to all WTO members despite the fact that only some members are prepared to make commitments. With the inclusion of the MFN principle in CMAs, it can be argued that open plurilaterals (CMAs) meet well the principle of inclusivity and are legally consistent with the tenets of the WTO multilateral trading system.

Since CMAs align with the WTO core principles, is CMA a suitable alternative to all WTO present and future trade negotiations? As will be discussed, the 'critical mass' approach to negotiation, although a feasible solution for some WTO multilateral negotiating challenges and contexts, is not appropriate for every negotiating issue.

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<sup>198</sup> See GATT 1947, *supra* note 2 at Art XXVII; GATS, *supra* note 145 at Art. XXI, XVIII.

### 3.4 What is the 'Critical Mass' Threshold?

The question of what constitutes a 'critical mass' in the negotiation of a CMA under the WTO has been a subject of long-standing debate. Put differently, what exactly is the threshold required for negotiating a CMA? For Patrick, "apart from the possibility of a ground rule about a certain minimum level of membership engagement required to embark on a 'critical mass' initiative, an obvious question is who decides that a 'critical mass' has been attained. The simplest answer is that the 'critical mass' defines itself."<sup>199</sup>

For Vickers, the 'critical mass' criteria will need to be developed openly and transparently (for example, 80–90% share of world trade in a specific product or sector).<sup>200</sup> Hufbauer adds that a 'critical mass' has typically been defined to include countries accounting for 90% or more of world trade in the particular sector; however, the threshold test for inclusion in the WTO framework should be "substantial coverage" of world trade or production in the affected sector.<sup>201</sup>

From commentators' opinions, it is evident that there is no agreed threshold for a 'critical mass' necessary to negotiate and successfully conclude a CMA. It is safe to assume that a 'critical mass' threshold should be determined specifically according to each trade negotiation's particular circumstances. A breakdown of CMAs successfully negotiated within the GATT/WTO will also be conducted to explain the subjectivity of the 'critical mass' threshold.

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<sup>199</sup> Low, *supra* note 34 at 9.

<sup>200</sup> Brendan Vickers, "The Relationships Between Plurilateral Approaches and the Trade Round", The E15 Initiative, Strengthening the Multilateral Trading System (ICTSD and IDB, June 2013) 1 at 4, online: *E15initiative* <<https://e15initiative.org/publications/the-relationship-between-plurilateral-approaches-and-the-trade-round/>>.

<sup>201</sup> Hufbauer & Schott, *supra* note 33 at 7.



### **3.5 Features of a 'Critical Mass' Negotiating Approach**

A critical mass-based approach has been applied in negotiating existing WTO trade agreements. What are the features of CMAs? What are the factors attributed to some of the WTO previous CMAs? In determining whether a CMA suitable for a WTO negotiation, a number of questions must be cumulatively answered in the affirmative:

- whether assembling a 'critical mass' is possible.
- whether there is a “champion” country willing to use the threat of market closure or other means to extract greater commitments from other WTO members.
- whether the resulting critical mass is high enough and commands adequate institutional power in the concerned trade sector.
- whether the issue of free-ridership is non-consequential.

The above-mentioned questions make up the characteristics implicit in a CMA negotiating type. An examination of these issues of CMAs will be conducted below and existing WTO CMAs will be examined through their historical negotiating process together with the CMA characteristics enumerated above. At the end of this chapter, previous WTO CMAs will be broken down further to understand the WTO 'critical mass' negotiating method.

#### **3.5.1 Whether assembling a 'critical mass' is possible**

For a 'critical mass' negotiating method to be adopted in a trade sector, the possibility of assembling a 'critical mass' should be feasible. The WTO Agreement was concluded to facilitate the flow of cross-border trade among its members. As a result, negotiations in the WTO are mostly about eliminating trade barriers, furthering its trade liberalization goals and members' commercial interests. The benefits of opening a domestic sector to international level is one of the incentives

for WTO members engaging in trade negotiations. With these benefits in mind, WTO members may be convinced to make specific commitments in different sectors and, in return, achieve freer trade in a trade sector.

As the experience of previous WTO CMAs will show, achieving a 'critical mass' was possible because of the trade liberalization benefits involved. For a CMA to be suitable for trade agreement negotiation, the starting point may be evaluating whether there are trade benefits that would encourage WTO members to participate in such negotiation in the form of a 'critical mass.' This, of course, presumes a benefit arises for both sides in any reciprocal exchange of concessions. However, it must also be asked whether it is possible to assemble a 'critical mass' for an agreement that is purely reciprocal and limitative – such as in the case of subsidies – where the aim of the agreement is to regulate behaviour or limit countries' activities? Chapter 4 of this thesis will examine that question.

### **3.5.2 Whether there is a "champion" country willing to use the threat of market closure or other means to extract greater commitments from other WTO members**

A precondition in the 'critical mass' negotiating method is the presence of a/some willing WTO member(s) to spearhead the CMA negotiation. This "champion(s)" should be a WTO member who is also capable of using the threat of market closure or any other means to extract more significant commitments from other members in a specified sector.<sup>202</sup>

A commentator states that in determining a suitable alternative to traditional negotiating methods, "... there is at least one precondition: the existence of a core group of Members that would mobilize

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<sup>202</sup> As mentioned, a CMA is sector specific. As a result, a major trading partner in a sector may not be so significant in another sector. That is why the "champion" should be a country with strong capability or significant dominance in the specific sector a CMA is proposed.

the expertise and political energy needed for such a project, and their readiness to reach mutually acceptable outcomes."<sup>203</sup> In other words, there must be the existence of a major participant(s) with some level of dominance in the particular trade sector that can initiate discussions and has the capacity to strongarm other WTO members to make significant commitments in a CMA-type arrangement in a specific sector. This instills the discipline necessary to get the negotiations completed.

### **3.5.3 Whether the resulting critical mass is high enough and commands adequate institutional power in the concerned trade sector**

For a CMA type of negotiation to be successful, the resulting 'critical mass' of participants should be high enough to command adequate institutional power in the particular sector. Wolfe explains that "a critical mass thus has two dimensions: on a given issue, the Members with the bulk of material power are essential players, yet they will be stymied if the process does not also have the legitimacy that comes with a critical mass of institutional power."<sup>204</sup>

Still, the notion of legitimacy cannot be easily defined as it is viewed from different lenses including from sociological, political, psychological, and legal perspectives. In the WTO, legitimacy takes on varying aspects. It ranges from the legitimacy of representation, legality, openness, and transparency (internal and external transparency) among WTO members at the negotiation, adoption, and implementation stages.<sup>205</sup> Srivastava opines:

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<sup>203</sup> Rudolf Adlung & Hamid Mamdouh, "Plurilateral Trade Agreements: An Escape Route for the WTO?" (2018) 52:1 J of World Trade 85 at 92.

<sup>204</sup> Robert Wolfe, "Can the Trading System Be Governed? Institutional Implications of the WTO's Suspended Animation" (2007) Centre for International Governance Innovation Working Paper No.30. 1 at 62-63 [Wolfe "Can the Trading System Be Governed?"].

<sup>205</sup> See generally, Manfred Elsig, "The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?" (2007) 41 J World Trade 75; Daniel C. Esty, "The World Trade Organization's Legitimacy Crisis" (2002) 1:1 World Trade Rev 7; Daniel C Esty, "Good Governance at the World Trade Organization: Building a Foundation of Administrative Law" (2007) 10(3) J Intl Econ L 509.

*To summarise, legitimacy of an inter-national organization [WTO] emanates from a combination of factors encapsulating broad concepts such as democracy, participation, representation, accountability, transparency and in addition, functional efficiency or its capacity to fulfil its mandate. Besides, for any political entity including inter-national organization, legitimacy is a process which is not static but is in a continuous process of evolution/accumulation (even dissipation), which is difficult to quantify and more often a matter of perception.<sup>206</sup>*

Since this thesis is concerned with the negotiating process of a CMA, the legitimacy for adequate institutional power required in a CMA arrangement will be analyzed from the point of its transparency, openness, and representation of all WTO members.

The transparency criterion mandates that all interested WTO members should be privy to every meeting, formal or informal, consultation and review process in a CMA negotiation. While openness posits that a CMA negotiation should be open-ended, every interested WTO member should be able to join the negotiation at any stage. Representation suggests that a CMA negotiation should not be limited to a subset or ‘club’ in the WTO. Rather, it should ensure participation that showcases a sort of broad geographical interest of WTO members from every region in the concerned sector.

Institutional power implies the indirect influence of an actor within an institution as a result of the institution's design.<sup>207</sup> As explained, the WTO operates on the basis of a consensus decision-making principle. Thus, every WTO member possesses and exerts institutional power/indirect influence on the ambit of agreements negotiated in the WTO. As a result, for a CMA to possess the necessary institutional power it has to garner a high number (critical mass) of WTO members

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<sup>206</sup> Jayati Srivastava, “World Trade Organisation at the Crossroads: The Legitimacy Dimensions” (2007) 42:40 *Economic and Political Weekly* 4075 at 4076.

<sup>207</sup> Michael Barnett & Bud Duvall, eds, "Power in Global Governance" in *Power in Global Governance* (Cambridge: Cambridge University Press, 2004) at 3.

in the sector concerned through a legitimate means. How then does a negotiation gather a significant number of participants?

Assembling a 'critical mass' in a CMA requires two groups of participants. First, there is a need to have major trading partners in the specific sector as participants in the proposed CMA. Unlike in the GATT 1947 era when the WTO membership was limited and negotiations were between the largest players, majorly the Quad countries (US EU, Japan, and Canada), today there is an increase in the numbers of power 'blocs' within the WTO stymying the emergence of a consensus. Emerging developing countries such as the BRICS (Brazil, Russia, India, China and South Africa) are no longer inclined to defer uncritically to the hegemony of the founding members who constituted the original Quad.<sup>208</sup> Wolfe adds that although the Quad countries still include the largest markets, they can no longer supply systemic leadership alone without the joinder of emerging markets.<sup>209</sup> As a result of the shift in power balance, it is pertinent to have emerging economies actively involved in a CMA negotiation, together with the Quad countries, because of the former's large markets in several trade sectors.

Second, there is a need to have a substantial number of WTO members participate in the negotiations if the 'critical mass' negotiating method is to succeed in the WTO. Every additional WTO member country contributes to the level of institutional power a negotiated result agreement may have. Hence, the higher the number of participants in a CMA negotiation, the higher the resulting 'critical mass', the higher the combined institutional power that can grant legitimacy to the agreement's negotiation and adoption.

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<sup>208</sup> See generally Andrew Hurrell, "Hegemony, Liberalism and Global Order: What Space for Would-Be Great Powers?" (2006) 82:1 Intl Affairs 1.

<sup>209</sup> Wolfe "Can the Trading System Be Governed?", *supra* note 204 at 6.

To get the legitimate high number of participants in a CMA arrangement, it is necessary to make the CMA negotiating process open and transparent to all WTO members without limitation. In addition to openness and transparency, a CMA negotiation should be inclusive, ensuring fair representation by considering the needs of interested WTO members in the sector concerned. If a CMA negotiation involves the concerns of both developed and developing countries, more WTO members may be willing to participate in the negotiation, and in the end, a 'critical mass' of participants can be assembled legitimately.

As a result, a CMA may only be a suitable alternative when the 'critical mass' involves both WTO members with significant market shares and a large majority of countries in the specified sector. When these participants (significant markets and a substantial majority of WTO members) are present, the resulting 'critical mass' may be high enough to command the required institutional power.

How is the 'critical mass' then determined? As previously indicated, the 'critical mass' threshold has not been calibrated with any absolute number, although the inclusion of countries with a market share of 80-90% is not uncommon. At the same time, as experience with previous CMAs will show, the 'critical mass' threshold is calculated chiefly with regard to the peculiarities in each sector.

#### **3.5.4 Whether the issue of free ridership is non-consequential**

As explained, a 'critical mass' negotiating approach requires that concessions and benefits from such a CMA be extended unconditionally to all WTO members on an MFN basis. The MFN provisions distinguish an 'open' plurilateral or CMA from a more traditional 'closed' plurilateral

such as the GPA, where benefits are only extended to signatories.<sup>210</sup> The purpose for the MFN requirement in a CMA was explained by the Warwick Commission as follows:

*In the name of justice and fairness, the principle of non-discrimination should apply to all Members, regardless of whether they participate in 'critical mass' agreements. To the extent that benefits do not only accrue as a direct result of obligations, the idea is that non-signatories benefit from a non-discriminatory application by signatories of the provisions of an agreement as well as access to benefits arising from the agreement.*<sup>211</sup>

However, the MFN clause in a 'critical mass'-type trade negotiation opens it up to the possibility of free-ridership. As mentioned, the problem of free-ridership refers to beneficiaries of commitments that do not 'pay for them' or offer anything in return. If widespread enough, free-ridership can act as a disincentive to achieving any agreement at all. The issue of free-ridership has been a persistent challenge in trade negotiations from the GATT 1947 era onwards to the present date. The extent of 'free ridership' is another determinant of the suitability of a 'critical mass' approach to trade negotiations in the WTO.

A CMA denotes a self-sustaining agreement. Aside from the 'critical mass' of participants in a CMA in allowing members to command institutional power in the WTO, the 'critical mass' in the sector concerned also reduces the adverse effect of free-ridership. In other words, there should be a 'critical mass' of participants in a specific sector whose commitments will ensure that the absence of some countries from obligations does not erode the participants' interests and benefits. When a 'critical mass' is met in a CMA, free-ridership will not pose a threat to the negotiation or impede the overall benefit of the agreement.

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<sup>210</sup> See section 3.2.2.

<sup>211</sup> Report of Warwick Commission, "The Multilateral Trade Regime: Which Way Forward?" (United Kingdom: University of Warwick, 2007) 1 at 30-31, online: <<https://warwick.ac.uk/research/warwickcommission/worldtrade/report/contents.pdf>>.

In addition, although the 'critical mass' criterion counters to some extent the free-ridership problem by ensuring that enough participants are already offering significant commitments, the extent to which 'free riders' should be allowed to benefit from a CMA remains a controversial point.

The success of a critical mass-type negotiating approach hinges on affirmative answers to all the points mentioned above. Previous WTO CMAs will now be analyzed to elucidate the features of a critical mass-based approach to trade agreement negotiations in the WTO.

### **3.6 ‘Critical Mass’ Approaches in Previous WTO Agreements**

#### **3.6.1 The WTO Information Technology Agreement (ITA)**

##### **3.6.1.1 Introduction**

The ITA was the first sector-specific tariff liberalization agreement negotiated after the UR. 29 countries launched the ITA during the Singapore MC on 13 December 1996.<sup>212</sup> The ITA came into force on 1 April 1997, eliminating tariffs on IT products with a zero-for-zero tariff reduction formula among 40 countries to be achieved within three years (1997-2000).

##### **3.6.1.2 Description of the WTO ITA Negotiation Process**

###### **3.6.1.2.1 The UR ITA Negotiation**

A proposal for sectoral negotiation on certain IT products started with the US during the UR.<sup>213</sup>

The US initiative originally proposed “zero-for-zero” tariffs on electronics, with the aim of

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<sup>212</sup> WTO, *Ministerial Declaration on Trade in Information Technology Products* (13 December 1996), WTO Doc WT/MIN (96)/16, online: WTO (online): <<https://www.wto.org/>> [ITA Ministerial Declaration].

<sup>213</sup> For details on the ITA preparatory works and its negotiation, see Barbara Fliess and Pierre Sauve, “Of Chips, Floppy Disks and Great Timing: Assessing the WTO Information Technology Agreement” (Paper prepared for the Institut Francais des Relations Internationales (IFRI) & Tokyo Club Foundation for Global Studies, 1998); WTO, “15 Years of the Information Technology Agreement” (2012), online: WTO <<https://www.wto.org/>> [WTO 2012]; VanGrasstek, *supra* note 10 at 347-350; John S. Wilson, “Telecommunications Liberalization: The Goods and Services Connection” in Gary C. Hufbauer & E. Wada, eds, *Unfinished Business: Telecommunications after the Uruguay Round* (Washington, DC: Institute for International Economics, 1998) at 72-76.



ensuring full trade liberalization in some IT products.<sup>214</sup> The US proposal did not go far during the UR because the EU, in particular, did not join a sectoral initiative on electronics.<sup>215</sup> However, at the end of the UR, industrialized countries agreed to a 50 percent elimination of tariffs on some electronic products (excluding consumer electronic products).<sup>216</sup>

### 3.6.1.2.2 Post-UR ITA Negotiation

Following a lack of success in negotiations for a zero-for-zero tariff on IT products during the UR, US IT manufacturers in the Information Technology Industry Council (ITI) developed a “Proposal for Tariff Elimination” in 1995.<sup>217</sup> The ITI proposal projected a plurilateral Information Technology Agreement to eliminate tariffs on hardware and software by 2000.<sup>218</sup> The ITI then worked with other IT sectors seeking to build a constituency for liberalization by eliminating trade barriers to their products.<sup>219</sup>

The ITI worked with other IT trade groups, including the European Association of Manufacturers of Business Machines and Information Technology Industry (EUROBIT), the Japanese Electronic Development Association (JEDA) and the Information Technology Association of Canada (ITAC). As a result, these IT firms jointly proposed an initiative at the G-7 Ministerial Conference

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<sup>214</sup> Automatic data processing equipment and parts, general electronic items, semiconductor manufacturing and testing equipment among other IT products: WTO 2012, *supra* note 213 at 9.

<sup>215</sup> The EU reasons were that some of the EU domestic industries opposed the IT initiative, particularly the semiconductor manufacturers. Secondly, since the EU duties were relatively higher for some of the proposed IT products, the EU stated that its main suppliers of electronic products, Japan, and the US, would have to offer more concessions in other areas: WTO, 2012, *supra* note 213 at 10; Fliess and Suave, *supra* note 213 at 13-14.

<sup>216</sup> *Ibid*, Fliess and Sauve at 13-14. The EU maintained its tariffs on some electronic chips with few exceptions. WTO 2012 at 10.

<sup>217</sup> “Text: ITI Proposal for Tariff Elimination”, *Inside US Trade* (3 March 1995) cited in *Ibid*, WTO 2012 at 11 n 22.

<sup>218</sup> VanGrasstek, *supra* note 10 at 347; *Ibid*, WTO 2012 at 11.

<sup>219</sup> Fliess and Sauve, *supra* note 213 at 15; Hoekman & Kostecki, *supra* note 4 at 310-311; See also, “G-7 Telecom, Computer Firms Draft Recommendations for GII”, *Inside US Trade* (2 June 1995) cited in *Ibid*, WTO 2012 at 11 n 23.

held in Brussels in February 1995.<sup>220</sup> Their proposal suggested eliminating customs duties on IT products that would contribute to enhancing the global information infrastructure by 2000.<sup>221</sup> Support for an ITA was later endorsed by the EU and US business groups taking part in the Trans-Atlantic Business Dialogue (TABD).<sup>222</sup> Other Quad countries, including Canada and Japan, also agreed to the ITA initiative. The idea was that a consensus among the Quad countries would encourage other WTO members to join in the proposed ITA.

After a consensus was achieved among the Quad countries on the matter, the US noted that the Quad countries' participation was necessary but was not sufficient to adopt an ITA because of any agreement's MFN application.

In order to bring other WTO members on board in the ITA negotiation the Quad countries began to extend negotiation towards other countries. The Asian region was of particular importance because it had a large IT market and was a major source of IT product export. To involve the Asian countries, including China and Taiwan that were the two key-IT producing countries in the ITA negotiations, the Quad countries introduced the ITA initiative on the Asia-Pacific Economic Cooperation (APEC) platform during the 1996 APEC Trade Ministers Meeting.<sup>223</sup>

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<sup>220</sup> *Ibid.* The G-7 countries include Canada, France, Germany, Italy, Japan, the United Kingdom, and the US

<sup>221</sup> The Global Information Infrastructures is an Organization for Economic Co-operation and Development (OECD) initiative to provide an easy digital form for market access transmission of services. See generally OECD, "Global Information Infrastructure --Global Information Society (GII-GIS): Policy Requirements," (1997) OECD Digital Economy Papers, No. 25.

<sup>222</sup> "US, EU Industry Calls for Zero Tariffs for Information Technology", *Inside US Trade* (17 November 1995) cited in WTO 2012, *supra* note 213 at 11 n 24.

<sup>223</sup> The ministers agreed to consider the ITA initiative further in the lead-up to the WTO Singapore MC. APEC, Trade Ministers Meeting, (16 July 1996) APEC Doc 1996/MRT/JMS at para 10, online: APEC <<https://www.apec.org/>>. APEC consists of all developed countries, including the Asian countries, China and Taiwan inclusive. However, the APEC countries were divided on the proposed ITA initiative because some countries opined that the ITA initiative was of no relevance altogether, other countries were particular about the implementation of the UR agreements, and so, they were reluctant to endorse any new tariff cutting exercise at the WTO Ministerial meeting. Fliess and Sauve, *supra* note 213 at 18-21.

In October 1996, the Quad countries and other WTO members, especially Asian electronics exporters, began to negotiate the contents and modalities of the ITA initiative in order to accommodate the concerns of developing countries.<sup>224</sup> The developed countries' chief interest was to encourage developing countries to participate and provide significant commitments in the ITA. At one point, the US agreed to some flexibility in the product coverage and tariff cuts implementation, with limits, to expand the ITA initiative country coverage. At a WTO informal meeting in 1996 US emphasized that countries with a lot to gain in the proposed ITA should be part of the negotiations and that the negotiation was open to every interested WTO member.<sup>225</sup> After some of the developing countries' IT products were listed as part of the proposed ITA in November 1996, the APEC countries agreed the ITA initiative should "substantially eliminate" tariffs on information technology products by 2000.<sup>226</sup>

At the Singapore MC in December 1996, the US and a number of WTO members wanted the ITA announced before the meeting ended.<sup>227</sup> In order to achieve this goal, US and the EU held several bilateral discussions during the Ministerial. As a result, trade negotiators eventually reached a provisional agreement on 11 December 1996. The provisional agreement was signed by the trade ministers of the US, EU, Japan, and Canada.<sup>228</sup> Afterwards, the signed agreement was circulated

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<sup>224</sup> Developing countries like Korea wanted certain IT products exclusion from the Quad countries IT lists; Thailand and other Southeast Asian countries pushed for the inclusion of some consumer electronics product in the IT products coverage; Other developing countries wanted some flexibility on the staging of the tariff cuts. *Ibid* at 20.

<sup>225</sup> WTO, Council for Trade in Goods, *Minutes of Meeting* (held on 1 November 1996), WTO Doc G/C/M/15 at para. 2, online: WTO <<https://docs.wto.org/>>

<sup>226</sup> APEC, Ministerial Meeting (22 November 1996), APEC Doc 1996/AMM/JMS at para 31, online: APEC <<https://www.apec.org/>>; APEC, Leaders Meeting, "From Vision to Action (25 November 1996), APEC Doc 1996/AELM/DEC at para 13, online: APEC <<https://www.apec.org/>>; Fliess and Sauve, *supra* note 213 at 20; WTO 2012, *supra* note 213 at 12-14.

<sup>227</sup> *Ibid*, Fliess and Sauve at 21.

<sup>228</sup> *Ibid*.

among all WTO members. Finally, on 13 December 1996, the ITA was formally launched through a "Ministerial Declaration on Trade in Information Technology", with 29 countries signatory.<sup>229</sup>

The ITA Ministerial Declaration stated that tariff cuts on IT products would apply on an MFN basis. However, to avoid the free-ridership problem participating countries agreed that the ITA would not come into force until it achieved 90 percent coverage in world trade of listed IT products.<sup>230</sup> The ITA itself could not enter into force when it was formally launched because the participants only represented 80 percent of the coverage threshold.

Annex 4 of the ITA Ministerial Declaration provided that participants would meet no later than 1 April 1997 to review the "state of acceptances received" and the associated implementation process of the ITA to determine if a 90 percent threshold had been met. Between the 1996 Singapore MC and the 1997 scheduled meeting, the ITA participants continued to meet extensively. However, some IT markets, including Thailand, New Zealand and the Philippines, had still not joined the ITA. Thailand, India, Norway and Malaysia maintained that they would sign the ITA before the April 1997 deadline only if there were major additions to the IT products list. On the other hand, the Quad countries were not willing to significantly alter the ITA's product coverage. The success of the ITA turned on more membership, especially on more Asian countries. To achieve this, the Quad countries eventually agreed that a longer phasing-out period could be agreed to for certain IT products. On 9 March 1997, 9 countries, including Malaysia, India, Thailand, and the Philippines, agreed to join the ITA.

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<sup>229</sup> *Ibid.*

<sup>230</sup> ITA Ministerial Declaration, *supra* note 212 at Annex para 4.

Ahead of the April 1997 meeting, participating countries held an informal meeting in March 1997. At the informal meeting, the WTO Secretariat's calculations showed that the approved 25 schedules of 40 participants accounted for more than 92 percent of world trade in the sector.<sup>231</sup> Following this determination participating countries approved the implementation of the ITA text. The ITA then came into force on 1 April 1997 and its benefits were immediately applied on an MFN basis to non-participants in the WTO.

According to commentators, one reason for the success of the ITA was that the ITA was to a certain degree cross-sectoral because the final ITA was concluded when the US agreed to lower its barriers to European liquor exports.<sup>232</sup> EU negotiators insisted on tariff phase-out for brown and white distilled spirits and liqueurs in exchange for phasing out EU tariffs on IT products on a similar schedule, a condition that the US agreed to.<sup>233</sup> Hence, achieving a critical mass was important to the ITA's conclusion but also involved concessions among major players *inter se*.

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<sup>231</sup> WTO, *Implementation of the Ministerial Declaration on Trade in Information Technology Products* (informal meeting held on 24 April 1997), Note by Secretariat, WTO Doc G/L/159/Rev.1 at 2, online: WTO <<https://docs.wto.org/>> [ Note on WTO Informal Meeting held on 24 April 1997].

<sup>232</sup> Philip Levy, "Do We Need an Undertaker for the Single Undertaking: Considering the Angles of Variable Geometry" in Simon J Evenett and Bernard M Hoekman, eds, *Economic Development and Multilateral Trade Cooperation*, (Palgrave-McMillan and World Bank, 2006) 417 at 426.

<sup>233</sup> The US had to agree to bring France onboard for the ITA. "A European spokesman was quoted to say, "We're not trying to pretend that whisky and cognac are IT products. We're saying, merely, the more, the merrier." (European Report 1996) cited in *Ibid*, Levy at 426 n 15.

### 3.6.1.2.3 Post-ITA Negotiation Process

The number of ITA participants has increased over time. In 1997, the ITA accounted for 92 percent of world trade in the IT sector.<sup>234</sup> The ITA participants have now increased in number to 82 and now account for 96 percent of world trade in listed IT products.<sup>235</sup>

According to one commentator, a contributory factor to the increase in the number of the ITA participants is that countries' WTO accessions have been predicated on ITA acceptance.<sup>236</sup> For instance, China and Vietnam joined the ITA as part of their WTO accession processes. New signatories from Central America also joined as a condition of free trade agreements they negotiated with the US<sup>237</sup>

The ITA was recently expanded to include additional IT products in December 2015.<sup>238</sup> The ITA's expansion similarly imposes a 90 percent coverage threshold before an "ITA2" should come into force. To curb free-ridership, the ITA2's Declaration provides that a committee is to be set up to examine the scope of coverage if there is a shift in trade that may affect its 'critical mass.'<sup>239</sup> In other words, if current free-riders become major IT markets in future, ITA participants will ensure they make substantial commitments in the ITA2 to limit any free-ridership effect. In addition, although ITA participants intend to expand the ITA to include non-tariff measures like subsidies

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<sup>234</sup> WTO, WTO, "Annual Report" WTO News (8 December 1997). online: <[https://www.wto.org/english/news\\_e/pres97\\_e/pr85\\_e.htm](https://www.wto.org/english/news_e/pres97_e/pr85_e.htm)>; Note on WTO Informal Meeting held on 24 April 1997, *supra* note 231.

<sup>235</sup> WTO, Committee of Participants on the Expansion of Trade in Information Technology Products, *Status of Implementation* (10 October 2018), WTO Doc G/IT/1/Rev.58 at para 1, online: WTO < <https://docs.wto.org/>>.

<sup>236</sup> Hoda, *supra* note 9 at 124.

<sup>237</sup> Woolcock, *supra* note 58 at 7.

<sup>238</sup> WTO, *Ministerial Declaration on The Expansion of Trade in Information Technology Products* (16 December 2015), WTO Doc WT/MIN (15)/25 online: WTO <<https://docs.wto.org/>> [ITA2 Ministerial Declaration]. For details on the ITA 2 negotiation, see generally, Gary Winslett, " 'critical mass' Agreements: The Proven Template for Trade Liberalization in the WTO" (2018) 17:3 World Trade Rev 405.

<sup>239</sup> *Ibid*, ITA2 Ministerial Declaration at para 3.

to an IT producer,<sup>240</sup> this proposed expansion has proved too difficult to negotiate through a binding agreement.<sup>241</sup> As a result, the ITA2 only covers IT products and not non-tariff issues specifically related to IT products.<sup>242</sup>

### 3.6.1.3 The ITA as a CMA

How did the ITA conform with CMA requirements? The following section provides an assessment of the ITA negotiation *vis-à-vis* the required features of a CMA.

#### 3.6.1.3.1 Whether assembling a 'critical mass' is possible.

Gathering a 'critical mass' in the ITA negotiation was possible in the case of the ITA because when the ITA was initiated the IT industry was a "highly globalized" one and there was keen competition among countries to attract foreign investment in the IT industry.<sup>243</sup> Most WTO members were interested in the IT industry. The hope of further liberalization of the IT market for everyone's benefit encouraged WTO members to continue the ITA's negotiation until it was concluded.

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<sup>240</sup> The NTMs in the IT sector include technical standards and related regulatory barriers, customs procedures, intellectual property protection, and anti-competitive conduct.

<sup>241</sup> According to the EU, the challenges in negotiating the ITA NTMs include lack of transparency and openness in domestic standardization processes, non-recognition of international standards by members: WTO 2012, *supra* note 213 at 38. Woolcock adds that because new provisions under the ITA will require modification to the WTO Agreement on Technical Barriers to Trade, it is difficult to find a balance or point of conformity for ITA NTMS due to the constant change in technology and countries' standards heterogeneity. Woolcock, *supra* note 58 at 6; Fliess & Sauve, *supra* note 213 at 54-56.

<sup>242</sup> The ITA2 covers an additional 201 IT products. WTO, "Information Technology Agreement", online: WTO <[https://www.wto.org/english/tratop\\_e/inftec\\_e/inftec\\_e.htm](https://www.wto.org/english/tratop_e/inftec_e/inftec_e.htm)>.

<sup>243</sup> "...most governments were attracted to a worldwide agreement for the elimination of tariffs on IT products, even outside the framework of global negotiations on tariffs" because one of the ways host countries attract foreign investors is through duty-free treatments." Hoda, *supra* note 9 at 126; Levy, *supra* note 232 at 426. The IT sector witnessed an industrial boom in the 1990s; Fliess and Suave, *supra* note 213 at 4,9 & 14; WTO 2012, *supra* note 213 at 11.

### **3.6.1.3.2 Whether there is a “champion” country willing to use the threat of market closure or other means to extract greater commitments from other WTO members**

As mentioned, the original proposal for sectoral negotiation on certain IT products emanated from the US<sup>244</sup>. The US was the "champion" that led other WTO members in the ITA initiative negotiation. Also, the US was not just a "champion"; as indicated, it was the most advanced country at the time in the WTO and therefore could make significant market access threats or convince other WTO members to join in the ITA negotiations.

Although it is not entirely clear if the US threatened market access closure during the ITA negotiation, its influence and contribution could be seen all through the negotiating period. With the US, other Quad countries also participated actively in the ITA negotiation at all stages to ensure a successful ITA.<sup>245</sup>

### **3.6.1.3.3 Whether the resulting critical mass is high and commands adequate institutional power in the concerned trade sector**

In ensuring that the ‘critical mass’ gathered is significant enough to command adequate institutional power in the WTO, attention was given to WTO members with significant IT markets, especially Asian countries.<sup>246</sup>

In addition, to generate the required number of participant countries that could command legitimate institutional power in the IT sector, the ITA negotiation was always open to all interested WTO members. At the initial negotiating stage, APEC members were allowed to give opinions about the ITA initiative and its product coverage.<sup>247</sup> APEC countries noted that the ITA product

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<sup>244</sup> See sections 3.6.1.2.1 and 3.6.1.2.2.

<sup>245</sup> *Ibid*, section 3.6.1.2.2.

<sup>246</sup> *Ibid*.

<sup>247</sup> *Ibid*



coverage and modalities should consider the development status of developing countries by accommodating the needs of developing countries in the proposed IT list.<sup>248</sup> Some developing countries wanted certain IT products excluded while other countries pressed to include other IT products in the IT products coverage list.<sup>249</sup> Prior to the Singapore MC some developing country needs were considered and included in the proposed ITA product lists before a final ITA was circulated to all WTO members at the Singapore Ministerial.<sup>250</sup>

In addition, the ITA Ministerial Declaration specifically stated that the ITA was open to every interested WTO member. In furtherance of this posture, after the ITA Ministerial Declaration, WTO members and countries or customs territories in the process of acceding to the WTO were enjoined to join the informal meetings following up between 17-31 January 1997.<sup>251</sup> WTO members continued to review the IT products coverage list and other related issues until the ITA was concluded in April 1997. Although the EU and US led the negotiating process, the ITA product coverage was a joint work from all WTO members interested in the ITA negotiation.

From the resources accessed in this thesis, it appears that all meetings conducted after the Quad countries agreed on the ITA initiative were transparent and open to all WTO members at each stage of the ITA negotiations until the final agreement was concluded. Furthermore, the inclusive nature of the negotiating process ensured widespread participation and is one reason why the required critical mass in the IT sector was achievable.

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<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

<sup>251</sup> The informal meetings were to discuss the ITA product coverage, the possibility of having extended staging, and other technical issues required to incorporate ITA concessions into the schedule of concessions. ITA Ministerial Declaration, *supra* note 210 at paras 7-10; WTO 2012, *supra* note 211 at 16.

How was the required ‘critical mass’ calculated for the ITA? The Quad countries had a specific list of IT products included in the ITA.<sup>252</sup> At the time the necessary ‘critical mass’ threshold was to be determined that threshold was calculable because tariffs on goods such as IT products were quantifiable and predictable. Furthermore, the ITA Ministerial Declaration specifically stated that the 90 percent threshold required for the ITA negotiation to come into force should be calculated by the WTO Secretariat.<sup>253</sup> This percentage was to be calculated by the WTO Secretariat based on the most recent data available at the final meeting.<sup>254</sup>

When the ITA came into force on 1 April 1997, 92 percent of world trade in the IT sector made significant ITA commitments in their schedules.<sup>255</sup> Participants representing the 92 percent threshold encompassed major IT suppliers and almost all WTO members with IT markets. This overwhelming majority represents the necessary ‘critical mass’ that commanded institutional power in the IT sector for the ITA to come into force.

#### **3.6.1.3.4 Whether the issue of free ridership is non-consequential**

As mentioned, the ITA was to be extended to other countries without requiring reciprocal commitments from them.<sup>256</sup> As such, ITA participants agreed that the ITA would not enter into force unless a 90 percent threshold was met.<sup>257</sup> In the end, more than 92 percent of the world trade in the IT sector significantly committed to the ITA.<sup>258</sup> The absence of other WTO members did

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<sup>252</sup> ITA Ministerial Declaration, *supra* note 212 at 14.

<sup>253</sup> *Ibid* at para 4 n 2.

<sup>254</sup> *Ibid*.

<sup>255</sup> ITA, *supra* note 35 at 2.

<sup>256</sup> ITA Ministerial Declaration, *supra* note 212 at para 4.

<sup>257</sup> *Ibid*.

<sup>258</sup> ITA, *supra* note 35 at 2.

not matter because the 90 percent threshold adopted in the ITA negotiation obviated the free-ridership concern.

### **3.6.2 WTO Basic Telecommunication Agreement (BTA)**

#### **3.6.2.1 Introduction**

The BTA is a sector-specific agreement that was negotiated and adopted outside the UR. The BTA is now annexed as the Fourth Protocol to the GATS.<sup>259</sup> The BTA entered into force on 5 February 1998 after 69 members representing over 90 percent of world telecommunications revenue had joined.<sup>260</sup> The BTA bound signatories to open their telecom markets either immediately or subject to a phased time frame.<sup>261</sup>

The BTA applies on an MFN basis as provided in GATS Art. II. However, because service coverage was a new feature of the WTO Agreement with potentially unforeseen consequences, the GATS allows for MFN exemptions.<sup>262</sup> This possibility is provided for in the "Annex on Article II Exemptions."<sup>263</sup>

During the GATS negotiations, developed countries, particularly the US, noted that applying an MFN principle without a substantive commitment from major developing countries might leave developed countries' markets at a disadvantage in terms of a lack of reciprocal commitment. For this reason, at the end of the UR the US secured a provision in the GATS that allowed countries

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<sup>259</sup> GATS Fourth Protocol, *supra* note 36.

<sup>260</sup> Phillip L. Spector, "The World Trade Organization Agreement on Telecommunications" (1998) 32:2 The Intl Lawyer 217 at 217.

<sup>261</sup> Hufbauer & Schott, *supra* note 33 at 17.

<sup>262</sup> The MFN provisions in the GATS states "...each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country". GATS, *supra* note 145 at Art. II.

<sup>263</sup> The members' listed exemptions are to be reviewed every five years to phase the exemptions out within the five-year duration. *Ibid*, Annex on Article II Exemptions at para 3.

to make limited exceptions to MFN treatment with respect to service. These negotiations resulted in GATS Article II (MFN) Exemptions and limitations on National Treatment as envisaged in GATS Art. XVI:2.<sup>264</sup> Hence, the GATS application of the MFN principle concerning "market access" and "national treatment" is to be determined on a case-by-case basis, with a view to countries' Schedules of Commitments and MFN Exemptions.<sup>265</sup>

### **3.6.2.2 Description of the WTO BTA Negotiation Process**

#### **3.6.2.2.1 The UR BTA Negotiation**

The forum for international telecommunications negotiations was initially the International Telecommunications Union ("ITU"). The ITU, established in 1865, was employed by national governments only to discuss technical issues, such as radio frequency allocation, in a bid to achieve harmonization among governments in telecommunication services.<sup>266</sup> During the early 1980s, US telecommunications providers wanted to expand into other countries' telecommunication markets because the US was the most advanced telecommunications market. However, because other countries' telecommunication markets were often dominated by de facto government or private monopolies that could frustrate the efforts of foreign entrants and breed anti-competitiveness, the US resolved to open its market only if there was reciprocity of similar size from other markets.<sup>267</sup>

This demand gave rise to the need for a 'critical mass' as the basis for the BTA. As a result, the US

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<sup>264</sup> *Ibid.* GATS Annex on Article II Exemptions provides that such exemptions "should not exceed a period of 10 years" and "shall be subject to negotiations in subsequent trade-liberalizing rounds."

<sup>265</sup> See Kenneth Freiberg, "World Trade Organization: Second Protocol to the General Agreement on Trade in Services (GATS) And Related Decisions" (1996) 35:1 Intl Legal Materials 199 at 199-200.

<sup>266</sup> For the details of the BTA negotiation, see generally Marco Bronckers & Pierre Larouche, "Telecommunication Services" in Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer, eds, *World Trade Organisation: Legal, Political and Economic Analysis* Vol. II (United States: Springer, 2005) at 991 [Bronckers & Larouche, "Telecommunication Services"]; Markus Fredebeul-Krein & Andreas Freytag, "Telecommunications and WTO Discipline: An Assessment of the WTO Agreement on Telecommunication Services" (1997) 21:6 Telecommunications Policy 477; Laura B. Sherman et al, "Wildly Enthusiastic" About the First Multilateral Agreement on Trade in Telecommunications Services," (1998) 51:1 Fed Comm Law J 61.

<sup>267</sup> *Ibid.*, Bronckers & Larouche, "Telecommunication Services" at 992.

would not agree to a telecommunication agreement except when there existed a "sufficiently large number of market access commitments from its trading partners."<sup>268</sup>

Besides US eagerness for global market access, competition in the telecommunication sector also grew among industrialized countries.<sup>269</sup> Growing competition resulted in pressure for market access and a reevaluation of national monopolies in the telecommunication sector.<sup>270</sup>

In 1986, developed countries proposed negotiating an agreement in the telecommunication sector at a global level akin to the GATT. As a result, they began a process of global outreach on the subject. Global outreach was necessary because developed countries wanted an international framework and perceived that the GATT negotiating mechanisms were more suitable than the ITU. This sentiment arose because the all-embracing nature of WTO commitments in many sectors meant there was a greater chance of achieving their desired result through the GATT platform's ability to promote cross-sectoral deals.<sup>271</sup> Developed countries also contemplated that introducing competitiveness and the advent of private suppliers of telecommunication services through the ITU might be regarded as running against the traditional spirit of cooperation the ITU was known for.<sup>272</sup> In addition, developed countries sensed that developing countries had a strong influence in the ITU and they might be less amenable to an agreement if negotiations proceeded under the ITU.

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<sup>268</sup> *Ibid*; Peter Holmes et al, "International Competition Policy and Telecommunications—Lessons from the EU and Prospects for the WTO" (1996) 20:10 Telecommunications Policy 755 at 764.

<sup>269</sup> *Ibid*, Holmes et al at 757-758.

<sup>270</sup> *Ibid*.

<sup>271</sup> The ITU dispute resolution forum has not been used since 1947. As such, the binding dispute settlement framework of the GATT was another incentive for including talks on Telecommunication Services liberalization in the UR. Bronckers & Larouche, "Telecommunication Services", *supra* note 263 at 991-992.

<sup>272</sup> *Ibid*; Holmes et al, *supra* note 268 at 757-758.

For these reasons, developed countries pushed for negotiations over telecommunication services in the UR.

Towards the end of the UR negotiations, it became evident that an agreement on basic telecoms and some other sectors, including financial and maritime services, could not be concluded in parallel with conclusions reached on other issues.<sup>273</sup> As a result, the UR participating countries agreed that talks on a WTO Agreement on Basic Telecommunication Services should continue after the UR ended. Accordingly, at the signing of the WTO Agreement trade ministers adopted the Ministerial Decision on Negotiations on Basic Telecommunications to extend the basic telecommunications agreement negotiation beyond the UR until 30 April 1996.<sup>274</sup>

The 1994 Ministerial Decision on Basic Telecommunications provided for the establishment of an *ad hoc* group, “Negotiating Group on Basic Telecommunication” (NGBT), to carry on with the post-UR basic telecommunications agreement negotiations.<sup>275</sup> The 1994 Ministerial Decision on Basic Telecommunications stated that continuing negotiations on telecommunication services

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<sup>273</sup> During the UR, while several countries took specific market-access and national treatment commitments in the value-added telecommunications services, few countries took commitments on basic telecommunications. At this time, the value-added service sector represented only a minor part in the telecoms sector, while the basic telecommunications sector encompasses the telecoms market majority. Marco CEJ Bronckers & Pierre Larouche, "Telecommunications Services and the World Trade Organization" (1997) 31:5 J World Trade 5 at 19. However, this distinction has been eliminated since countries now have full commitments in both value-added and basic telecommunications services. Bronckers & Larouche, “Telecommunication Services”, *supra* note 266 at 994-995. Value-added services are those telecommunication services for which suppliers 'add value' to the customer's information by enhancing its form or content or by providing for its storage and retrieval. Basic telecommunications comprise “all telecommunication services, both public and private that involve end-to-end transmission of customer supplier information.” They are provided through cross-border supply and the establishment of foreign firms or commercial presence, including the ability to own and operate independent telecom network infrastructure. See WTO, *Coverage of Basic Telecommunications and Value-Added Services*, online: WTO < <https://www.wto.org/>>.

<sup>274</sup> WTO, *Decision on Negotiations on Basic Telecommunications* (15 April 1994) at para 5, in Results of the Uruguay Round, *supra* note 22 [1994 Ministerial Decision on Basic Telecommunications].

<sup>275</sup> *Ibid* para 3.

would be open to every interested WTO member on a voluntary basis with a view to the progressive liberalization of trade in telecommunications networks and services.<sup>276</sup>

In addition, the 1994 Ministerial Decision on Basic Telecommunications included a standstill commitment by countries that every participant country was to refrain from applying any trade measure that might affect trade in basic telecommunication services in a way that would improve its negotiating position and leverage.<sup>277</sup>

Furthermore, the WTO Agreement included an Annex on Negotiations on Basic Telecommunications.<sup>278</sup> The purpose of the Annex was to suspend GATS Art II on MFN application in the telecommunication sector until the date to be stated by a projected BTA or 30 April 1996 if no BTA was reached.<sup>279</sup> Also, the Annex extended the duration for filing exemptions to GATS Article II (MFN treatment) in the telecommunications sector on the same basis.<sup>280</sup>

#### **3.6.2.2.2 Post-UR BTA Negotiation**

After the UR negotiations ended in April 1994 the NGBT continued negotiations on basic telecommunication services. The US spearheaded the basic telecommunication services negotiations because it was the most advanced country in terms of telecommunications liberalization at the time.<sup>281</sup> The NGBT resolved not to have a fixed list of what constituted basic telecommunications services but agreed that the talks would "include ... all telecommunications

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<sup>276</sup> *Ibid* para 1.

<sup>277</sup> *Ibid* para 7.

<sup>278</sup> The *Annex* is attached to the GATS, *supra* note 145, "*Annex on Negotiations on Basic Telecommunications*".

<sup>279</sup> *Ibid*.

<sup>280</sup> *Ibid*.

<sup>281</sup> Bronckers & Larouche, "Telecommunication Services", *supra* note 266 at 992.

services that involve real-time transmission of customer-supplied information (i.e. without adding value)." <sup>282</sup>

As the April 1996 deadline for achieving agreement drew near, the US withdrew its offer of open satellite market access.<sup>283</sup> It was not encouraged by offers on telecommunications market access and national treatment made by most developing countries, especially the ASEAN countries, India, and Latin America.<sup>284</sup> The US was also not satisfied with the quality of offers on investment limitations, international traffic, and satellite services issues.<sup>285</sup>

In connection with its market access withdrawal, the US expressly stated that a 'critical mass' of offers of "sufficient quantity and sufficient quality" had not been reached.<sup>286</sup> According to the US, "over 40% of world telecom revenues and over 34% of global international traffic are not covered by acceptable offers. We will not enter an agreement on these terms."<sup>287</sup> The US noted that it would conclude a basic telecommunication services agreement only when a "critical mass" of offers was achieved and urged other participants to improve their offers.

As the original April 1996 negotiating deadline approached, the NGBT, in a bid to control the situation, agreed to the proposal of the then WTO DG Renato Ruggiero to extend the timeline for

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<sup>282</sup> VanGrasstek, *supra* note 10 at 343: "These included (among others) domestic and international voice telephony, mobile services, data transmission, facsimile, private leased circuits, satellite services and video transport services."

<sup>283</sup> Bronckers & Larouche, "Telecommunication Services", *supra* note 266 at 993; Holmes, *supra* note 268 at 764.

<sup>284</sup> For instance, India and the ASEAN countries continued foreign ownership restrictions in some EU countries and Canada. *Ibid*, Bronckers & Larouche, "Telecommunication Services" at 993; Fredebeul-Krein & Freytag, *supra* note 266 at 486.

<sup>285</sup> *Ibid*, Fredebeul-Krein & Freytag at 486.

<sup>286</sup> Spector, *supra* note 260 at 218; Petrazzini, B., Global Telecom Talks: A Trillion Dollar Deal Policy Analyses in International Economics, Vol. 44. Institute for International Economics, Washington, D.C., 1996 at 13 cited in Fredebeul-Krein & Freytag, *supra* note 266 at 486 n 44.

<sup>287</sup> Statement of Ambassador Charlene Barshefsky on Basic Telecom Negotiations (USTR, April 30, 1996) cited in Bronckers & Larouche, "Telecommunication Services", *supra* note 266 at 993 n 15. The US also stated that 36 out of the 47 offers on the table were inadequate. According to the US, out of the 47 offers at the time, only 11 had offered to provide open market access for all domestic and international services and facilities allowing 100 percent foreign investment. See Sherman et al, *supra* note 266 at 88-89.



the adoption of both the Decision on Negotiations on Basic Telecommunications and the Annex on Negotiations on Basic Telecommunications. The NGBT then transmitted its final report to the Council on Trade in Services.<sup>288</sup> The NGBT Report of 30 April 1996 included Schedules of Commitments and Lists of Article II Exemptions listed together with a draft “Fourth Protocol to the General Agreement on Trade in Services”<sup>289</sup> and a “Decision on Commitments in Basic Telecommunications.”<sup>290</sup>

The WTO Council on Trade in Services adopted the NGBT final report on 30 April 1996 and extended the Basic Telecoms Negotiation deadline to 15 February 1997.<sup>291</sup> The GATS Fourth Protocol annexed WTO members’ Schedules of Commitments and Lists of Article II Exemptions concerning Basic Telecommunications.<sup>292</sup> The Decision on Commitments in Basic Telecommunications adopted on 30 April 1996 adopted the text of the Fourth Protocol and its annex. The 1996 Decision on Commitments in Basic Telecommunications also provided a 30-day period in January-February 1997 during which members that had listed Schedules of Commitments might supplement or modify their schedules of Article II exemptions.<sup>293</sup> Alternatively, WTO members that had not submitted lists of GATS Art. II exemptions could do so within the 30-day period.<sup>294</sup>

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<sup>288</sup> WTO, NGBT, *Report of the Negotiating Group on Basic Telecommunications* (30 April 1996), WTO Doc S/NGBT/18, online: WTO <<https://docs.wto.org/>> [NGBT Report of 30 April 1996].

<sup>289</sup> The draft Fourth Protocol is reproduced as the GATS Fourth Protocol, *supra* note 36.

<sup>290</sup> WTO, Trade in Services, *Decision on Commitments in Basic Telecommunications* (30 April 1996), WTO Doc /S/L/19, online: WTO <<https://docs.wto.org/>> [1996 Decision on Commitments in Basic Telecommunications].

<sup>291</sup> WTO, Council for Trade in Services, *Report of the Meeting* (held on 30 April 1996), WTO Doc S/C/M/9 at para 6, online WTO: <<https://docs.wto.org/>>.

<sup>292</sup> The GATS Fourth Protocol provided that the Protocol would be open and come into force on 1 January 1998, provided it has been accepted by all members concerned. However, if all members do not accept the Protocol on the stated date, the members that have accepted may decide on its entry into force. GATS Fourth Protocol, *supra* note 36 at paras 2-3.

<sup>293</sup> 1996 Decision on Commitments in Basic Telecommunications, *supra* note 290 at para 3.

<sup>294</sup> *Ibid.*

After the April 1996 deadline, the NGBT was replaced by the Group on Basic Telecommunications ("GBT"). The GBT was open to all WTO members as participants, unlike the NGBT, where some countries were participants and other observers.<sup>295</sup>

Between April 1996 and mid-February 1997 countries continued to improve their offers and commitments.<sup>296</sup> The US also retracted its market access restriction and increased its offers as an enticement to other countries. The GBT meeting on 14 February 1997 revealed significant changes in members' offers.<sup>297</sup> The US also noted the improved offers and eventually agreed that the 'critical mass' of offers of 90 percent needed to achieve an agreement on basic telecommunications services had been met.<sup>298</sup>

At the final GBT meeting on 15 February 1997, the GBT adopted a list of participants' schedules.<sup>299</sup> The new list of participants' schedules was to replace the ones adopted on April 30, 1996.<sup>300</sup> The schedules of the signatories were attached as the Fourth Protocol to the GATS. The

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<sup>295</sup> WTO, GBT, *Report of the Meeting* (held on 19 July 1996), WTO Doc S/GBT/M/1 at para 3, online: WTO <<http://docs.wto.org>> [GBT Meeting of 19 July 1996]; Bronckers & Larouche, "Telecommunication Services", *supra* note 266 at 993.

<sup>296</sup> See WTO, GBT, *Report of the Meeting* (held on 14 November 1996), WTO Doc S/GBT/M/4, at para 2, online: WTO <<http://docs.wto.org>> [GBT Meeting of 14 November 1996]; WTO, GBT, *Report of the Meeting* (held on 15 January 1997), WTO Doc S/GBT/M/5 at paras 2-3, online: WTO <<http://docs.wto.org>> [GBT Meeting of 15 January 1997]; WTO, GBT, *Report of the Meeting* (held on 31 January 1997), WTO Doc S/GBT/M/6 at paras 2-3, online: WTO <<http://docs.wto.org>> [GBT Meeting of 31 January 1997]; WTO, GBT, *Report of the Meeting* (held on 10 February 1997), WTO Doc S/GBT/M/7 at paras 2-5, online: WTO <<http://docs.wto.org>> [GBT Meeting of 10 February 1997].

<sup>297</sup> The improved members' offers included higher thresholds on foreign equity participation in a number of offers that listed such limitations and the incorporation of the Reference Paper on regulatory principles (in an increasing number of offers). WTO, GBT, *Report of the Meeting* (held on 14 February 1997), WTO Doc S/GBT/M/8 at para 2 online: WTO <<https://docs.wto.org/>> [GBT Meeting of 14 February 1997].

<sup>298</sup> *Ibid* at para 3.

<sup>299</sup> WTO GBT, *Report of the Meeting* (held on 15 February 1997), WTO Doc S/GBT/M/9 online: WTO <<https://docs.wto.org/>> [GBT Meeting of 15 February 1997]. 55 separate schedules of commitments accounting for 69 members (with the EU as a single member) representing over 90 percent of the worldwide telecommunications services' revenues were adopted at the meeting. Bronckers & Larouche, "Telecommunication Services", *supra* note 263 at 994,998-99; Hoekman & Kostecki, *supra* note 4 at 311, 344.

<sup>300</sup> The replacement was in accordance with para 3 of the 1996 Decision on Commitments in Basic Telecommunications, *supra* note 290.

Fourth Protocol entered into force on 5 February 1998 and is now generally known as the WTO BTA.

At the 15 February 1997 meeting, the then WTO DG Renato Ruggiero emphasized the importance of the social and economic benefits that would be derived from the BTA and the role that liberalization in the basic telecommunication sector could have in promoting growth and development in a globalized world.<sup>301</sup> He also noted that the BTA could enhance the human aspect of globalization by making information and knowledge more accessible.<sup>302</sup>

BTA participants have now increased from 69 to 108 WTO members.<sup>303</sup> Like the case of the WTO ITA, it is generally believed that an increase in membership of the WTO BTA is a result of WTO accessions.<sup>304</sup> Accession to the WTO by new members requires that the newly acceding member accept all agreements adopted before the accession including the BTA. As such, participation in CMAs increases as the WTO membership increases.

### 3.6.2.3 The BTA as a CMA

With the historical account of the BTA negotiation provided, this section will attempt to assess the agreement alongside the required features of a CMA. This assessment will illustrate how the WTO BTA qualifies as a CMA.

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<sup>301</sup> GBT Meeting of 15 February 1997, *supra* note 299 at para 6.

<sup>302</sup> *Ibid.*

<sup>303</sup> WTO, “Telecommunications services” online: WTO  
<[https://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/telecom\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm)>.

<sup>304</sup> VanGrasstek, *supra* note 10 at 344.

### 3.6.2.3.1 Whether assembling a ‘critical mass’ is possible

As mentioned, the BTA is a service agreement regulated by the GATS.<sup>305</sup> Again, like the ITA, the BTA was focused on trade liberalization, in this case in the telecommunications sector. The concluded BTA opened up national telecommunications sectors to foreign direct investment across the border, bringing more revenue for WTO members and providing employment worldwide.<sup>306</sup> The focus on these gains was one reason why gathering a 'critical mass' was possible. In the end, 69 members representing over 90 percent of world telecommunications revenue finalized the BTA.<sup>307</sup>

### 3.6.2.3.2 Whether there is a “champion” country willing to use the threat of market closure or other means to extract greater commitments from other WTO members

The US proposed the BTA.<sup>308</sup> It assumed the “champion” role in BTA negotiations. Throughout the negotiation, from the UR through the post-UR period until adoption, the US played a leadership role in ensuring the BTA's success. When the US was not satisfied with other participating countries' offers, especially developing countries, it insisted on no deal and withdrew some of its initial offers.<sup>309</sup> During that time, the NGBT Chair was successful in preserving the existing commitments and in pushing for an extension of the BTA negotiation deadline.<sup>310</sup>

It is arguably correct to state that because the US had the most advanced telecommunications market at the time, its temporary market access withdrawal forced other members to improve on

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<sup>305</sup> GATS Fourth Protocol, *supra* note 36.

<sup>306</sup> See for instance, WTO, Council for Trade in Services, *Telecommunication Service*, WTO Doc S/C/W/74, (8 December 1998) Note by the Secretariat at paras 12-15, online: WTO <<https://docs.wto.org/>>.

<sup>307</sup> *Supra* note 260.

<sup>308</sup> See section 3.6.2.2.2.

<sup>309</sup> *Ibid*

<sup>310</sup> *Ibid*.

their offers and commitments. In addition, after the first post-UR deadline extension the US retracted its offer on market restrictions to incentivize other countries to make better commitments.<sup>311</sup> Eventually, other participating countries improved on their offers and a BTA was successfully negotiated.

From the BTA's negotiating history, it is clear that at every point of the negotiation there was a "champion" ready to hold the reins of the negotiations together and prevent the thwarting of BTA negotiation efforts.

### **3.6.2.3.3 Whether the resulting critical mass is high and commands adequate institutional power in the concerned trade sector**

As indicated, one part of assembling a 'critical mass' that commands the necessary institutional power is in assembling the major trading partners that can negotiate a self-sustaining agreement on behalf of all WTO members in a specific sector. Thus, in order to satisfy the first criterion of a high resulting critical mass, the BTA negotiations strove to involve emerging economies with significant telecommunications markets in the negotiating process.<sup>312</sup> The participation of these emerging economies helped to ensure satisfaction of an important criterion for assembling the 'critical mass' that gave institutional impetus to the BTA negotiation in the telecommunications sector.

In addition, to ensure the legitimacy of the resulting 'critical mass', Quad countries pushed for an open and transparent negotiation that would involve every WTO member with a telecommunication service market. As a result, the 1994 Decision on Basic Telecommunication

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<sup>311</sup> *Supra* note 297.

<sup>312</sup> See section 3.6.2.2.2.

expressly stated that the BTA negotiation would be open to every WTO member that volunteered to join.<sup>313</sup> The NGBT meetings held between May 1994 and April 1996 were accessible by every WTO member interested as participants or observers.<sup>314</sup> After the NGBT's replacement with the GBT, the BTA's negotiation was open to all WTO members with no limitation.<sup>315</sup> All interested WTO members were allowed to participate and make suggestions at every meeting regarding the BTA negotiation.<sup>316</sup> The inclusiveness at every stage of the BTA negotiation encouraged as many WTO members interested in the negotiation as possible to gather a legitimate "critical mass".

If participation in the BTA had been limited to a particular "club" or if developing countries were not involved – as in the case of the Tokyo Round "side codes" - the resulting 'critical mass' may not have been sufficient to command the necessary, legitimate institutional power on behalf of all WTO member in the telecommunication sector. For instance, it is noteworthy that the Quad countries, mainly, US, EC, and Japan, were reported to accrue 75 percent of world telecommunication revenue during the BTA negotiation.<sup>317</sup> An agreement that consisted of only the Quad group without other WTO members might be regarded as self-sustaining. However, such an agreement might not be regarded as having achieved quite the high 'critical mass' that would give the BTA legitimate institutional power in the WTO telecommunication sector.

How was the BTA's 'critical mass' determined? The BTA entered into force on 5 February 1998, after a substantial 69 members representing 92 percent of world telecommunications revenue had

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<sup>313</sup> *Supra* note 276 at para 4; see also, WTO, NGBT, *Report of the Meeting* (held on 6 May 1994), WTO Doc TS/NGBT/1 at paras 2-4, online: WTO <<http://docs.wto.org>> [NGBT Meeting of 6 May 1994].

<sup>314</sup> *Ibid* at paras 2-4. Although observers were allowed to speak on invitation at every meeting, they were not allowed to participate in arriving at any decision among the NG.

<sup>315</sup> GBT Meeting of 19 July 1996, *supra* note 295 at para 3.

<sup>316</sup> *Ibid*.

<sup>317</sup> Fredebeul-Krein & Freytag, *supra* note 266 at 486 n 45.

joined. Like tariffs, revenues accrued in the telecommunications sector for WTO members are calculable and quantifiable. As a result, determining the necessary 'critical mass' for the BTA was possible. The 92 percent of world telecommunication revenue represents almost all WTO members in the basic telecommunication sector. Therefore, the BTA gathered the necessary 'critical mass' that commanded required institutional power in the telecommunication sector.

#### **3.6.2.3.4 Whether the issue of free ridership is non-consequential**

As indicated, the 'critical mass' threshold in a CMA is vital for two reasons. First, to ensure a resulting high number that will grant the CMA in question of legitimacy. Second, a 'critical mass' is necessary to reduce the temptation of free-ridership. For example, to avoid the issue of free-ridership in the BTA the US noted that a 'critical mass' of offers of "sufficient quantity and sufficient quality" needed to be met.<sup>318</sup> At the 14 February 1997 meeting, the WTO Secretariat and the US confirmed that the 'critical mass' required for the BTA negotiation and adoption had been met.<sup>319</sup> Having achieved coverage of more than 90 percent of the world's basic telecommunication revenue from the participants' commitments, free-ridership in the basic telecommunication sector was discouraged to the utmost.

### **3.6.3 The WTO BTA Reference Paper**

#### **3.6.3.1 Introduction**

Aside from market access and national treatment commitments made by countries in the BTA, participating members determined that effective market access for telecommunication service suppliers might be restricted due to domestic monopolies and governmental measures and policies

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<sup>318</sup> *Supra* note 286.

<sup>319</sup> GBT Meeting of 14 February 1997, *supra* note 297 at para 3.

not regulated by the GATS.<sup>320</sup> As such, in 1996 the NGBT developed a "Reference Paper on Basic Telecommunications."<sup>321</sup> The Reference Paper includes regulatory principles on competitive safeguards, commitments related to interconnection rights, universal service obligations, public availability of licensing criteria, commitments for independent regulators, and allocation of scarce resources.<sup>322</sup>

During the conclusion of the basic telecommunication services negotiations in 1996, some 67 out of the 69 countries indicated that they would commit to regulatory disciplines contained in the Reference Paper.<sup>323</sup> The Reference Paper signatories have since increased to 82 members.<sup>324</sup>

### 3.6.3.2 Description of the Reference Paper Negotiation Process

In 1992, talks on a Telecommunications Reference Paper began as an informal discussion on extending basic telecommunications negotiations beyond the UR. In 1993 the Group of Negotiations on Services ("GNS") charged an informal group with conducting consultations on the idea of an extension of negotiations among interested participants' trade telecoms officials.<sup>325</sup>

To encourage negotiating parties to reach an agreement on an extension of the negotiating period beyond the UR, the informal group decided to develop a "common understanding on the services

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<sup>320</sup> See generally, WTO, Committee on Specific Commitments, *Additional Commitments Under Article XVIII of the GATS* (16 July 2002), Note by the Secretariat, WTO Doc S/CSC/W/34 at para 13 online: WTO <<https://docs.wto.org/>> [Additional Commitments]; Sherman et al, *supra* note 266 at 71-87. The Reference Paper was developed according to GATS Art. XVIII, *supra* note 197.

<sup>321</sup> For the provisions of the Reference Paper, see WTO, NGBT, *Telecommunication Services: Reference Paper* (24 April 1996), online: WTO <[https://www.wto.org/english/Tratop\\_e/serv\\_e/telecom\\_e/tel23\\_e.htm](https://www.wto.org/english/Tratop_e/serv_e/telecom_e/tel23_e.htm)>; The Reference Paper is also attached as an Appendix in Bronckers & Larouche, "Telecommunication Services", *supra* note 266 at 1038-1040.

<sup>322</sup> *Ibid.*

<sup>323</sup> *Ibid.*, Bronckers & Larouche, "Telecommunication Services" at 999-1000.

<sup>324</sup> WTO, *Telecommunications services* online: WTO <[https://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/telecom\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm)>.

<sup>325</sup> Additional Commitments, *supra* note 320 at para 9.



and issues [basic telecommunications services] that would be subject to negotiations" after the UR. At the end of the UR, this informal group came up with a draft list of regulatory issues, referred to as a "shopping list," that could form the basis of the post-UR basic telecommunication services discussions and negotiations.<sup>326</sup>

When the NGBT began to meet after the UR was concluded in April 1994 and early 1995, the discussions included regulatory issues on basic telecommunication services along with the market access and national treatment negotiations.<sup>327</sup> In July 1995 negotiating participants started to submit their initial market access offers on basic telecommunication commitments. The US and Japan were the first to attach proposals concerning regulatory issues to their market access offers.<sup>328</sup> At this time, the Quad countries started to hold consultations among themselves on how to explore further the regulatory issues involved in basic telecommunication services access.<sup>329</sup> Subsequently, the Quad realized that the consultations' success depended on involving other

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<sup>326</sup> The "shopping list" included licensing procedures or requirements related to licensing and safeguards against anti-competitive practices. *Ibid* at para 10.

<sup>327</sup> WTO, NGBT, *Review of Outstanding Issues* (July 8, 1994), Note by Secretariat, WTO Doc TS/NGBT/W/2 at para 15-18, online: WTO <<https://docs.wto.org/>>. Several countries, including the Quad countries, submitted communications on the telecommunication regulatory issues. WTO, NGBT, *Communication from the United States, Pro-competitive Regulatory and Other Measures for Effective Market Access in Basic Telecommunications Services* (9 February 1995), WTO Doc S/NGBTIW/5, online: WTO <<https://docs.wto.org/>>; WTO, NGBT, *Communication from the European Community and its Member States, GATS Coverage of Telecom Regulatory Issues* (21 April 1995), WTO Doc S/NGBT/W/6, online: WTO <<https://docs.wto.org/>>; WTO, Informal Communication from Canada, Canadian Non-papers on Basic Telecommunications Regulatory Issues, 13 April 1995; See also *Ibid* at para 11 n 4,5,6.

<sup>328</sup> WTO, NGBT, *Communication from the United States, Draft Offer on Basic Telecommunications* (31 July 1995), WTO Doc S/NGBTIW/12/Add.3 cited in Sherman et al, *supra* note 263 at 72 n 56. Subsequently, Canada, Australia, Slovak Republic, and Venezuela also submitted offers related to telecommunications regulatory issues. Additional Commitments, para 12-14; WTO, NGBT, *Communication from Australia, Draft Offer on Basic Telecommunications* (6 September 1995), WTO Doc S/NGBT/W/12/Add.6, online: WTO <<https://docs.wto.org/>>; WTO, NGBT, *Communication from Canada, Draft Offer on Basic Telecommunications* (11 September 1995), WTO Doc S/NGBT/W/12/Add.7 online: WTO <<https://docs.wto.org/>>; WTO, NGBT, *Communication from Slovak Republic, Draft Offer on Basic Telecommunications* (25 September 1995) WTO Doc S/NGBT/W/12/Add.8 online: WTO <<https://docs.wto.org/>>; and WTO, NGBT, *Communication from Venezuela, Some Principles for the Design of a Global Regulatory Framework* (24 November 1995) WTO Doc S/NGBT/W/17 online: WTO <<https://docs.wto.org/>>. For Communications from all countries on the BTA, see WTO, online: WTO <<https://docs.wto.org/>>.

<sup>329</sup> Additional Commitments, *supra* note 320 at para 13.

NGBT participants to ensure broader representation.<sup>330</sup> Following this, the Quad countries began to invite other NGBT participants that had tabled offers to participate in informal consultations. Eventually, the consultative group increased to 12 participants and later expanded to 16.<sup>331</sup>

In December 1995, a proposed text entitled “Reference Paper” was presented as a non-paper by the consultative group to a formal meeting of the NGBT.<sup>332</sup> The Reference Paper included regulatory issues proposed in the “shopping list.” The Reference Paper was presented as a draft serving as a “possible basis for focusing broader discussion” by the NGBT.<sup>333</sup> The Reference Paper was further discussed with input from other NGBT participants in early 1996.

In March 1996, the WTO Secretariat noted that the proposed Reference Paper was relatively clear, and the revised Reference Paper was forwarded to all NGBT participants. The Reference Paper was accepted, but the NGBT participants maintained that the Reference Paper would remain a non-paper without binding force.<sup>334</sup>

### 3.6.3.3 Legal Status of the Reference Paper

As indicated, the Reference Paper is considered a “non-paper”. In other words, it is characterized as a policy document without legal status.<sup>335</sup> The Reference Paper was only to serve as a guide or

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<sup>330</sup> *Ibid.*

<sup>331</sup> The 16 participants included both developing and developed countries representing almost all geographical regions. *Ibid* at para 13.

<sup>332</sup> WTO, NGBT, *Report on the Meeting of 15 December 1995*, WTO Doc S/NGBT/11, (22 December 1995) online: WTO <<https://docs.wto.org/>> [NGBT Meeting of 15 December 1995]; *Ibid* at paras 11-14.

<sup>333</sup> *Ibid*, NGBT Meeting of 15 December 1995 at para 5.

<sup>334</sup> Additional Commitments, *supra* note 320 at para 14; WTO, NGBT, *Report of the Meeting* (22 March 1996), WTO Doc S/NGBT/14 at para 5, online: WTO <<https://docs.wto.org/>> [NGBT Meeting of 22 March 1996].

<sup>335</sup> *Ibid*, NGBT Meeting of 22 March 1996; Additional Commitments at paras 15-17; Bronckers & Larouche, “Telecommunication Services”, *supra* note 266 at 1000; Hunter Nottage & Thomas Sebastian, “Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law” (2006) 9(4) *J Intl Econ L* 989 at 1013.

model to help provide indicators for the scheduling of additional commitments.<sup>336</sup> Parties were not under any obligation to be bound by it except that the Reference Paper was referenced in their services schedules.<sup>337</sup> WTO members that accepted the Reference Paper only incorporated it into their service schedules as an attachment.<sup>338</sup>

#### 3.6.3.4 Analyses of the Reference Paper

In examining the significance of the Reference Paper, commentators have opined that the Reference Paper is a significant step towards common regulatory principles in the WTO.<sup>339</sup> Through its flexibility, the Reference Paper attempts to balance two objectives: international market openness and national sovereignty.<sup>340</sup> In other words, the Reference Paper attempts to create free trade in telecommunications services and allows countries the flexibility to adopt suitable regulations without imposing a set of strict regulations in the telecommunication sector.

One commentator has characterized the specific functions of the Reference Paper as divisible into two categories. One is "to provide the requisite safeguards in domestic law for market access and

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<sup>336</sup> The means of implementation of the Reference Paper provisions were left to the discretion of each participant. A commentator states that the purpose of the Reference Paper was to "ensure certain results, a level playing field for new entrants, not to determine the means by which the results would be achieved." Sherman et al, *supra* note 266 at 73.

<sup>337</sup> NGBT Meeting of 22 March 1996, *supra* note 334 at para 5. In 2004, the Reference Paper was interpreted for the first time by the WTO Panel, *Mexico – Measures Affecting Telecommunications Services, (complaints by the United States) (2004)*, WTO Doc WT/DS204/R (Panel Report), online WTO <<https://docs.wto.org/>> [Telmex Report]. In the Telmex Report, the WTO Panel held that Mexico was bound by the Reference Paper inscribed in its schedule (similar to the Reference Paper guideline), and it failed to comply with its provisions.

<sup>338</sup> For example, see WTO, Trade in Services, *United States of America – Schedule of Specific Commitments, Supplement 3*, WTO Doc GATS/SC/90/Suppl.2 (11 April 1997), online: WTO <<http://docs.wto.org/>>; WTO, Trade in Services, *European Communities and their Member States – Schedule of Specific Commitments, Supplement 3* (11 April 1997), WTO Doc GATS/SC/31/Suppl.3 at 2, online: WTO <<http://docs.wto.org/>>.

<sup>339</sup> The Reference Paper was the first time an agreement on Competition policy was successfully negotiated in the GATT/ WTO. The WTO dispute settlement body is also binding on the Reference Paper signatories as they can subject the telecommunication regulatory issues to the WTO dispute settlement mechanism.

<sup>340</sup> Chantal Blouin, "The WTO Agreement on Basic Telecommunications: A Reevaluation" (2000) 24 *Telecommunications Policy* 135 at 139-140; Bronckers & Larouche, "Telecommunication Services", *supra* note 266 at 1012-1013.

foreign investment commitments to be truly effective." The other is "to anchor these safeguards in the WTO system and hence make failure to implement them challengeable under the WTO Dispute Settlement Understanding."<sup>341</sup>

However, the formulated Reference Paper's principles' effectiveness has been questioned because of their lack of clarity. Many of the principles have been described as "vaguely and/or are incomplete."<sup>342</sup> Due to this lack of precision, they have been challenging to enforce. As mentioned, they are only indicative, not legally binding.

### **3.6.3.5 The Reference Paper as a CMA**

The following section will analyze the Reference Paper and the way in which it serves as an example of a CMA.

#### **3.6.3.5.1 Whether assembling a 'critical mass' is possible**

The Reference Paper was a part of the BTA negotiation. Regulating policies helped to advance liberalization in the telecommunication sector. One of the reasons gathering a 'critical mass' for the Reference Paper was feasible was because WTO members were in the middle of negotiating an agreement for the telecommunication sector. In addition, like previous CMAs the focus of the Reference Paper negotiation was its trade benefit to both developed and developing countries.

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<sup>341</sup> Bronckers & Larouche, "Telecommunication Services", *supra* note 266 at 1000; Additional Commitments, *supra* note 320 paras 18-21.

<sup>342</sup> Blouin, *supra* note 340 at 138-139; "There is no definition of basic terms such as "anti-competitive cross-subsidization," "anti-competitive results" and "non-discrimination." Nor is there a benchmark against which these terms are to be interpreted: is the goal to increase market access for foreign suppliers, or to improve effective conditions of competition in the host country?". Bronckers & Larouche, "Telecommunication Services", *supra* note 266 at 1012-1013.

### **3.6.3.5.2 Whether there is a “champion” country willing to use the threat of market closure or other means to extract greater commitments from other WTO members**

After the UR, the NGBT began negotiations on market access and national treatment, including regulatory issues on basic telecommunication services.<sup>343</sup> However, most countries only submitted market access offers until US and Japan included basic telecommunication services regulatory issues in their submitted offers.<sup>344</sup> Afterwards, the Quad countries started an informal discussion on these regulatory issues. Eventually 16 countries, the “group of 12” contributed to the initial Reference Paper draft.<sup>345</sup>

Although it is not clear whether there is evidence of the use of threats from the US or any member of the "group of 12" in the Reference Paper negotiation, the US and other Quad countries took up the lead role from the Reference Paper 's initiation until its successful negotiation.<sup>346</sup>

### **3.6.3.5.3 Whether the resulting critical mass is high and commands adequate institutional power in the concerned trade sector**

The Reference Paper satisfied the two criteria required to gather a high 'critical mass' that could command the required legitimate institutional power for a CMA in the WTO. First, although there was no express evidence of the largest players being involved in or dictating regulatory policies in the global telecommunication sector, since the Reference Paper was a part of the negotiated BTA the fact that significant trading partners were already involved in the BTA inevitably shaped conclusion of the Reference Paper.

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<sup>343</sup> *Supra* note 327.

<sup>344</sup> *Supra* note 328.

<sup>345</sup> *Supra* note 331.

<sup>346</sup> See section 3.6.3.2.

Second, the Reference Paper negotiation was not limited to the largest players in the global telecommunication sector. As indicated, the talks on basic telecommunications services regulatory issues continued within the NGBT (among the Quad countries) after the UR.<sup>347</sup> After the first NGBT meeting, a questionnaire was circulated among the participants.<sup>348</sup> The purpose of the questionnaire was to “explore each government's regulatory environment regarding the supply of basic telecommunications networks and services. It is intended to facilitate an exchange of information with reference to a common format”.<sup>349</sup> In essence, the status of each governments’ regulatory environment was to be considered in the Reference Paper negotiation.

In addition, when the Quad countries realized that the success of their "informal consultation" was dependent on expanding the talks to other countries in the NGBT, they extended discussions to other WTO members until a consultative group of 16 was formed.<sup>350</sup> The consultative group consisted of both developed and developing countries representing every geographic region.<sup>351</sup>

Afterwards, a Reference Paper proposal was presented to the whole NGBT on behalf of the consultative group. The essence of the circulation was for other WTO members to participate and contribute to the submitted Reference Paper proposal.<sup>352</sup> The negotiating history shows that the Reference Paper was open, transparent, and encouraged participation from all interested WTO members, and as a result, a majority of 67 out of the 69 members agreed to incorporate the regulatory issues contained in the Reference Paper as additional commitments in their services’ schedules.

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<sup>347</sup> *Supra* note 327.

<sup>348</sup> GATS, NGBT, *Questionnaire on Basic Telecommunications Services – Note by the Secretariat*, WTO Doc TS/NGBT/W/3, online: WTO <<http://docs.wto.org>> [Questionnaire on Basic Telecommunications].

<sup>349</sup> *Ibid* at 1.

<sup>350</sup> *Supra* note 331.

<sup>351</sup> *Ibid*.

<sup>352</sup> *Supra* note 333.

How was a ‘critical mass’ threshold determined for the Reference Paper? Issues regarding regulatory matters may not be quantifiable. However, as mentioned, the Reference Paper negotiation was undertaken between 69 WTO members that were participants in the BTA negotiation. Logically, 67 members out of the 69 members agreeing to incorporate the Reference Paper represented an overwhelming majority with regards to the total number of participants involved in the negotiation. In this case, the 67 members were the resulting ‘critical mass’ that commanded the required institutional power for the Reference Paper negotiation and conferred upon it legitimacy.

#### **3.6.3.5.4 Whether the issue of free ridership is non-consequential**

Like the WTO BTA, the Reference Paper’s benefits were to be applied on an MFN basis. However, to prevent the effect of free riders outweighing the participants’ benefits the Reference Paper did not enter into force until a ‘critical mass’ of the WTO membership participated in it.<sup>353</sup> In other words, the respective NGBT participants’ scheduled additional commitments did not take effect until a ‘critical mass’ of them had agreed to enter additional commitments concerning regulatory principles to be applied in the telecommunications sector.

One of the reasons for the additional commitments ‘critical mass’ threshold introduced in this instance was to avoid free-ridership. At the conclusion, 67 members out of 69 participants that made Reference Paper commitments could be described as substantial enough, meeting the

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<sup>353</sup> Stuart Harbinson & Bart de Meester, “A 21st Century Work Program for the Multilateral Trading System”, System (2012), 15, online: *National Foreign Trade Council* <<https://www.nftc.org/default/trade/WTO/NFTC21stCenturyTradeAgenda2012.pdf>>.21stCenturyTradeAgenda2012.pdf>.

‘critical mass’ threshold to limit the issue of free-ridership in the Reference Paper negotiation and implementation in the telecommunication sector.

### **3.6.4 The WTO Financial Services Agreement (FSA)**

#### **3.6.4.1 Introduction**

The FSA is the second sector-specific agreement negotiated with respect to trade in services in the WTO. The FSA is the Fifth Protocol to the GATS. It was concluded in December 1997 and entered into force on 1 March 1999.<sup>354</sup> The FSA came into force after 102 members, representing 98 percent of the WTO members involved in the world's banking services, insurance and securities, joined the negotiations and made significant commitments.<sup>355</sup> The coverage of the FSA is extensive. The term "financial services" includes insurance and insurance-related services and all banking and other financial services.<sup>356</sup>

Like the BTA, the FSA is a service agreement negotiated by means of a 'critical mass' approach. Thus, although countries were allowed certain exceptions to MFN under the GATS Article II Exemptions, the FSA is otherwise subject to the MFN obligation.

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<sup>354</sup> GATS Fifth Protocol, *supra* note 37. For details of the WTO FSA, its history and negotiation, see generally Sydney J. Key, "Financial Services" in Patrick F. J. Macrory, Arthur E. Appleton, Michael G. Plummer, eds, *World Trade Organisation: Legal, Political and Economic Analysis*, Vol. II (United States: Springer, 2005) 956 [Key, "Financial Service"]; Constance Z. Wagner, "The New WTO Agreement on Financial Services and Chapter 14 of NAFTA: Has Free Trade in Banking Finally Arrived" (1999) 5:2 *Law & Bus Rev Am* 6 at 58-74; VanGrasstek, *supra* note 10 at 340-342; See Roger Kampf, *A Step in the Right Direction: The Interim Deal on Financial Services in the GATS*, 1 *Intl Trade L. & Reg* (1995).

<sup>355</sup> WTO, *Successful Conclusion of the WTO's Financial Services Negotiations* (12 December 1997), Press Release/86, online: WTO <[https://www.wto.org/english/news\\_e/pres97\\_e/pr86\\_e.htm](https://www.wto.org/english/news_e/pres97_e/pr86_e.htm)>.

<sup>356</sup> WTO, *Annex on Financial Services*, Art. 5(a), online: WTO, <[https://www.wto.org/english/tratop\\_e/serv\\_e/10-anfin\\_e.htm](https://www.wto.org/english/tratop_e/serv_e/10-anfin_e.htm)>.



### 3.6.4.2 Description of the WTO FSA negotiation

Negotiations for an agreement on financial services in the WTO started during the UR. In the 1980s the US financial services industry had proposed a financial services agreement. This proposal was put forward with the aim of a multilateral negotiation on the subject of financial services within the framework of GATT 1947. These multilateral negotiations were foreseen to involve a broad trade-off between goods and services commitments among negotiating parties that would provide an opportunity for more market openings for financial services in emerging market economies. In pursuit of this aim, the US government worked to include financial services on the UR agenda.<sup>357</sup>

As in the case of the BTA, talks on financial services were included in the UR. However, the UR did not produce much positive response to the negotiations on financial services partly because countries' commitments and offers were limited.<sup>358</sup> For instance, most emerging economies refused to make commitments that would allow foreign financial firms to hold majority-ownership positions in domestic financial services firms.<sup>359</sup>

In October 1993, the US submitted a proposal envisaging a “two-tier” approach under which it would apply MFN to WTO members with respect to financial services at different levels. In the first tier the US would grant unconditional MFN to the services of trading partners who opened

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<sup>357</sup> Key, “Financial Service”, *supra* note 354 at 958.

<sup>358</sup> *Ibid.* For other reasons why an FSA was not concluded during the UR, see Sydney J. Key, “Financial Services in the Uruguay Round and the WTO” (1997) Occasional Paper 54 1 at 24-32.

<sup>359</sup> Commitments from developing countries' banking sectors and other financial services sectors except insurance were also low. Japan and many Asian countries did not want to make commitments that will give foreign financial firms direct access to avoid competition with their domestic financial industries that have helped their growth and development. Some other developing countries feared that the proposed financial services liberalization was a camouflage by developed countries to erode their national economies. R. Brian Woodrow, “Insurance Services in the Uruguay Round Services Negotiations: An Overview and Assessment of the Final Agreement” (1995) 20:74 *The Geneva Papers on Risk and Insurance, Issues and Practice* 57 at 63.

their financial services market based on reciprocity.<sup>360</sup> In the second-tier, participants with restricted or limited market access would be granted conditional MFN.<sup>361</sup> The two-tier proposal did not go far among negotiating parties. Most countries, particularly Japan and those in Asia, felt attacked and threatened to downgrade their limited financial services offers if the US two-tier approach was followed.<sup>362</sup>

As the UR drew to an end in December 1993 the US insisted that offers on the table, especially those by Japan and other Asian countries, were not good enough to agree on unconditional MFN for financial services in the UR.<sup>363</sup> On 14 December 1993, the US also threatened to exclude any agreement on financial services from the final UR final agreements altogether.<sup>364</sup>

Although the EU and US both wanted an FSA with a global commitment, and the EU agreed with the US on the insufficiency of commitments from other participants, the EU was particularly concerned about getting an FSA regardless of some members' weak commitments. At the same time, the US was interested in an FSA with substantial commitments from principal members and unwilling to allow emerging economies to become free riders.<sup>365</sup>

Towards the end of the UR negotiations the participating countries agreed that the GATS should be concluded while the financial services negotiations were extended until 20 June 1995 with the existing offers kept in place. A Decision on Financial Services was then drafted and attached to

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<sup>360</sup> *Ibid* at 66-67.

<sup>361</sup> *Ibid*.

<sup>362</sup> *Ibid*.

<sup>363</sup> *Ibid*.

<sup>364</sup> *Ibid*.

<sup>365</sup> For the US perspective, see Jeffrey Shafer & Jeffrey Lang, *In Defence of a Modest Outcome*, Fin. Times, Jul. 25, 1995, for an EU perspective, Leon Brittan, *Why Apathy Must Not Prevail*, Fin. Times, June 19, 1995, cited in Key, "Financial Service", *supra* note 354 at 959-960; Wagner, *supra* note 354 at 59-60.

the results of the UR.<sup>366</sup> Members were allowed to modify, alter or withdraw any of their listed commitments up to the deadline.<sup>367</sup>

In addition, like in the BTA negotiations, a standstill provision was adopted. The Ministerial Decision on Financial Services suspended all listed MFN exemptions concerning financial services that were made conditional upon the level of commitments undertaken by other participants until the 20 June 1995 deadline.<sup>368</sup>

### 3.6.4.3 Post-UR FSA Negotiation

Negotiations on financial services began again after the UR. During that period, WTO members started to reconsider and improve their commitments and some of them narrowed or withdrew their MFN exemptions.<sup>369</sup> Towards the extension deadline, the US insisted that the market access commitments of some countries were still inadequate. In less than 24 hours to the deadline, US announced that it would impose a reservation on the MFN principle.<sup>370</sup> The US applied an MFN

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<sup>366</sup> GATS, *supra* note 145, *Second Annex on Financial Services* [GATS Second Annex on Financial Services]; WTO, Uruguay Round Trade Negotiations Committee, *Ministerial Decision on Financial Services* (Dec. 15, 1993), online: WTO <[https://www.wto.org/english/docs\\_e/legal\\_e/48-dsfin\\_e.htm](https://www.wto.org/english/docs_e/legal_e/48-dsfin_e.htm)>; Results of the Uruguay Round, *supra* note 22 [Ministerial Decision on Financial Services]; Key, "Financial Service", *supra* note 354 at 960. During the UR, an "Understanding on Commitments in Financial Service" was adopted. Although not part of the WTO Agreement, the Understanding has been adopted by about 30 WTO members in scheduling their FSA commitments. For details on the "Understanding Commitments in Financial Services," see, Additional Commitments, *supra* note 320 at 18-30.

<sup>367</sup> *Ibid*, GATS Second Annex on Financial Services at para 2.

<sup>368</sup> Ministerial Decision on Financial Services, *supra* note 366 at para 1.

<sup>369</sup> WTO, Committee on Trade in Financial Services, *Report of the Meeting* (held on 28 March 1995), Note by Secretariat, WTO Doc S/FIN/M/ at paras 4-5, online: WTO <<http://docs.wto.org>>; WTO, Committee on Trade in Financial Services, *Report of the Meeting* (held on 28 April 1995), Note by Secretariat, WTO Doc S/FIN/M/2 at para 4, online: WTO <<http://docs.wto.org>>; WTO, Committee on Trade in Financial Services, *Report of the Meeting* (held on 18 May 1995), Note by Secretariat, WTO Doc S/FIN/M/3 at paras 4-5, online: WTO <<http://docs.wto.org>>; WTO, Committee on Trade in Financial Services, *Report of the Meeting* (held on 7 June 1995), Note by Secretariat, WTO Doc S/FIN/M/4 at paras 4-10, online: WTO <<http://docs.wto.org>>; Key, "Financial Service", *supra* note 354 at 960.

<sup>370</sup> "...There were deficiencies in some offers especially with respect to new firms. For too many important markets, offers did not provide new market access for banking, securities, insurance, fund management, and other financial services activities. Some offers did not fully protect the current market access of foreign firms, and several offers specifically reserved the right to force divestiture of the current holdings of US and other foreign firms. Under these circumstances, the US had decided on two actions; one was to maintain an offer that protected the existing activities of foreign financial services providers in the US; the other was not to bind open the US market nor guarantee national

exemption based on reciprocity since other countries did not improve their offers and commitments.<sup>371</sup> The US was disappointed with some developing country offers. For example, major participant countries in the financial services sectors including Brazil and other Asian and Latin American countries, were reluctant to commit adequately.<sup>372</sup> Singapore, the Philippines, and India were looking towards cross-sectoral negotiations too.<sup>373</sup> In essence, most countries made inadequate offers.

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treatment for new entrants and new activities. Therefore, on 1 July, the US would not have an MFN obligation that covered new activities in banking, securities, insurance, fund management, and other financial services.” WTO, Committee on Trade in Financial Services, *Report of the Meeting* (held on 29 June 1995), Note by Secretariat, WTO Doc S/FIN/M/5 at para 4, online: WTO <<http://docs.wto.org>> [ Financial Services Committees’ Meeting of 29 June 1995]. At the US FSA Hearing, Secretary Rubin reiterated, “A few parties to the negotiations made offers that would have provided what we were seeking. However, many offers did not provide acceptable market access and national treatment commitments. Countries sought to maintain a range of restrictions - from prohibitions on new licenses for foreign firms to discriminatory regulatory and legal requirements - that could not be justified, except as a way of keeping foreign firms out. Some also held back from committing themselves to allowing US firms now in their markets to continue operations on current terms. In the end, we could not commit ourselves to grant essentially full market access and national treatment to firms from other countries that would not open their markets to our firms and commit to keeping them open.” Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs: Status of Financial Services Negotiations Now Underway Under the GATS of the WTO, 104th Cong. 29 (1995) [Senate FSA Hearing] Secretary Robert E. Rubin testimony before Congress on the FSA in June 1995 cited in Wagner, *supra* note 354 at 62 n 379.

<sup>371</sup> The US made commitments for existing operations of foreign financial firms and took a broad MFN exemption concerning new entrants in its domestic. Secretary Rubin noted, “To be sure, the decision to accept or refuse an MFN obligation is a tough one. The benefits of accepting an MFN obligation could be substantial. Countries which have made attractive market-opening commitments would bind those commitments through the GATS. US firms would be assured of important new opportunities to compete in exciting new markets.... But there would be a serious downside to our irrevocably accepting an MFN obligation, assuming that commercially significant countries continued to retain restrictions against foreign firms. GATS most favored nation rules would not allow us to treat countries which do not open their markets to us any differently from those that do. All WTO member countries’ firms would be entitled to full market access and national treatment in the United States. In other words, the few closed markets would be able to free-ride on the agreement we reach with other market-opening WTO members, such as the European Union. We would lose the leverage we now have to open markets by taking other countries’ practices into account when their firms apply to do business over here.” Senate FSA Hearing at 46-47 cited in Wagner, *supra* note 354 at 61 n 380; Key, “Financial Service”, *supra* note 354 at 959-960.

<sup>372</sup> *Ibid*, Wagner at 60.

<sup>373</sup> Chakravarthi Raghavan, “Financial Services, the WTO and Initiatives for Global Financial Reform” G24 1 at 25, online: G24 < <https://www.g24.org/wp-content/uploads/2016/01/Financial-Services-the-WTO-and.pdf>>.

The US decision to limit MFN application was a surprise to all other participants who expected a deal to be struck.<sup>374</sup> It was the first time the US had stepped back from a trade negotiation, and it was the first time a WTO trade negotiation was going to be completed without US's full backing.<sup>375</sup>

The EU proposed a negotiating extension of the deadline for 30 days until 28 July 1995 in a bid to preserve the existing commitments made by other countries after the 1995 deadline lapsed.<sup>376</sup>

However, the US stated that its position would not change within the proposed 30-day interval.<sup>377</sup>

Between the June deadline and the proposed four-week extension, the EU began to encourage the US, Japan, South Korea and the ASEAN countries to improve on their market-access offers so that a deal could be reached by the July 1995 deadline. As a result, after bilateral discussions between the EU and the Asian countries, Japan and South Korea, these countries agreed to be a part of the EU interim agreement proposal.<sup>378</sup>

With the backing of 30 countries in July 1995 the WTO Secretariat submitted a proposal for an interim agreement on financial services to the Committee on Trade in Financial Services.<sup>379</sup> The Secretariat's proposal was adopted by the Committee on Trade in Financial Services as an interim agreement annexed as a 'Second Protocol' to the GATS.<sup>380</sup> The interim agreement was to be

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<sup>374</sup> Japan, Australia, Canada and Hong Kong referred to the US MFN reservation as "disappointing." Financial Services Committees' Meeting of 29 June 1995, *supra* note 370 at para 6; Wagner, *supra* note 354 at 61.

<sup>375</sup> *Ibid.*

<sup>376</sup> WTO <<http://docs.wto.org>>; WTO, Committee on Trade in Financial Services, *Report of the Meeting* (held on 30 June 1995), Note by Secretariat, WTO Doc S/FIN/M/6 at para 2, online: WTO <<http://docs.wto.org>>.

<sup>377</sup> *Ibid* at para 8.

<sup>378</sup> WTO, Committee on Trade in Financial Services, *Report of the Meeting* (held on 21 July 1995), Note by Secretariat, WTO Doc S/FIN/M/7 at paras 3-15, online: WTO <<http://docs.wto.org>>; WTO, Committee on Trade in Financial Services, *Report of the Meeting* (held on 26 July 1995), Note by Secretariat, WTO Doc S/FIN/M/9 at paras 3-7, online: WTO <<http://docs.wto.org>>.

<sup>379</sup> WTO, Committee on Trade in Financial Services, *Report of the Meeting* (held on 28 July 1995), Note by Secretariat, WTO Doc S/FIN/M/10, online: WTO <<http://docs.wto.org>>.

<sup>380</sup> WTO, Council for Trade in Services, *Second Protocol to the General Agreement on Trade in Services* (24 July 1995), WTO Doc S/L/11, online: WTO <<http://docs.wto.org>> [GATS Second Protocol]; WTO, Council for Trade in

implemented for an initial period up to 1 November 1997, with negotiations envisaged being reopened afterwards.

The Second Protocol annexed the participating members' Schedules of Commitments and Lists of Article II Exemptions concerning financial services as of April 1995. The participating members' Schedule of Specific Commitments and the Exemptions from Article II lists concerning financial services annexed to the Second Protocol replaced the participating members' existing sections of the Schedule of Specific Commitments and the List of Article II Exemptions.<sup>381</sup> As a result of these moves, a Decision on Commitments in Financial Services was agreed to that opened a 60-day period starting 1 August 1996 for participating governments that had listed Scheduled Commitments to supplement or modify their schedules of Article II exemptions.<sup>382</sup>

In this way, the financial services talks were rekindled in 1997. This time, the negotiating participants aimed to achieve a final agreement on financial services by December 1997.<sup>383</sup> The US itself was willing to adopt more substantial commitments. On 12 December 1997, the US circulated a paper containing a "revised conditional offer" among the WTO members.<sup>384</sup> The US

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Services, *Ministerial Decision adopting the Second Protocol to the General Agreement on Trade in Services* (24 July 1995), WTO Doc S/L/13, online: WTO <<http://docs.wto.org>>; WTO, Council for Trade in Services, *Decision on Commitments in Financial Services*, (24 July 1995), WTO Doc S/L/8, online: WTO <<http://docs.wto.org>> [Decision on Commitments in Financial Services] and WTO, Council for Trade in Services, *Second Decision on Financial Services*, (24 July 1995), WTO Doc S/L/9, online: WTO <<http://docs.wto.org>> S/L/9 [Second Decision on Financial Services]; Key, "Financial Service", *supra* note 354 at 960.

<sup>381</sup> *Ibid*, GATS Second Protocol at para 2.

<sup>382</sup> This is, however, subject to if all concerned members did not accept the *Second Protocol* by July 1, 1996, and if participating members are not able to come up with a date for the *Second Protocol* in 30 days after the July 1 deadline.

<sup>383</sup> The US Trade Representative Charlene Barshefsky stated: "For the financial service negotiations to be successful, it is absolutely critical that we see significantly improved offers from a critical mass of countries, particularly in Asia and Latin America." Gary G. Yerkey, *Services: US Major Trading Partners Urge Others to Improve Offers in Financial Services Talks*, 14 Intl Trade Rep. 1811, 7 May 1997, cited in Wagner, *supra* note 354 at 64 n 405.

<sup>384</sup> WTO, Committee on Trade in Financial Services, *Communication from The United States of America-Revised Conditional Offer on Financial Services* (12 December 1997), WTO Doc S/FIN/W/12/Add.5/Rev.2, online: WTO <<http://docs.wto.org>>. The US Communication was termed "conditional" because the US still pushed for reciprocity in the form of commitments from other countries of the same strength, especially from emerging economies, as a condition for tabling its final proposed offer. *Ibid*, Wagner at 62.

offered to withdraw its limitation for new entrants and expand existing activities and the conduct of new activities among foreign financial firms in the US market. In addition, the US promised to table a final offer based on its conditional offer if other countries would do the same. It would seem that the US conditional offer incentivized other countries in that direction because 15 countries tabled new offers or improved on their offers the same day the US conditional offer was circulated.<sup>385</sup>

The negotiations on financial services were finally concluded on the same day.<sup>386</sup> The concluded FSA was to remain open for government acceptance until January 1999 and, in the end, garnered commitments from 102 WTO members.

Apart from the US and EU's immense contribution to the initiation and conclusion of the negotiations in this instance, one of the identified reasons for the eventual success of the negotiations of the FSA was the Asian commercial crisis that began in 1997. Global markets were uncertain about the regulation and openness of the Asian financial services sector. To avoid future crises of this sort, countries became more willing to negotiate a final FSA.<sup>387</sup> In particular, Asian governments believed that binding commitments on financial services in GATS that would allow foreign direct investment was another way to reassure nervous markets and investors that they were committed to long-term policy reform.<sup>388</sup>

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<sup>385</sup> See, for instance, WTO, Committee on Trade in Financial Services, *Communication from Japan-Revised Offer on Financial Services* (12 December 1997), WTO Doc S/FIN/W/12/Add.3/Rev.1, online: WTO <<http://docs.wto.org>>; WTO, Committee on Trade in Financial Services, *Communication from the European Communities and their Member States-Revised Offer on Financial Services* (12 December 1997), WTO Doc S/FIN/W/12/Add.1/Rev.2, online: WTO <<http://docs.wto.org>>; *Ibid*, Wagner at 63.

<sup>386</sup> WTO, Committee on Trade in Financial Services, *Report of the Meeting* (held on 12 December 1997), Note by Secretariat, WTO Doc S/FIN/M/20, online: WTO <<http://docs.wto.org>> [Trade in Financial Service Committee Meeting of 12 December 1997]; Key, "Financial Service", *supra* note 354 at 961-962.

<sup>387</sup> Levy, *supra* note 232 at 11.

<sup>388</sup> Key, "Financial Service", *supra* note 354 at 961.

According to some scholars, the FSA's accomplishments are challenging to analyze because restrictions on financial services are entrenched in domestic regulatory policies that cannot easily be reduced or eliminated. However, Hufbauer opines that "The most significant contribution to liberalization is bringing financial services within the WTO framework and applying and creating the policy space for further liberalization."<sup>389</sup>

#### **3.6.4.4 The FSA as a CMA**

How did the FSA come to be a CMA? Did the FSA meet the necessary criteria for a CMA? The following section will attempt an answer to these questions.

##### **3.6.4.4.1 Whether assembling a 'critical mass' is possible**

Like examples of the other CMAs already discussed, the FSA focused on liberalization in the WTO financial service sector. The FSA was agreed upon to improve WTO members' financial infrastructure and the workings of their economies.<sup>390</sup> The FSA's coverage was broad and included banking services, insurance, and other financial services. The opportunities evident in an FSA of this type encouraged the possibility of a 'critical mass' for the FSA.

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<sup>389</sup> Hufbauer & Schott, *supra* note 33 at 17.

<sup>390</sup> The FSA improved FDIs such as ensuring foreign equity participation in branches, subsidiaries or affiliates of banks and insurance companies; removal or liberalization of nationality or residence requirements for members of the boards of financial institutions; and the participation of foreign-owned banks in cheque clearing and settlement systems. "WTO Director-General Hails Financial Services Accord" *WTO News* (July 26, 1995), Press Release/18, online: WTO <[https://www.wto.org/english/news\\_e/pres95\\_e/addpr3.htm](https://www.wto.org/english/news_e/pres95_e/addpr3.htm)>. [WTO 1995 Press Release].



#### **3.6.4.4.2 Whether there is a “champion” country willing to use the threat of market closure or other means to extract greater commitments from other WTO members**

Again, the US was the “champion” country in the FSA negotiation. The US, through its financial services industry, proposed an FSA during the UR.<sup>391</sup> After the UR, US, with the help of the EU, continued their leadership role in the FSA talks until the agreement came into force in 1998.<sup>392</sup>

When the US was not satisfied with limited market access offers from some major countries, it indicated its dissatisfaction by conditioning its MFN exemptions on reciprocity if other countries did not improve their offers and commitments.<sup>393</sup> At that point, the EU, through the WTO Secretariat, attempted to preserve existing commitments by proposing a deadline extension and drafting an interim agreement.<sup>394</sup>

In addition, the US was not only a significant leader in the FSA negotiation, it was also the “champion” that used the threat of market closure to new entrants in the financial services sector and improved commitments on its side after the interim agreement ended to persuade other WTO members to make significant financial services commitments.

When an interim agreement was concluded, the WTO DG referred to the interim agreement as a "second best" option because "one major trading partner [US] could not offer non-discriminatory market access for foreign financial services."<sup>395</sup> The DG added that he hoped the US would return to the multilateral MFN framework when the interim FSA expired, if not earlier.<sup>396</sup>

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<sup>391</sup> See section 3.6.4.2.

<sup>392</sup> *Ibid*; see also section 3.6.4.3.

<sup>393</sup> *Ibid*, section 3.6.4.3.

<sup>394</sup> *Ibid*.

<sup>395</sup> WTO 1995 Press Release, *supra* note 390.

<sup>396</sup> *Ibid*.

The purpose of the extension was to allow participating members improve on their offers and, more importantly, for the WTO to gain more time to fully reinvolve the US in a final agreement. After the interim agreement came to an end, the US proposed to withdraw its limitations and improve its offers. The US's improved offer also served as an incentive to other countries in securing the final FSA.<sup>397</sup>

From this assessment, it is evident that there were “champion” countries at each stage of the FSA negotiation willing to ensure other countries made substantial financial services commitments and that a final agreement could be achieved.

#### **3.6.4.4.3 Whether the resulting critical mass is high and commands institutional power in the concerned trade sector**

The FSA came into force after 95 percent of world trade in financial services in banking, insurance, and securities joined the negotiations and made significant commitments.<sup>398</sup> Throughout the FSA negotiations the US and the EU continued to push for the participation of more WTO members in the FSA talks. This move reveals the openness and inclusive nature of the FSA negotiation to every interested WTO member, particularly significant trade partners in the financial services sector such as ASEAN countries. Throughout the FSA negotiation process, there is no evidence that the negotiation was at any point limited to a set of WTO members or if certain WTO members were denied representation or access to necessary documents.

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<sup>397</sup> *Supra* note 385.

<sup>398</sup> *Supra* note 355.

At the 12 December 1997 meeting, the US noted, "...the set of commitments covered over 95 percent of world trade in financial services, with new and improved offers from 70 countries, both developed and developing countries from all regions of the world. This was truly a global deal."<sup>399</sup>

When an agreement such as the FSA has a number of participants that accumulate over 95 percent of world trade in a concerned sector from both developed and developing countries, it goes without saying that the overwhelming 95 percent of participants provided the necessary 'critical mass' that commanded legitimate institutional power in the WTO financial sector for the FSA.

How was the FSA 'critical mass' calculated? Like other WTO CMAs, the financial services operations in question, including equal foreign equity participation, are predictable and quantifiable. As a result, the US could calculate the required 'critical mass' for an FSA from the participants' tabled offers and commitments.<sup>400</sup>

#### **3.6.4.4.4 Whether the issue of free ridership is non-consequential**

The issue of free-ridership is perhaps the most crucial point of consideration in a CMA arrangement. As indicated, the assurance that WTO members that benefit without any form of obligation in an agreement will not overshadow the participants' benefits in a CMA is one of the determinants for the suitability of a 'critical mass' negotiating method.

In the FSA, the US's insistence in getting substantial commitments from WTO members with major financial services market was one reason a 'critical mass' was achieved. The 'critical mass'

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<sup>399</sup> Trade in Financial Services Committee Meeting of 12 December 1997, *supra* note 386 at para 4.

<sup>400</sup> According to US calculation, the final offers "covered 17.8 trillion US dollars in global securities assets, 38 trillion dollars in global domestic bank lending, and 22.2 trillion dollars in worldwide insurance premiums". *Ibid.*

threshold in a CMA substantially limits the issue of free-ridership. With a 95 percent ‘critical mass’ gathered for the FSA, the issues of free-ridership were reduced to a minimum.

### **3.7 Conclusion**

This chapter has examined the concept of the ‘critical mass’ negotiating method and its features within the WTO. This chapter has also analyzed previous WTO CMAs including the ITA, the BTA, the Reference Paper, and the FSA, by giving their historical breakdown *vis a vis* the mentioned CMA characteristics with the aim of further elucidating the WTO’s ‘critical mass’ negotiating modality. With the successes of the previous CMAs, the pertinent question now is, to what degree is the ‘critical mass’ approach suitable for present and future trade negotiations in the WTO? Can a ‘critical mass’ negotiating method replace the WTO’s multilateral negotiating methods in most or every trade agreement negotiation? Are there specific sectors where the critical mass-based negotiating technique is more suitable? In an attempt to answer these questions, Chapter 4 will supply a case study of ongoing WTO trade agreement negotiation on fisheries subsidies and the feasibility of a ‘critical mass’ negotiating method in respect of it.

## **CHAPTER FOUR**

### **4. 'CRITICAL MASS' IN WTO NEGOTIATIONS CONCERNING FISHERIES SUBSIDIES**

#### **4.1 Introduction**

Fish is a major source of food, employment, and income for many countries, especially the developing countries and LDCs.<sup>401</sup> With the importance of fish to all countries for different purposes, fishing activities have increased worldwide. Due to this increase, the U.N. Food and Agriculture Organization (FAO) reports that global marine fishery resources have continued to decline.<sup>402</sup>

The continuous depletion of marine resources has resulted in long-standing research on how best to protect fish stocks and ensure sustainability. The WTO and other international organizations (IOs) have been negotiating agreements that attempt to address the sustainability of fishery resources now and in the future.

This chapter examines the feasibility of a 'critical mass' approach to ongoing negotiation over an Agreement on Fishing Subsidies (AFS) in the WTO, why the WTO is an appropriate negotiating forum for an AFS, and how productive the WTO AFS negotiations have been so far.

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<sup>401</sup> Fish and fishery products provide protein and other nutritional benefits. Most developing countries and LDCs consume fish as a source of protein needed for a healthy diet. Countries have also found fish to be a major source of income, especially in international trade, and this has led to the increase in the cross-border exchange of fish and fishery products. In 2018, 67 million tons of fish (live weight equivalent) were traded internationally for a total export value of USD164 billion. This equates to almost 38 percent of all fish caught or farmed worldwide. Food and Agricultural Organization of the UN (FAO), *The State of the World's Fisheries and Aquaculture (SOFIA) (2020)*, online: FAO <<http://www.fao.org/publications/sofia/en/>>.

<sup>402</sup> *Ibid* at 7.

## 4.2 What is Subsidy?

The WTO Agreement on Subsidies and Countervailing Measures (ASCM), a part of the WTO Agreement, defines a ‘subsidy’ as “a financial contribution by a government or public body, within the territory of a Member," which confers a specific benefit to a domestic industry.<sup>403</sup> This financial contribution may come in different forms, including grants, loans, loan guarantees, tax credits, or governments' fiscal incentives.<sup>404</sup>

In the fisheries sector, the means by which a WTO-member government may grant subsidies to its fishing industry include tax exemptions, lowering of costs for boat construction and equipment, fuel costs reduction, vessel buybacks, grants for research and development purposes and a range of other incentives.

Although the WTO Agreement on Subsidies and Countervailing Measures (ASCM) currently covers certain prohibited and actionable subsidies on goods, the effort to negotiate a sector-specific agreement on fisheries subsidies aims to target the activity of fishing operations in the hope that this will help to stem overfished stocks, overfishing and overcapacity, and illegal, unreported, and unregulated (IUU) fishing, thereby contributing to the recovery in the marine biomass.

## 4.3 Why is the WTO the right forum for AFS Negotiations?

The international community has always agreed that certain, if not most, fisheries subsidies adversely affect fish stocks. IOs and NGOs have for a long time been addressing harmful fisheries

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<sup>403</sup> Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 Art. 1.1 [ASCM] The ASCM is the major treaty within the WTO Agreement regulating subsidies activities among the WTO actors except for agricultural subsidization. The ASCM was developed during the UR and was signed into force in 1994 along with other parts of the WTO Agreements.

<sup>404</sup>There are different names for a subsidy, including support programs, government support, state aid, financial support/payment, economic assistance, government financial transfers, general services, cost-reducing transfers, and direct payments.

subsidies. These IOs and NGOs include the FAO<sup>405</sup>, regional fisheries management organizations (RFMOs)<sup>406</sup> and Oceana.<sup>407</sup>

Although there is general agreement that fisheries subsidies have contributed to depleting fish stocks, there has been a debate on the suitability of the WTO as a forum where talks on fisheries subsidies disciplines should take place. Some commentators opine that the WTO is primarily a trade-oriented organization and should not be saddled with addressing environmental issues.<sup>408</sup>

Nevertheless, while the WTO is not an environmental organization in the classic sense, it is obligated to ensure environmental sustainability. The preamble of the WTO Agreement provides that trade commitments should be undertaken "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with member's respective needs and concerns at different levels of economic development."<sup>409</sup>

In addition, the geographical reach of the WTO makes the organization a suitable platform to negotiate disciplines on fisheries subsidies. The WTO has 164 member countries today, and with

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<sup>405</sup> In 1992, the Mexican Government and the FAO countries held the International Conference on Responsible Fishing in Cancun, Mexico. The conference led to the adoption of the Cancun Declaration. FAO, *Declaration of the International Conference on Responsible Fishing* (6-8 May 1992), online: FAO <[www.fao.org/](http://www.fao.org/)>. The Cancun declaration emphasise the importance of fishing, the need for fishing activities to align with environmental sustainability and protection of fisheries resources. See also, FAO, *Report of the Twenty-Fifth Session of the Committee on Fisheries* (held on 24-28 February 2003), FAO Fisheries Report No. 702, online: FAO <[www.fao.org/](http://www.fao.org/)>.

<sup>406</sup> RFMOs are regional bodies that regulate fishing activities and conserve fish stocks among countries in a geographical location.

<sup>407</sup> Oceana is an NGO established for protecting and restoring the "oceans on a global scale," online: Oceana <<https://oceana.org/>>.

<sup>408</sup> Peter Lloyd, 'When Should New Areas of Rules be Added to the WTO?' (2005) 4 World Trade Rev 275; Seung Wha Chang, "WTO Disciplines on Fisheries Subsidies: A Historic Step Towards Sustainability" (2003) 6:4 J Intl Econ L 879 at 918.

<sup>409</sup> See also GATT 1947, *supra* note 2 at Art. XX(g).

a number of these providing fisheries subsidies in various forms the WTO Agreement can serve as a venue for negotiating a global agreement on fisheries subsidies disciplines.

The dispute settlement mechanism of the WTO Agreement also makes it an appropriate platform for fisheries subsidies rules. Most IOs and NGOs do not have a legally binding framework. As such, their fisheries subsidies rules are not truly binding. Rules made under the aegis of the WTO Agreement are binding. Hence disciplines to be negotiated on fisheries subsidies will be enforceable.

Furthermore, the WTO Agreement has addressed subsidies in existing WTO arrangements.<sup>410</sup> As such, the disciplines on fisheries subsidies would be consistent with the general regulatory aim of limiting subsidization.<sup>411</sup> The former WTO DG, Roberto Azevedo, has reiterated that although the WTO is not a fisheries management organization, it is an appropriate forum for negotiating and enforcing multilateral trade rules governing subsidies, including fisheries subsidies.<sup>412</sup>

Fisheries subsidies have also been regarded as trade-distorting practices. Fish is a source of international trade. More than one-third of fish products are traded internationally every year.<sup>413</sup>

Fisheries subsidies adversely affect global access to fish by encouraging competition in the marine

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<sup>410</sup> Before the conclusion of the ASCM in 1994, subsidies under GATT 1947 were regulated by GATT Art. XVI and a portion of the 1979 Tokyo Round Agreement, Subsidies and Countervailing Duties Code, *supra* note 100. The Subsidies Code and the GATT Art. XVI provisions address subsidies that are harmful to products, primarily exported products; these articles also state the measures that affected Countries should take in response to harmful subsidies.

<sup>411</sup> David K. Schorr “Healthy Fisheries, Sustainable Trade: Crafting New Rules on Fishing Subsidies in the World Trade Organization” (2004) WWF Position Paper 1 at 18, online; <[https://www.wto.org/english/forums\\_e/ngo\\_e/posp43\\_wwf\\_e.pdf](https://www.wto.org/english/forums_e/ngo_e/posp43_wwf_e.pdf)>.

<sup>412</sup> WTO, DG Roberto Azevedo Speeches, “Economic Diversification and the Blue Economy – What Role for a WTO Fisheries Subsidies Agreement?”, *WTO News* (4 July 2019), online; <[https://www.wto.org/english/news\\_e/spra\\_e/spra276\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra276_e.htm)>; Rashid U. Sumaila et al, “The World Trade Organization and Global Fisheries Sustainability” (2007) 88:1 *Fisheries Research* 1 at 2.

<sup>413</sup> *Supra* note 401.



products sector.<sup>414</sup> Most developing countries and LDCs are not able to compete with developed countries that subsidize their fisheries, which causes competitive disadvantage and distorts free and fair international trade.

All these points make the WTO a proper forum for the negotiation of an AFS.

#### **4.4 Inadequacy of the ASCM vis-a-vis Fisheries Subsidies.**

The text of the WTO ASCM has been criticized as ineffectively addressing fisheries subsidies.<sup>415</sup>

The limitations of the ASCM vis-a-vis fisheries subsidies disciplines were concisely put by the WTO Secretariat as follows: “It was observed that fisheries differed from other sectors in that [fisheries] was a renewable resource which was vulnerable to depletion if overexploited. Because many fisheries were of interest to more than one country, subsidies in this sector could affect not only markets but also access to the resource. Yet ASCM Agreement rules focused on the impact of subsidies on markets, not on the damage to productive resources.”<sup>416</sup>

A scholar reiterates that the “[t]raditional view of the trade-distorting effects of subsidies misses the point that such subsidies, in addition to having ... direct competition-distorting effects... also

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<sup>414</sup> Schorr *supra* note 411 at 13, 18; Andrew Rubin et al, *Paths to Fisheries Subsidies Reform: Creating Sustainable Fisheries Through Trade and Economics* (2015) 1 at 124, online: *Oceana* <<https://oceana.org/publications/reports/paths-fisheries-subsidies-reform-creating-sustainable-fisheries-through-trade>>; Chen-Ju Chen, *Fisheries Subsidies under International Law*, Jurgen Basedow et al, 2010th ed, (Springer, 2010) at 11-12.

<sup>415</sup> See generally, Chun Hing Harvey CHAU, Geoffrey Curfman & Matthew Pereira., “Remedies Applicable to a New WTO Fisheries Subsidies Framework” (Research Paper Presented to The Pew Charitable Trusts, 2019) 1 at 5-15, online: TradeLab Law Clinic <<https://www.tradelab.org/single-post/2019/06/12/remedies-applicable-to-a-new-wto-fisheries-subsidies-framework>> [Chau et al].

<sup>416</sup> WTO, Negotiating Group on Rules, “*Summary Report of the Meeting* (held on 6&8 May 2002), Note by the Secretariat, WTO Doc TN/RL/M/2 at para 13, online: WTO <<https://docs.wto.org/>> [NGR Meeting of 6&8 May 2002]. However, some WTO members and trade scholars have opined that the ASCM can regulate fisheries subsidies and that the deficiencies in the ASCM provisions are cross-sectorial issues not necessarily limited to fisheries subsidies. For this diverging opinion, see NGR Meeting of 6&8 May 2002 at paras 14-19; see also generally, Chang, *supra* note 408.

have a significant adverse effect on the sustainability of the underlying resource being produced (fish), which threatens the viability of all other Members' fishing industry."<sup>417</sup>

As a result of the ASCM's inadequacies and the urgency of promoting environmental sustainability in the fisheries sector, the WTO has been trying to negotiate new rules on fisheries subsidies for over two decades.<sup>418</sup>

#### **4.5 Description of the WTO Fisheries Subsidies Negotiations**

GATT/WTO disciplines have traditionally been concerned with government subsidies to the extent that these distort trade or retard the development of domestic industries. However, with growing consciousness of environmental depletion, particularly in the case of fish stocks, the WTO membership under the auspices of the Negotiating Group on Rules (NGR) has formally pursued discussions towards an AFS to curb government-bestowed subsidies for this purpose since the Doha Round was launched in the early 2000s.

##### **4.5.1 Pre-Doha Round Negotiations on Fisheries Subsidies Disciplines**

In 1997 the WTO Committee on Trade and Environment (CTE) began discussions about fisheries subsidies. WTO members, including New Zealand and the US, tabled several papers on the adverse effects of fisheries subsidies to the CTE and the WTO Secretariat.<sup>419</sup>

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<sup>417</sup> Alice V. Tipping, "A 'Clean Sheet' Approach to Fisheries Subsidies Disciplines", The E15 Initiative, Strengthening the Multilateral Trading System (ICTSD and WEF, April 2015), online: E15Initiative <<http://e15initiative.org/wp-content/uploads/2015/09/E15-Fisheries-Alice-Tipping-Final.pdf>>; Peter Allgeier & Courtney Sakai, "Trade and the Oceans: A New Paradigm for Environmental Protection and Conservation." (2011) 6:6 Global Trade and Cust J 253 at 257.

<sup>418</sup> WTO, "Introduction to Fisheries Subsidies in the WTO", online: WTO <[https://www.wto.org/english/tratop\\_e/rulesneg\\_e/fish\\_e/fish\\_intro\\_e.htm](https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm)>.

<sup>419</sup> WTO, CTE, *Submission by the United States-Environmental and Trade Benefits of Removing Subsidies in the Fisheries Sector* (19 May 1997), WTO Doc WT/CTE/W/51, online: WTO <<https://docs.wto.org/>>; WTO, CTE, *Submission by New Zealand-The Fisheries Sector* (21 May 1997), WTO Doc WT/CTE/W/52, online: WTO <<https://docs.wto.org/>>; WTO, CTE, *Environmental Benefits of Removing Trade Restrictions and Distortions* (7 November 1997), Note by the Secretariat, WTO Doc WT/CTE/W/67 at paras 91-95, online: WTO <<https://docs.wto.org/>>; see also Chen, *supra* note 414 at 47 to 54.

At the 1999 Seattle MC a group of seven countries referred to as "Friends of Fish" submitted a statement and presented several proposals on the need to prohibit and eliminate environmentally damaging and trade-distorting subsidies in the fishing sector.<sup>420</sup>

At the 1999 MC, certain members like Korea, the EC, and Japan mentioned that not all subsidies in the fisheries sectors have adverse effects and that other factors adversely affect the fisheries sectors aside from subsidies.<sup>421</sup> Korea and Japan also noted that because of the technicalities and expertise involved, negotiations on fisheries subsidies disciplines were beyond the WTO's ambit, whose focus is on trade, and should properly be pursued instead in the FAO and RFMOs.<sup>422</sup> As explained in Chapter 2, the 1999 Seattle MC ended abruptly, and nascent talks on fisheries subsidies in the WTO were also suspended.

#### 4.5.2 Doha Round Fisheries Subsidies Negotiations

WTO members included talks on fisheries subsidies in the Doha Ministerial Declaration to improve the WTO rules on subsidies and, in particular, fisheries subsidies.<sup>423</sup> Paragraph 28 of the Doha Ministerial Declaration states, "...In the context of these negotiations, participants shall also

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<sup>420</sup> WTO, General Council, *Submission by Iceland-Fisheries Subsidies* (6 July 1999). WTO Doc WT/GC/W/229, online: WTO <<https://docs.wto.org/>>; WTO, General Council, *Communication from Australia, Iceland, New Zealand, Norway, Peru, Philippines, and United States-Fisheries Subsidies*, (6 August 1999) WTO Doc WT/GC/W/303, online: WTO <<https://docs.wto.org/>>; see also *Ibid*, Chen at 47 to 54. The friends of fish are Argentina, Australia, Chile, Iceland, New Zealand, Peru, the Philippines, and the United States.

<sup>421</sup> WTO, CTE, *Submission by Japan-Japan's Basic Position on The Fishery Subsidy Issue* (23 October 2000), WTO Doc WT/CTE/W/173 at paras 3&6, online: WTO <<https://docs.wto.org/>> [Japan's Submission on Fisheries Subsidies]; WTO, CTE, *Communication from Korea-Utilization of Subsidies and their Positive Role in the Fisheries Sector* (24 October 2000), WTO Doc WT/CTE/W/175 at para 20, online: WTO <<https://docs.wto.org/>> [Korea's Submission on Fisheries Subsidies]; WTO, CTE, *Note by the European Community-Comments By the European Community on the Document of the Secretariat of the Committee on Trade and Environment (WT/CTE/W/80) on Subsidies and Aids Granted in the Fishing Industry* (6 November 1998), WTO Doc WT/CTE/W/99 at para 14, online: WTO <<https://docs.wto.org/>>; *Ibid*, Chen at 54.

<sup>422</sup> *Ibid*, Japan's Submission on Fisheries Subsidies at paras 7&10; Korea's Submission on Fisheries Subsidies at para 19; Chen at 55.

<sup>423</sup> The US proposed fisheries subsidies negotiations at the Doha Round. The proposal was supported by other countries, including New Zealand, Australia, and some other countries. Doha Ministerial Declaration, *supra* note 27 at para 28; see also John Kurien, *Untangling Subsidies, Supporting Fisheries: The WTO Fisheries Subsidies Debate and Developing Country Priorities* (2006) ICSF Occasional Paper 1 at 22.

aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries."<sup>424</sup> WTO members also agreed to address trade and environment concerns as they relate to fisheries subsidies.<sup>425</sup> The WTO NGR was assigned to oversee the negotiation process.

### 4.5.3 Post-Doha Fisheries Subsidies Negotiation

Since 2001, negotiations on fisheries subsidies rules have continued, along the way encountering a series of valleys and hills.<sup>426</sup> At the 2005 Hong Kong MC, WTO members continued to negotiate fisheries subsidy rules. The Hong Kong Declaration gave a specific mandate that the NGR should “strengthen disciplines on subsidies in the fisheries sector, including through the prohibition of certain forms of fisheries subsidies that contribute to overcapacity and overfishing”, with appropriate S&DT provisions for developing countries and LDCs.<sup>427</sup>

The negotiations continued and in 2007 the NGR Chair released the first consolidated draft text of prohibited fisheries subsidies, new disciplines for actionable subsidies, general exceptions and S&DT provisions.<sup>428</sup> There was also a 2008 “roadmap” draft on fisheries subsidies calling for

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<sup>424</sup> *Ibid.*

<sup>425</sup> *Ibid* at para 31.

<sup>426</sup> Negotiations continued to take place in the established NGR and were monitored by the TNC. At the 2003 Cancun MC, negotiations on curbing harmful fisheries subsidies could not go far because of the lack of consensus among the WTO members in the agriculture and Singapore Issues. For the Fisheries Subsidies negotiation since the 2001 Doha Ministerial Declaration, see Chen, *supra* note 414 at 59-86.

<sup>427</sup> WTO, MC, *Doha Work Programme* (18 December 2005), WTO Doc WT/MIN (05)/DEC at Annex D para 9, online: WTO <<https://docs.wto.org/>> [WTO MC 2005]; *Ibid* at 87-88.

<sup>428</sup> WTO, NGR, *Draft Consolidated Chair Texts of the AD and ASCM Agreements* (30 November 2007), WTO Doc TN/RL/W/213 at Annex VIII – Fisheries Subsidies, online: WTO <<https://docs.wto.org/>> [WTO 2007 Draft Consolidated Chair Texts]; Margaret Young, "Food Security, Sustainability and Trade Distortions: Fisheries Subsidies and the WTO" in Rosemary Rayfuse, & Nicole Weisfelt, eds, *Challenge of Food Security: International Policy and Regulatory Frameworks* (Edward Elgar Publishing Ltd, 2012) at 197 [Young, “Fisheries Subsidies and the WTO”]; Chen, *supra* note 414 at 88-111.

inputs to a second draft.<sup>429</sup> In April 2011 a Chair's report on the state of the negotiations on fisheries subsidies was circulated among the WTO members.<sup>430</sup> Despite drafts from the Chair, negotiations fell through in 2011 alongside the collapse of other trade negotiations in the Doha Round.

WTO members resumed talks on fisheries subsidies again in the runup to the Nairobi MC in 2015. Preparatory talks to the Nairobi MC included a paper put together by some WTO members proposing a "recalibrated outcome" on fisheries subsidies.<sup>431</sup> The proposals included prohibitions on subsidies for illegal, unreported, and unregulated (IUU) fishing and fishing of overfished stocks.

At the 2015 Nairobi MC, WTO members were divided on specific proposals put forward. Some countries opined that the proposals were too ambitious while others regarded them as inadequate.<sup>432</sup> A draft decision text on fisheries subsidies with special mention of transparency was circulated among members by the Chair.<sup>433</sup> In the end, division among WTO members persisted and a consensus could not be achieved. Due to this, the NGR agreed that talks on fisheries subsidies disciplines should continue after the Nairobi MC.<sup>434</sup>

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<sup>429</sup> WTO, NGR, *New Draft Consolidated Chair Texts of the AD and SCM Agreements* (19 December 2008), WTO Doc TN/RL/W/236 at Annex VIII- Fisheries Subsidies-Roadmap for Discussion, online: WTO <<https://docs.wto.org/>>; *Ibid.*, Young, "Fisheries Subsidies and the WTO".

<sup>430</sup> The Chair draft did not gather consensus on some issues, including the scope and the S&DT provisions. See WTO, NGR, *Communication from the Chairman* (21 April 2011), WTO Doc TN/RL/W/254, online: WTO <<https://docs.wto.org/>>.

<sup>431</sup> The proposal was jointly put forward by a group of delegations, including Argentina, Iceland, New Zealand, Norway, Peru and Uruguay. WTO, MC, *Briefing Note: Negotiations on Rules — Anti-Dumping and Subsidy Disciplines (Including Fisheries Subsidies) and Regional Trade Agreements*, online: WTO <[https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/briefing\\_notes\\_e/brief\\_antidumping\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/briefing_notes_e/brief_antidumping_e.htm)> [2015 Nairobi MC Briefing Note].

<sup>432</sup> *Ibid.*

<sup>433</sup> *Ibid.*

<sup>434</sup> *Ibid.*

In September 2015, the UN General Assembly (UNGA) adopted a resolution on its 2030 Agenda for Sustainable Development.<sup>435</sup> The UNGA 2015 Resolution includes a Goal on Life below Water contained in Art. 14.6 mandated as part of the U.N.'s Sustainable Development Goals (SDG):

*By 2020, [to] prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported, and unregulated fishing and [to] refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation.*<sup>436</sup>

The UN SDG Goal 14.6 mandate relied on WTO's previous and ongoing negotiations on fisheries subsidies disciplines, particularly the DDA and the Hong Kong MC mandates.<sup>437</sup>

In 2016, WTO members moved again to deliberate on fisheries subsidies disciplines ahead of the Buenos Aires MC in 2017. This time WTO members aimed to complete an AFS as a part of the UN SDG to be achieved by 2020.

At the Buenos Aires MC WTO members agreed to further talks on fisheries subsidies “with a view to adopting, by the MC in 2019, an agreement on comprehensive and effective disciplines that prohibit certain forms of fisheries subsidies that contribute to overcapacity and overfishing, and eliminate subsidies that contribute to IUU-fishing recognizing that appropriate and effective special and differential treatment for developing country Members and least

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<sup>435</sup> UNGA, 70th Sess, UN Doc A/RES/70/1 (25 September 2015) [UNGA 2015 Resolution].

<sup>436</sup> *Ibid* at 24. The Goal 14 generally aims to improve the conservation and sustainable use of the oceans, seas, and marine resources for sustainable development.

<sup>437</sup> *Ibid* at Goal 14.6 n16.

developed country Members should be an integral part of these negotiations.”<sup>438</sup> In sum, the three main pillars of fisheries subsidies being considered for prohibition by the WTO are subsidies 1) for IUU fishing, 2) for the fishing of stocks that are already overfished, 3) that contribute to overcapacity and overfishing.

So far, through the previous draft AFS Texts and the most recent draft AFS Text circulated on 30 June 2021 the WTO membership has been able to reach a point of convergence on some parts of the projected AFS. WTO members have agreed on the AFS’ scope; technical assistance and capacity building for developing countries and LDCs; notification and transparency obligations; a committee or institutional set-up and dispute settlement arrangement.<sup>439</sup> In addition, WTO members have reached an agreement on what constitutes an IUU fishing, subsidy concerning overstocked fishing, and subsidies that contribute to overfishing and overcapacity and how to determine these harmful subsidies.<sup>440</sup>

Some of these agreed provisions in the *Chairs Text of 30 June 2021* will be examined in subsequent sections. However, because the AFS negotiations are ongoing, it is impossible to exhaustively cover such a “moving target”. Understandably, several parts of the Text to be discussed are subject to change or alterations.

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<sup>438</sup> WTO, MC, *Ministerial Decision on Fisheries Subsidies* (13 December 2017), WTO Doc WT/MIN (17)/64, WT/L/1031, online: WTO <<http://docs.wto.org>>; WTO, “Ministerial Ends with Decisions on Fish Subsidies, E-commerce Duties; Ongoing Work Continues”, *WTO News* (13 December 2017), online: <[https://www.wto.org/english/news\\_e/news17\\_e/mc11\\_13dec17\\_e.htm](https://www.wto.org/english/news_e/news17_e/mc11_13dec17_e.htm)>.

<sup>439</sup> The AFS scope covers prohibition and disciplining of subsidies on “marine wild capture fishing and fishing related activities at sea” that contributes to the mentioned three pillars of fisheries subsidies mentioned. For the most recent consolidated draft on Fisheries Subsidies, see WTO, NGR, *Fisheries Subsidies-Revised Draft Consolidated Chair Text* (30 June 2021), WTO Doc TN/RL/W/276/Rev.1, online: WTO <<http://docs.wto.org>> [Chair’s Text of 30 June 2021]; The Chairs’ accompanied explanatory note, WTO, NGR, *Fisheries Subsidies- Revised Draft Consolidated Chair Text* (30 June 2021), WTO Doc TN/RL/W/276/Rev.1/Add.1, online: WTO <<http://docs.wto.org>>; WTO, NGR, *Communication from the Chair* (11 May 2021), WTO Doc TN/RL/W/276, online: WTO <<http://docs.wto.org>> [Chair’s Text of 11 May 2021]. The Chair’s Text of 30 June 2021 is attached as an appendix to this thesis.

<sup>440</sup> *Ibid.*

#### 4.5.4 Post- 2015 WTO AFS Negotiating Approach

Establishing prohibitions for fisheries subsidies in a projected WTO AFS has not followed any of the negotiating methods employed in previous WTO trade agreements. This is because WTO members have not been able to agree on the same rules on subsidies for subsidies specific to the fisheries sector. In addition, in the case of fisheries subsidies the negotiation of rules banning subsidies that contribute to IUU, overfished stock, and overfishing and overcapacity involve different sets of scientific data available to different countries and consideration of various regional and national fisheries management laws.

This section will attempt to profile some of the approaches adopted by the WTO members in determining fisheries subsidy prohibitions in the three areas of concern mentioned above.

##### 4.5.4.1 Prohibition of IUU Fishing

A focal point for fisheries subsidies disciplines is on subsidies for IUU fishing.<sup>441</sup> It is reported that IUU fishing approximately accounts for almost 30 percent of global fishing activity, representing about 26 million tons of fish caught annually at a cost to the global economy of more than \$23 billion a year.<sup>442</sup>

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<sup>441</sup> See generally, Isabelle Van Damme, “Reflections on the WTO Negotiations on Prohibiting IUU Fishing Subsidies” (10 February 2020) online: *International Institute for Sustainable Development* <[www.iisd.org/publications/reflections-wto-negotiations-prohibiting-iuu-fishing-subsidies](http://www.iisd.org/publications/reflections-wto-negotiations-prohibiting-iuu-fishing-subsidies)>; Alice Tipping & Tristan Irschlinge, “WTO Negotiations on Fisheries Subsidies: What’s the state of play?” (16 July 2020), online: *International Institute for Sustainable Development* <[www.iisd.org/gsi/policy-briefs/wto-fisheries-negotiations-state](http://www.iisd.org/gsi/policy-briefs/wto-fisheries-negotiations-state)>.

<sup>442</sup> Fisheries and Oceans Canada, “Government of Canada takes the fight against illegal fishing to outer space” (5 June 2020), online: *Fisheries and Oceans Canada* <[www.canada.ca/en/fisheries-oceans/news/2020/06/government-of-canada-takes-the-fight-against-illegal-fishing-to-outer-space.html](http://www.canada.ca/en/fisheries-oceans/news/2020/06/government-of-canada-takes-the-fight-against-illegal-fishing-to-outer-space.html)>.



The composition of IUU is comprehensive.<sup>443</sup> Generally, illegal fishing comprises fishing activities carried out in breach of applicable domestic or international fishing regulations and laws.<sup>444</sup> Unreported fishing is comprised of fishing activities that are unreported or misreported to the relevant fisheries authorities.<sup>445</sup> Unregulated fishing comprises fishing activities that occur in fisheries areas where no regulatory or conservation management exists or pertains to fishing activities carried out by unregistered vessels.<sup>446</sup>

According to the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), IUU fishing “leads to the loss of both short- and long-term social and economic opportunities”.<sup>447</sup> IUU fishing has contributed significantly to the depletion of fish stocks because it contributes to inaccuracies in catch statistics.<sup>448</sup> As a result of the lack of proper tabulation and management, it is difficult to determine what fish species have been overfished or almost fished into extinction.<sup>449</sup>

WTO members have proposed several ways to determine a subsidy contributing to IUU. In the most recent Chair’s Draft Text it was proposed that the IUU subsidy prohibition should be

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<sup>443</sup> The WTO, in defining an IUU fishing, adopts the definition in para 3 of the UN FAO “International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of the (FAO IPOA-IUU.) Chair’s Text of 30 June 2021, *supra* note 439; FAO, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Abstract* (Rome: FAO, 2001) at 1-3, online: FAO, <<http://www.fao.org/3/y1224e/y1224e.pdf>> [IPOA-IUU]; WTO, Glossary Terms, *IUU Fishing*, online: WTO <[https://www.wto.org/english/thewto\\_e/glossary\\_e/iuu\\_fishing\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/iuu_fishing_e.htm)>; see also, Schorr, *supra* note 411 at 171-176.

<sup>444</sup> *Ibid*, IPOA-IUU at Art. 3.1; at 8; Rubin et al, *supra* note 414 at 115.

<sup>445</sup> *Ibid*, IPOA-IUU at Art. 3.2; 2018; Rubin et al at 115.

<sup>446</sup> *Ibid*, IPOA-IUU at Art. 3.3; Rubin et al at 115.

<sup>447</sup> *Ibid* at IPOA-IUU at Art. 1; Schorr, *supra* note 411 at 59-60.

<sup>448</sup> World Bank & Food and Agriculture Organization, *The Sunken Billions: The Economic Justification for Fisheries Reform* (World Bank, 2009) at 26, Rubin et al, *supra* note 414 at 3.

<sup>449</sup> For instance, in the 1990s, because of IUU fishing, Patagonian toothfish (“Chilean sea bass”) have been overfished, resulting in diminishing stocks and near extinction around the Antarctic and Sub- Antarctic oceans. See generally, Kelvin Bray, “A Global Review of Illegal, Unreported and Unregulated (IUU) Fishing” (2000), FAO Doc AUS: IUU/2000/6, online: FAO <[www.fao.org/](http://www.fao.org/)>; Ganapathiraju Pramod et al, “Sources of Information Supporting Estimates of Unreported Fishery Catches (IUU) for 59 Countries and the High Seas” (2008) 16:4 Fisheries Centre Research Reports 1.

determined by notification from a WTO member or an RFMO in compliance with relevant international law.<sup>450</sup> WTO members' and RFMOs' IUU determinations are to be made "based on positive evidence and follows due process."<sup>451</sup>

#### 4.5.4.2 Prohibition of Overfished Stocks

According to the WTO, "... A stock generally is considered overfished when it is exploited beyond an explicit limit set to ensure safe reproduction."<sup>452</sup> Overfished stocks occur when the biomass of a fish stock is below mortality.<sup>453</sup> In other words, overfished stocks are fish species that have been over-exploited and are almost extinct. In most cases, overfishing is the primary cause of overfished stocks.<sup>454</sup>

According to the Chair's Text of 30 June 2021, overfished stocks occur when they are "recognized as overfished by the coastal Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A based on best scientific evidence available to it".<sup>455</sup> The conclusion that a stock is overfished is to be determined based on the best evidence "available to" or "recognized by" the Member.<sup>456</sup>

#### 4.5.4.3 Prohibition of Overfishing and Overcapacity

The WTO explains overfishing of a stock as occurring "where the fishing effort is excessive in relation to the stock's abundance and rate of reproduction, such that a reduction of the level of

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<sup>450</sup> Chair's Text of 30 June 2021, *supra* note 439 at Art. 3.2 & 3.3.

<sup>451</sup> *Ibid* at Art. 3.3(b).

<sup>452</sup> WTO, Glossary Term *Overfishing/overfished stocks*, online: WTO, <[https://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm)>; Chen, *supra* note 414 at 15.

<sup>453</sup> The major difference between overfishing and overfished stock is that the former addresses the rate of fish caught to the proportion of fish that can be reproduced through the MSY; the latter is concerned with the total population size of a fish species.

<sup>454</sup> Other grounds for an overfished stock would include habitat degradation, pollution, and climate change.

<sup>455</sup> Chair's Text of 30 June 2021, *supra* note 439 at Art. 4.2.

<sup>456</sup> *Ibid*.

fishing would lead to an increase in the total catch”.<sup>457</sup> Subsidies that contribute to overfishing are also referred to as 'capacity enhancing subsidies.' On the other hand, "[o]vercapacity generally refers to the ability of a fleet to fish at levels which exceed the sustainable catch level in a fishery (for example, because of too many vessels and/or too many fishers)."<sup>458</sup>

According to the Chair's Text of 30 June 2021, subsidies that contribute to overfishing and overcapacity include subsidies to construction, acquisition, modernization, renovation, upgrading of fishing vessels, subsidies to fuel costs, or subsidies covering operating losses of fishing or fishing-related activities, amongst others.<sup>459</sup> These subsidies allow fishing fleets to fish longer, harder, and farther away than otherwise would be economically possible.<sup>460</sup> For instance, subsidies on vessel construction allow more vessels to be produced so that more vessels will be involved in fishing, which will invariably contribute to overcapacity. Put differently, subsidies and incentives that reduce vessel operation cost encourage an increase in the number of fleets available for fishing which, in turn, puts more pressure on marine resources and leads to overfishing and compounds overexploitation of fish stock in the long run.

In the case of subsidies that cause overfishing and overcapacity, countries have proposed a number of qualitative calculations to determine when a fish is overstocked or overfished.<sup>461</sup> The Chair's

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<sup>457</sup> WTO, Glossary Terms, *Overfishing/Overfished Stocks*, online: WTO, <[https://www.wto.org/english/thewto\\_e/glossary\\_e/glossary\\_e.htm](https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm)>.

<sup>458</sup> WTO, Glossary Terms, *Overcapacity*, online: WTO <[https://www.wto.org/orh/thewto\\_e/glossary\\_e/glossary\\_e.htm](https://www.wto.org/orh/thewto_e/glossary_e/glossary_e.htm)>.

<sup>459</sup> Chair's Text on 11 May 2021, *supra* note 439 at Art. 5.1; see generally, David K. Schorr & John F. Caddy, "Sustainability Criteria for Fisheries Subsidies, Options for the WTO and Beyond" (Report commissioned by United Nations Environment Programme (UNEP), Economics and Trade Branch (ETB), Geneva and WorldWide Fund for Nature (WWF), 2007)1 at 14-19, online: *UN Digital Library* <<https://digitalibrary.un.org/record/610459>>.

<sup>460</sup> Rubin et al, *supra* note 414 at 3.

<sup>461</sup> The negotiating group has proposed three approaches: the list-based approach, capping approach, and the effect-based or fisheries management linked approach. The listing approach proposes that subsidies provided to large-scale fisheries that are generally known to be harmful should be listed and outright prohibited. This approach was proposed mainly by Africa, Caribbean, and Pacific (ACP) Group and the LDC group. See WTO, NGR, *Communication from*

Text of 30 June 2021 does not indicate how subsidies that cause overfishing and overcapacity will be determined. However, it can be implied from the Text's totality that they will be determined by relevant RFMO/A laws or the best scientific evidence available to WTO members.

#### 4.6 Limitations to the Successful AFS Negotiation in the WTO

Despite failing to meet the 2020 negotiating deadline for a final text, WTO negotiations on an AFS have continued with the aim of their conclusion by MC12, originally scheduled for summer 2020 in Nur-sultan, Kazakhstan but now postponed until November 30, 2021 in Geneva.<sup>462</sup> However, as a result of certain sticking points WTO members have not been able to develop a specific AFS text.<sup>463</sup> Among these sticking points is the issue of S&DT in relation to an AFS.

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*the Delegation of Jamaica on behalf of the ACP Group of States on Overcapacity and Overfishing* (3 February 2020) WTO Doc RD/TN/RL/96/Rev.1, online: WTO <<https://docs.wto.org/>>. The capping approach proposes the prohibition of subsidies that exceed a specific monetary value. See, WTO, NGR, *A Cap-based Approach to Addressing Certain Fisheries Subsidies-Submission of Argentina, Australia, the United States and Uruguay* (11 July 2019) WTO Doc TN/RL/GEN/197/Rev.2, online: WTO <<https://docs.wto.org/>>; See also *Communication from China - A Cap-Based Approach to Address Certain Fisheries Subsidies that Contribute to Overcapacity and Overfishing* (4 June 2019), WTO Doc TN/RL/GEN/199, online: WTO <<https://docs.wto.org/>>. The effects-based approach proposes that a subsidy should be prohibited only when it adversely affects the sustainability of a stock. See, WTO, NGR, *Fisheries subsidies - New Zealand and Iceland Draft Text on Overfishing and overcapacity* (18 April 2019) WTO Doc RD/TN/RL/79/Rev.1, online: WTO <<https://docs.wto.org/>>. For comments on the various listed approach, see generally, Alice Tipping, "Addressing the Development Dimension of an Overcapacity and Overfishing Subsidy Discipline in the WTO Fisheries Subsidies Negotiations" (20 January 2020), online: *International Institute for Sustainable Development* <[www.iisd.org/system/files/publications/overfishing-discipline-wto-fisheries-subsidies.pdf](http://www.iisd.org/system/files/publications/overfishing-discipline-wto-fisheries-subsidies.pdf)>; Peter Lunenborg, "Analysis of the Overcapacity and Overfishing Pillar of the WTO Fisheries Subsidies Negotiations" (2020) Research Paper 122 South Centre 1 at 12-25, online: *The South Centre* <<https://www.southcentre.int/wp-content/uploads/2020/11/RP-122-REV.pdf>>.

<sup>462</sup> "Okonjo-Iweala: WTO on the 'Cusp' of a Fisheries Deal" *Inside US Trade* (9 July 2021); [US Trade News of 9 July 2021]; "WTO Fisheries Talks Chair, DG ask Ministers to Focus on Text, S&D" *Inside US Trade* (7 July 2021); "New Fisheries Text Aims to Move Talks in 'Direction of More Convergence'" *Inside US Trade* (30 June 2021); Okonjo-Iweala Laments 'Gaps' in Fisheries Talks as July meeting looms, *Inside US Trade* (16 June 2021); "Okonjo-Iweala, WTO Fisheries Talks Chair Urge Mid-July Deal" *Inside US Trade* (8 June 2021); "WTO Members make Progress on Fisheries Carve-outs, but Divide Remains" *Inside US Trade* (4 June 2021); "WTO Fisheries Chair Releases Compromise Text Ahead of July Ministerial" *Inside US Trade* (11 May 2021) [US Trade News of 11 May 2021]; "In 'Interactive' HODS Meeting, Okonjo-Iweala looks to Close in on MC12 Outcomes", *Inside US Trade* (3 May 2021); "Okonjo-Iweala calls for July Ministerial as Fisheries Talks Heat Up" *Inside US Trade* (21 April 2021); "Okonjo-Iweala: No Progress this week in Fish Talks would be 'Substantial Blow'" *Inside US Trade* (13 April 2021); "Tai talks climate, WTO ambassadors talk fisheries" *Inside US Trade* (12 April 2021).

<sup>463</sup> "WTO Members Resume Negotiations on Fisheries Subsidies," *IISD News* (1 February 2021), online, <[sdg.iisd.org/news/wto-members-resume-negotiations-on-fisheries-subsidies/](http://sdg.iisd.org/news/wto-members-resume-negotiations-on-fisheries-subsidies/)>.

As explained, the notion that members differ in their development level has always been recognized in the GATT/WTO and the international agreements negotiated under their auspices. One controversial topic in the negotiations over a WTO AFS involves S&DT for developing countries and LDCs in the WTO and how this principle would be honoured in a concluded arrangement while preserving the overall objective of enhanced sustainability of the oceans.<sup>464</sup>

In acknowledging the difficulty of implementing S&DT in AFS negotiations, it has been reported that, “Special and differential treatment for developing and least-developed countries has been a particularly intractable sticking point.”<sup>465</sup> S&DT has afforded developing countries some latitude in the WTO. However, most developed countries, especially the US, no longer conveniently accept what is in their view such "systematically lop-sided arrangements" while developing countries continue to view the S&DT provisions as a significant feature of WTO trade negotiations.<sup>466</sup>

For instance, in 2019 India made a proposition advocating for flexibility and exemptions for developing and LDCs from some of the provisions of the proposed AFS, especially in the area of

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<sup>464</sup> “WTO Members Debate Special and Differential Treatment in Fisheries Talks” *Inside US Trade* (27 May 2021). “...even as members [WTO members] remained unable to break any of the deadlocks in key areas like special and Differential Treatment,” “Fisheries Talks Chair: Divides Remain, but Members have what they need for a Deal” *Inside US Trade* (19 February 2021); IISD, *WTO Negotiations on Fisheries: “Fundamental Differences” Remain* (1 March 2021), online, <<https://sdg.iisd.org/news/wto-negotiations-on-fisheries-fundamental-differences-remain/>> Responding to the July 2020 Chair's text, the US noted, “We also take note that the draft's treatment of Special and Differential treatment is intended only to be a starting point for discussion; suffice it to say that the SDT texts currently included, utterly undermine any beneficial effect of the draft prohibitions and will not garner a consensus.” Statement by Ambassador Dennis C. Shea, Deputy US Trade Representative and US Permanent Representative at the WTO Meeting of the Heads of Delegation (July 21, 2020), online: *US Mission International Organizations in Geneva* <<https://geneva.usmission.gov/2020/07/21/statement-by-ambassador-shea-wto-rules-negotiating-group-fisheries-subsidies-negotiations/>> [Ambassador Shea’s Statement of July 2020].

<sup>465</sup> US Trade News of 11 May 2021, *supra* note 462.

<sup>466</sup> Hoekman & Sabel, *supra* note 33 at 14.

prohibition of subsidies contributing to overfishing and overcapacity.<sup>467</sup> Other countries, especially the US, do not agree with such exemptions.<sup>468</sup>

The Chair's Text of 11 May 2021 provided for S&DT for developing and LDCs with respect to subsidies on overfished stocks and subsidies that contribute to overfishing and overcapacity. Art. 5.5 of the Draft exempts LDCs from disciplines on "fishing or fishing related activities" while developing countries are exempted from disciplines on "fishing or fishing related activities at sea within their territorial sea."<sup>469</sup> However, in the Chair's Text of 30 June 2021 exemption for subsidies on overfished stocks and subsidies that contribute to overfishing and overcapacity for developing countries has been restricted to those countries that can cumulatively establish that they are "low income, resource-poor and [have fishing industries characterized by] livelihood fishing."<sup>470</sup>

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<sup>467</sup> India proposed developing and LDCs should be exempted from the prohibition of subsidies in the three categories when they are fishing within their territorial waters or EEZ. Also, in case of subsidies contributing to overfishing and overcapacity, developing and LDCs should be exempted from subsidies prohibition when fishing on the high seas under applicable fishery management measures. WTO, NGR, *Communication from India-Article [X]: Special and Differential Treatment* (14 June 2019), WTO Doc N/RL/GEN/200, online: WTO, <<http://docs.wto.org>>. In 2020, India also presented a revised proposal to exempt from subsidy prohibition developing countries that meet specific fishing volume and gross national income (GNI) thresholds. "WTO Members Delay Agreement on Fisheries Subsidies to 2021," *IISD News* (16 December 2020), online:<<https://sdg.iisd.org/news/wto-members-delay-agreement-on-fisheries-subsidies-to-2021/>>.

<sup>468</sup> "...Regarding special and differential treatment, it is not appropriate for any Member here representing major fishing areas and marine capture, to seek a blanket carve-out, an outright exclusion from disciplines. As the United States has been saying for almost 20 years, the objective of this negotiation is to preserve the sustainability of fisheries resources, not to provide harmful subsidies to the fishing sector..." Statement by Ambassador Dennis C. Shea, Deputy US Trade Representative and US Permanent Representative at the WTO Meeting of the Heads of Delegation (November 25, 2020), online: *US Mission International Organizations in Geneva* <<https://geneva.usmission.gov/2020/11/27/statement-by-us-ambassador-dennis-shea-wto-fisheries-subsidies-negotiations/>> [Ambassador Shea's Statement of November 2020]; WWF, *Can a WTO Agreement on Fisheries Subsidies help save the Ocean?* (December 2017), WWF Recommendations for the 11th WTO Ministerial Conference,1 at 6-8, online (pdf): World Wildlife Fund <[https://wwfeu.awsassets.panda.org/downloads/WWF\\_briefing\\_WTO\\_Fisheries\\_Subsidies\\_MC11\\_2017.pdf](https://wwfeu.awsassets.panda.org/downloads/WWF_briefing_WTO_Fisheries_Subsidies_MC11_2017.pdf)>.

<sup>469</sup> Chairs Text of 11 May 2021, *supra* note 439.

<sup>470</sup> Chair's Text of 30 June 2021, *supra* note 439 at Art. 5.5(b).

As noted by one scholar, "Fishers from developing countries may conjure up an image of small boats and fishing villages dotted along the shore. But in WTO negotiations, it includes major fishing powers such as China and India and their massive factory ships and fleets of large trawlers competing (and out-competing) on the world's oceans with rivals from the developed countries."<sup>471</sup> The prospect of these countries being exempted or granted some flexibility from large swaths of coverage encompassed in the AFS text has been said to be potentially problematic.<sup>472</sup>

S&DT status, the diversity of interests in the WTO's membership and several fisheries management technicalities such as the measurement of depletion have been some of the obstacles to the successful negotiation of an AFS within the WTO to date. At the time of writing, it remains uncertain whether an AFS is within reach because of these thorny issues. Nevertheless, at the July 15, 2021 meeting, the WTO DG and NGR Chair, Ambassador Santiago Wills, expressed optimism that an AFS may be concluded at MC12.<sup>473</sup> The July 15 meeting had in attendance 104 trade ministers representing 128 WTO members. According to the WTO DG, the July 15 meeting was the first time in 20 years a text-based draft was consensually agreed upon by all WTO members present for an AFS negotiation.<sup>474</sup>

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<sup>471</sup> Patrick Love, *Fisheries: While Stocks Last* (Paris: OECD, 2010) at 92,102.

<sup>472</sup> *Ibid.*

<sup>473</sup> WTO, "WTO Members Edge Closer to Fisheries Subsidies Agreement" *WTO News*, online: <[https://www.wto.org/english/news\\_e/news21\\_e/fish\\_15jul21\\_e.htm](https://www.wto.org/english/news_e/news21_e/fish_15jul21_e.htm)>.

<sup>474</sup> "I feel new hope this evening. Because ministers and heads of delegation today demonstrated a strong commitment to moving forward and doing the hard work needed to get these negotiations to the finish line. I applaud you for this. In 20 years of negotiations, this is the closest we have ever come towards reaching an outcome — a high-quality outcome that would contribute to building a sustainable blue economy." *Ibid.*

#### 4.7 A 'Critical Mass' Approach to the AFS

If an AFS is not agreed in the WTO's current negotiating framework, some WTO members and trade experts have placed hope instead on a plurilateral AFS that would extend its benefits to non-participants. According to a trade expert, "If multilateral progress remains elusive, plurilateral efforts could bear more fruit."<sup>475</sup>

First, it is noteworthy that, like the diverging opinions on the WTO JSIs, the proposed AFS is a form of rule-making in the WTO. As indicated, rule-making or amendment in the WTO requires a consensus among its members.<sup>476</sup> However, assuming the consensus principle may be sidestepped, how feasible is a successful plurilateral agreement (CMA) on fisheries subsidies in the WTO? To determine the suitability of the 'critical mass' method in negotiating an AFS, the four mentioned criteria of a CMA arrangement examined in Chapter 3 will be assessed.

##### 4.7.1 Whether assembling a 'critical mass' is possible.

As indicated, negotiations in the WTO have always been about advancing trade liberalization. The ASCM that regulates WTO subsidies is also focused on improving market access. On the other hand, a WTO AFS aims to protect marine resources, establishing disciplines for subsidies that cause unsustainable fish stocks. The 'inherent gains' from an AFS is not trade oriented. In this sense, the problem structure underlying an AFS is different from the trade advancement that have been the hallmark of many WTO agreements. As a result of the minimal trade gains involved, there may be difficulty convincing a number of WTO members on why limitations in fisheries

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<sup>475</sup> Marianne Schneider-Petsinger, "Reforming the World Trade Organization: Prospect for Transatlantic Cooperation and the Global Trade System" (Research Paper for Chatham House, 2020) 1 at 46, online: *Chatham House* <<https://www.chathamhouse.org/sites/default/files/publications/research/2020-09-11-reforming-wto-schneider-petsinger.pdf.pdf>>.

<sup>476</sup> See section 2.7.



subsidies will be beneficial to all countries environmentally and promote trade in fish for WTO members in the long run.

In addition, most LDCs and some developing countries mainly depend on subsidies to reduce costs and catch more fish stock in order to sustain their population's livelihoods. Hence, assembling a 'critical mass' may be a long shot for an AFS because most WTO members may be reluctant to give up the immediate benefits of fishery subsidies for longer-term, ill-defined environmental benefits.

#### **4.7.2 Whether there is a “champion” country willing to use the threat of market closure or other means to extract greater commitments from other WTO members.**

Assuming gathering a 'critical mass' among the WTO members for an AFS is feasible, are other CMA features present for the success of a CMA for an AFS?

It is noteworthy that the pattern of previous successfully concluded CMAs was that the Quad countries, particularly the US and EU, initiated, participated and in some cases directed negotiations, until the previous CMAs were concluded. In the ongoing WTO multilateral negotiation for an AFS, there is no evidence of a WTO member intending to be the “champion” country which is willing to steer the course of a 'critical mass' negotiating approach for an AFS.

The moving forces behind an AFS are environmental and oceans-based NGOs.<sup>477</sup> These have a varying relationship with the global fishing industry. The closest the AFS negotiations came to having a leading country was in 2016 when the US and 12 WTO members attempted to launch a

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<sup>477</sup> See section 4.3.

plurilateral agreement on fisheries subsidies.<sup>478</sup> At that time it was not clear if the US intended to seek a CMA in this sector as it only stated that it would negotiate with “like-minded” WTO members to prohibit harmful fisheries subsidies.<sup>479</sup>

In addition, there was a significant market and industry-led consensus in the US and other developed countries about the benefit of disciplines being pursued in previous WTO CMAs. In the current instance, however, the US appears to be non-committal about its role in the WTO. Although it is a major seafood importer and consumer, there seems to be no strong industry voice that has emerged in the US to support the negotiations which, if successful, would require at least some economic actors to remove themselves from the market or develop expensive sustainable alternatives such as fish farming. Furthermore, in 2021 the US new administration has stated its intention to remain on the sidelines regarding any WTO trade agreements negotiation for some time.<sup>480</sup> With the US taking a back seat on trade agreement negotiations, the push for an AFS CMA may dwindle.

If the US does not initiate the projected CMA for an AFS, it is pertinent that a significant global fisheries subsidizer country should spearhead the negotiations. As mentioned, from the ongoing AFS negotiations it is unclear if any of the major fisheries’ subsidizers intend to push for a critical mass-based negotiating approach.

Assuming there is a “champion” country willing to lead the CMA for an AFS, will it have the capability to compel or incentivize other WTO members to be a part of the required ‘critical mass’?

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<sup>478</sup> USTR, “Obama Administration Undertaking Global Initiative to Prohibit Harmful Fishing Subsidies” (2016), online: *US Mission to International Organizations in Geneva* < <https://geneva.usmission.gov/2016/09/15/obama-administration-undertaking-global-initiative-to-prohibit-harmful-fishing-subsidies/>>.

<sup>479</sup> *Ibid.*

<sup>480</sup> “WTO Fisheries Talks Resume -with the US in a Holding Pattern” *Inside US Trade News* (22 January 2021).

Since the AFS is not about trade advancement, the answer perhaps may be in the negative. For instance, if the EU decides to take up the leadership role for an AFS CMA, it is unclear how the EU will use the threat of market closure or other means at its disposal to extract greater commitments from other WTO members. Unlike previous CMAs where the threat of US market access restrictions implied limitations for other WTO members in the sectors concerned, this same threat may not be invocable in the AFS' case. If the EU prohibits certain fisheries subsidies, the prohibitions will only apply in its member states and other WTO members will still be able to continue their subsidy activities without restraint. Hence, even the presence of a 'willing champion' may not make the 'critical mass' negotiating method a suitable alternative for an AFS.

#### **4.7.3 Whether the resulting critical mass is high and commands adequate institutional power in the concerned trade sector**

As mentioned in previous chapters, there are two criteria in gathering a 'critical mass' high enough to command legitimate institutional power in a particular sector.

First, it is necessary to have the most prominent players in the sector join the CMA. As of 2019 the largest fisheries subsidizers are China, the US, the Republic of Korea, the EU and Japan.<sup>481</sup> These five WTO members account for more than 58 percent of all global fisheries subsidies amounting to USD 20.5 billion in terms of the dollar value of subsidies.<sup>482</sup> With China holding on to its developing country status, it might be difficult to have all these major fisheries subsidizers agree on the same course in the form of a CMA arrangement for the WTO AFS.

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<sup>481</sup> China provides the highest amount of subsidies (capacity-enhancing) among nations (21% of the total), and then the US ranks second (10%), followed by the Republic of Korea (9%) and the EU (11%) of global fisheries subsidies. Sumaila also notes that "Asia, including China, is by far the greatest subsidising region (55% of the total), followed by Europe (18% of the total), and North America (13% of the total)." U. Rashid Sumaila et al, "Updated estimates and analysis of global fisheries subsidies" (2019) 109 Marine Policy 103695 1 at 2.

<sup>482</sup> *Ibid.*

Second, there must be an overwhelming majority of WTO members to participate in the negotiation. How can the high number of participants for a 'critical mass' negotiating method in an AFS be determined? How will the critical mass threshold be calculated? Like other WTO negotiations aiming to include every WTO member, a 'critical mass' negotiation for an AFS will be open and transparent to every interested WTO member that wishes to join. It will also be inclusive by considering the concerns of both developed, developing countries and LDCs. However, since an AFS is about the environment and keeping marine resources safe and sustainable it may be challenging to determine the WTO members necessary for a high 'critical mass' that would command adequate institutional power for a CMA on fisheries subsidy for a number of reasons.

#### **4.7.3.1 Imprecise Determination of Necessary Participants for 'Critical Mass'**

One of the difficulties in determining the required institutional power in a CMA modality for negotiating an AFS stems from imprecise determination of the necessary participants. Some scholars have noted that one of the shortfalls of the 'critical mass' negotiating approach, especially in achieving the required 'critical mass,' is that "When new rules are proposed to be negotiated on certain issues it would be extremely difficult to draw the line between countries that are relevant or not."<sup>483</sup> In other words, a CMA could exempt some countries for which a particular sector is significant in its economy, but the country itself is too small to be relevant to the negotiations at the global level.<sup>484</sup>

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<sup>483</sup> Rodriguez M. Mendoza & Marie Wilke, "Revising the Single Undertaking: Towards a more Balanced Approach to WTO Negotiations" in Deere Birkbeck. C, ed, *Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries* (Cambridge: Cambridge University Press, 2011) at 502-504.

<sup>484</sup> *Ibid.* When NTBs were negotiated through a plurilateral agreement during the Tokyo Round, Winham notes that NTBs were "problematic in that they were largely undefinable, numerous, often concealed, and incomparable, and that their effects were unknown precisely but generally thought to be pernicious. Negotiators had to achieve an

For instance, although Senegal is categorized as an LDC in the WTO; the country is not one of the significant fisheries subsidizers. At the same time, it is a major exporter of fish. Some time ago, Senegal's fisheries subsidies encouraged an increase in export capacity that caused overfishing and IUU fishing, eventually resulting in severe depletion of its marine resources.<sup>485</sup> Under the current negotiating text for an AFS, Senegal would ordinarily not be regarded as a significant participant for CMA purposes. However, it is undeniable that Senegal's fisheries activities affect its marine resources and those of other countries.<sup>486</sup>

#### **4.7.3.2 Fish as a Common Resource**

A second challenge in determining the necessary 'critical' mass threshold that would command the required institutional power in a CMA arrangement for an AFS is the idea of fisheries as a common resource. Fisheries are common heritage and, in most instances, not subject to national jurisdiction until caught.<sup>487</sup> Unlike tangible trade sectors like IT where the necessary critical mass of the world trade in the IT sector can be easily determined, it is difficult to establish responsibility for a fish stock until the fish in question are caught. As a result, until a country engages in fishing activities it may be impossible to foresee which countries would be essential to form a part of the 'critical mass' to negotiate a CMA on fisheries subsidies aside from known major fisheries subsidizing countries.

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intellectual understanding of these measures before they could negotiate their removal". Winham, *supra* note 12 at 88. This further explains the challenges involved in negotiating trade rules such subsidy because they are unquantifiable and not easy to determine like tangible goods.

<sup>485</sup> Young, "Fisheries Subsidies and the WTO", *supra* note 428 at 190; Rubin et al, *supra* note 414 at 118.

<sup>486</sup> *Ibid*, Rubin et al at 105.

<sup>487</sup> Common heritage is an international law concept which establishes that access to a certain space or jurisdiction belongs to every mankind. For instance, water such as high seas and the outer space is often referred to as common heritage or common resource because access to them and their resources are for every man's benefit.

#### 4.7.4 Whether the issue of free ridership is non-consequential

In the event a 'critical mass' is achieved for a CMA on fisheries subsidies, the problem of free-ridership also becomes acute since other countries will benefit from the agreement without making any commitments of their own.

First, in cases where all other major WTO fishery subsidizers negotiate a critical mass-structured AFS except China, such an agreement will be affected by free-ridership that may undermine the efficiency and sustainability aim of an AFS. According to Hufbauer, "The prospect of free-riders the size of Brazil, India, or China is enough to suffocate most plurilateral agreements [AFS] in the crib."<sup>488</sup>

If China and other major fisheries subsidizers agree to an AFS, removing fisheries subsidies without a global commitment doing so may be difficult because those who agree to reduce their subsidies could be disadvantaged by other parties that do not with the same access to the resource.<sup>489</sup> As explained, the 'critical mass' of countries negotiating such an agreement is suitable for international agreements that can manage with a minimum of free riders.

In addition, most fish species are shared stocks, including transboundary stocks, that is, fish species moving from the high seas and through different Exclusive Economic Zones (EEZs); straddling stocks or highly migratory fish stocks, that is, fish stocks that are found both within the coastal country or within a country's EEZ and the adjacent high seas.<sup>490</sup> An increasing volume of the

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<sup>488</sup> Hufbauer & Schott, *supra* note 33 at 7.

<sup>489</sup> *Ibid.*

<sup>490</sup> Highly migratory species such as tuna and sharks move between the high seas and countries' EEZs. "The oceans do not respect borders, and what happens in one area will invariably affect neighbouring ecosystems. "Obiageli Ezekwesili, "High Seas at Risk: Why the World Must Act" (5 July 2016), online: *TREND Magazine* <<https://www.pewtrusts.org/en/trend/archive/summer-2016/high-seas-at-risk-why-the-world-must-act>>.

global catch comes from these shared stocks, and this diversity of jurisdiction further points to the need to have an AFS involving every WTO member.<sup>491</sup>

Although fisheries subsidies are more pronounced in developed countries because of their large fishing fleets in distant waters, subsidy programs to increase fishing capacity are found in both developed and developing countries.<sup>492</sup> If a CMA on fisheries subsidies is reached, it is unclear how to determine that the few countries not obligated under a projected ‘critical mass’ negotiation will not be tempted to engage in prohibited subsidization. If free riders continue to engage in prohibited subsidization, then such fishing activities may undermine the protection of marine resources as a key objective of an envisaged AFS.

Put another way, the impact of fisheries subsidies by the states not bound by a CMA AFS may be minimal compared to heavy industrial fisheries subsidizers. However, this minimal contribution to the problem does not presuppose that some fish types will not continue to be overfished, fished in an IUU manner, or lead to overfishing and overcapacity under an AFS. Fishing fleets are mobile and may simply decamp to a holdout jurisdiction that does not adhere to the AFS. These unchecked acts may eventually result in the extinction of fish stocks and cause marine resources unsustainability.

Also, LDCs rely heavily on fishing as a source of food and employment. This basic fact presupposes that some form of rules should exist to ensure that the type of subsidies provided to them for these purposes do not contribute to IUU fishing, overfishing and overcapacity, or increase

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<sup>491</sup> Rashid U. Sumaila, “Shared Stocks and Fisheries Subsidies Disciplines: Definitions, Catches, and Revenues” (September 2017), online: *International Centre for Trade Sustainable Development* <[https://ictsd.iisd.org/sites/default/files/research/info\\_note\\_fisheries\\_shared\\_stocks\\_sumaila\\_0.pdf](https://ictsd.iisd.org/sites/default/files/research/info_note_fisheries_shared_stocks_sumaila_0.pdf)>.

<sup>492</sup> Rubin et al, *supra* note 414 at 3, 109.

overfished stock. Any country's fishing and fisheries activities may result in the depletion of fish stocks and harm the environment.<sup>493</sup>

The argument that WTO countries can overlook free-riders' fishing activities once a 'critical mass' is achieved may not suffice for an AFS. A successful AFS should include obligations on all countries without any exemption.<sup>494</sup> Free-riders in an AFS - no matter how small - may undermine the aim of the agreement because the issue of depletion of fish stocks and its resources is a global issue that requires the commitment of all WTO members. The purpose is to protect global fish stocks, not protecting a country from injury caused by another country.

#### **4.8 Conclusion**

This chapter has examined the feasibility of the CMA arrangement to the ongoing WTO AFS negotiation. To do so, the chapter has examined the concept of subsidy in the WTO and the continuous efforts of IOs and NGOs in combating subsidy activities that endanger marine resources, particularly IUU fishing, fishing that contributes to overfishing and overcapacity and overstocked fishing.

This chapter has also explored why the WTO is an appropriate forum for AFS negotiations, including by means of a description of the WTO AFS negotiations so far. In addition, this chapter analyses the ongoing WTO AFS *vis a vis* the CMA features. This chapter concluded that the

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<sup>493</sup> "Accounting for 6.1% of world fish captures, subsidies granted by LDCs may have a similar effect as subsidies currently provided by a country such as Japan. Globally, this may seem small and allowable. However, the effects may be even stronger if these subsidies are limited to certain species, hence affecting fishers only in particular countries". Leah Worrall & Max Mendez-Parra, "Fisheries: The Implications of Current WTO Negotiations for Economic Transformation in Developing Countries" (2017), online: *Supporting Economic Transformation* <<https://set.odi.org/wp-content/uploads/2017/12/SET-WTO-Negotiations-Fisheries.pdf>>.

<sup>494</sup> As rightly stated by the US Representative, "...If the subsidies contribute to overfishing and overcapacity, why should the WTO exempt these Members' subsidies – regardless of self-declared development status – from disciplines? There is simply no reasonable argument that any Member should be able to continue harmful subsidies in perpetuity, given that fisheries are a shared natural resource..." Ambassador Shea's Statement of November 2020, *supra* note 468.



‘critical mass’ approach may not be a viable negotiating method for a WTO AFS for a number of reasons including the need for absolute obligations on all members to protect marine resources, the failure to attract a willing champion country in the negotiations, and the diversity of interests that make certain developing countries reluctant to agree.

As indicated, these are momentous times in the WTO. The WTO has not been able to successfully negotiate an agreement since the Doha Round, and as a result, the organization is almost losing its relevance in the global policy-making. The WTO AFS is at a crucial stage now and a successful AFS negotiation might help to reinvigorate the WTO’s negotiating function. Despite the fact that most of the indicia identified for a CMA-type AFS seem to be missing, the negotiations are moving forward and – perhaps – coming to a conclusion, which would be a feather-in-the-cap for the WTO as a whole.

According to the WTO DG, “A key WTO priority is therefore to conclude an agreement this year [MC12] to protect our oceans by ending harmful fisheries subsidies”.<sup>495</sup> In a subsequent interview, the WTO DG adds that “We are on the cusp of forging an agreement [AFS] at the WTO that is historic in more ways than one. It would show that members can come together and act on issues of the global commons... We cannot -- simply cannot -- afford to miss this opportunity.”<sup>496</sup>

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<sup>495</sup> WTO, “DG Okonjo-Iweala on World Environment Day: Harness sustainable Trade to Protect the Planet” *WTO News* (5 June 2021), online: <[https://www.wto.org/english/news\\_e/news21\\_e/envir\\_04jun21\\_e.htm](https://www.wto.org/english/news_e/news21_e/envir_04jun21_e.htm)>.

<sup>496</sup> US Trade News of 9 July 2021, *supra* note 462.

## **CHAPTER FIVE**

### **5. CONCLUSION AND SUMMARY**

Countries generally in a bid to constantly advance and grow their economy will continue to negotiate trade agreements and rules among each other. The WTO Agreement and its predecessor, the GATT 1947, have significantly ensured the smooth running of international trade after the WWII. In light of the growing desire of cross-border trade negotiations and agreements signing, and despite the challenges facing the WTO at the moment, especially in its negotiating arm, the WTO remains a significant IO in the regulation of international trade among its members.

Before the WTO Agreement the GATT 1947 employed some traditional means of negotiation in multilateral trade negotiation rounds. These negotiating methods included the ‘offer and request’, ‘linear method’ and the ‘formula’ approaches. During the UR WTO members consensually introduced the single undertaking as a political tool employed at the end of the negotiations to tie the results on different topics together and make trade-offs between them. With other agreements and Ministerial Decisions, the WTO Agreement was concluded on the basis of a “single undertaking” approach in the UR.

Following the UR, it was thought that single undertakings would be the way to proceed with future WTO negotiations. However, as pointed out, the single undertaking achieved in 1994 was not universal. There was much unfinished business.

Negotiations continued after that time on areas of select interest including financial services, telecommunications services, and information technology. In each of these areas, agreement was

subsequently achieved without the cross-cutting agreement that characterizes a single undertaking, in the form of CMAs.

The different types of agreement concluded under the WTO Agreement and its predecessor, the GATT 1947, emphasizes how the WTO Agreement could be characterized as an umbrella covering a range of agreements and commitments, some of which are agreed bilaterally between pairs of members, plurilaterally between groups of members, and others which are multilateral.

As indicated, the ‘critical mass’ approach examined in this thesis may offer a way forward for the WTO’s negotiating arm. CMAs remain important in the WTO context because multilateral options for agreement appear to have stalled. The indefinite suspension of the DDA in 2015 appears to have marked the end of multilateral efforts at agreement among the entire membership, at least for the time being. With 164 members, the WTO membership is simply too diverse to achieve an agreement of the whole like the one achieved in 1994. A complicating factor is the presence of many countries at different levels of development in the organization, and consequently, the demand for S&DT. This result has led to alternative approaches to negotiating new WTO agreements of a plurilateral type, which are either ‘closed’ in some degree, or alternatively, ‘open’.

CMAs appear to fall in the ‘plurilateral’ category, but they are different from the classic plurilateral agreement, which is typically closed (i.e. extends its benefits to signatories only). In the case of a CMA, the agreement is ‘open’ in the sense that its benefits are available to all WTO members regardless of whether they sign on or not.

An exhaustive list of the criteria necessary for a CMA is elusive. However, the concept of ‘critical mass’ as a negotiating approach entails more consideration than the gathering of a ‘critical mass’

to obviate the issue of free-ridership. This thesis has tried to point out what some of the chief characteristics of a CMA are:

- whether there is a critical mass of countries willing to commit on a given topic or in a specific sector
- whether there is a “champion” country willing to use the threat of market closure or other means to extract greater commitments from other WTO members
- whether the resulting critical mass commands adequate institutional power in the concerned sector
- whether free-ridership is inconsequential

This thesis examined each of these criteria as they were satisfied in the case of the WTO ITA, and the BTA, the Reference Paper and the FSA. In each instance, a critical mass of countries was achieved. The benefits accrued from each agreement were enough enticement to gather the required ‘critical mass’ of participants. In addition, the role of the US, and to a lesser extent the EC/EU, was noted in satisfying the necessity of a “champion country”. In each instance the critical mass appeared to command the adequate institutional power in the concerned sector. In addition, the specific sectors were quantifiable, and hence there was the possibility of calculating and determining the necessary institutional power.

Finally, it appeared that, for various reasons, the problem of free-ridership in each instance was inconsequential. The problem of free-ridership did not constitute an intractable barrier to the agreements since the necessary ‘critical mass’ of participants required were determinable and quantifiable. In addition, each of these agreements eventually garnered the ‘critical mass’ that were envisaged. Consequently, the idea that someone was “getting something for nothing” did not play a prominent role in the previous CMAs. There was also little sense that agreeing to the disciplines

in question prevented some countries from enjoying a resource that would be left to other non-signatories to exploit as it is the case in a projected CMA-type arrangement for an AFS negotiation.

Another benefit of the ‘critical mass’ negotiation method is that the level of S&DT is not a major problem. In the ITA, the BTA, the Reference Paper and the FSA S&DT was not a bone of contention because developing countries involved had incentives to lower or abolish tariffs on information technology products, or because they provide few financial services or telephony. An alternative explanation could be that they agreed to these CMAs because they saw inherent advantages to financial service discipline for their reputations or to the liberalization of their national telecoms markets. Hence, even without the promise of reciprocal market access there were significant domestic forces and advantages that worked to ensure developing countries would agree to CMAs. In essence, S&DT was not a roadblock.

The successes of the existing WTO CMAs suggest that a CMA-type arrangement could continue to be a way forward in ongoing WTO negotiations depending on the issue area involved. Previous CMA arrangements point out how a CMA-type approach to ongoing fisheries subsidies negotiations might unfold in the WTO.

The current crisis in global fisheries is generally well-known. Subsidies given by WTO member governments in various forms have contributed to the current situation. Existing WTO rules on subsidies are inadequate to deal with subsidization that may have long lasting or permanent impacts on the marine biomass. As a result, a WTO AFS has been envisaged for the last two decades and has assumed a new urgency under the U.N. SDG.

One option might be to use a CMA for the purposes of negotiating the AFS. Yet, as seen, the ‘problem structure’ of fisheries subsidies and other criteria for a successful CMA do not appear to

be present in the case of a projected AFS. The first barrier to an CMA type for fisheries subsidies in the WTO was revealed by the difficulty of assembling a critical mass. There is no clear idea of the immediate trade benefit to be enjoyed from an AFS, and in any event, the potential advantages from such an agreement are projected in the distant future and speculative. They will arise when the global marine biomass recovers. Major countries – principally developing countries and LDCs – have not agreed to the current AFS text or are seeking broad exemptions in the form of S&DT that would eviscerate the agreement’s effectiveness. Many developing countries and LDCs use fish resources to feed their populations. If they are to agree to an AFS, some alternative would have to be found to replace this food source. Consequently, it may be challenging to gather a ‘critical mass’ among WTO members, particularly, the developing countries and LDCs since there is no immediate economic or trade benefit from the proposed AFS.

Another barrier to a ‘critical mass’ AFS in the WTO is the apparent lack of a “champion” country seeking to push the negotiations and ready to use its heft to ensure a deal gets concluded. The analysis in early chapters revealed that in almost any CMA under the WTO’s aegis to date the US has played a significant role in assembling the critical mass through the broadcast of its own commitments and then using the threat of their revocation to compel more favourable concessions from other countries.

There is the further point that no WTO member, apart perhaps from the EU, has stepped forward to fill-in where the US has stepped away, threatening to use closure of its markets to foreign marine products to force countries to adhere to an agreement. Without its critical championing of these disciplines, they are unlikely to succeed. Even with a willing “champion”, as indicated in chapter 4, it is unclear how the “champion” could use the threat of their revocation or other means to compel substantial commitments from other WTO members in the AFS case.

There is also the difficulty of deciding the required institutional power in a CMA type of AFS because of the imprecise determination of the necessary 'critical mass'. Fish are not subject to jurisdiction until they are caught. Thus, countries whose subsidies causes IUU fishing, contributes to overfishing or overcapacity and encouraged fishing of overfished stocks may not be determined until the fishing activity has taken place. Additionally, fish are common resources and controlled and managed fishing activities of some countries does not deter other countries from engaging in activities that are harmful to the marine resources. Accordingly, defining the adequate institutional power for a 'critical mass' AFS in the WTO may be an insurmountable task.

The AFS problem structure is such that free-ridership might well be extensive and difficult. Disciplines on fisheries subsidies involve countries encouraging economic operators to withdraw from an activity – fishing – which has immediate economic consequences. Second, some fish stocks are shared, transboundary or migratory, making the issue of free-ridership very difficult to address unless all countries universally abstain.

A CMA-type AFS would effectively prevent some countries (chiefly signatories) from accessing a resource in the form of the marine biomass which other non-signatories would be left to exploit. As indicated in the thesis, this would be a significant loophole in the projected agreement, only offset perhaps to some extent by the possibility of using continuing exploitation and depletion to shame non-signatories who continue to subsidize and who could be labelled 'culprits' in worsening of the depletion of global fishing stocks.

The projected WTO AFS assessed in this thesis has shown that a CMA arrangement may not be an option for negotiation even after a 'critical mass' is gathered. There is a need for the mentioned CMA features to be affirmed cumulatively for a 'critical mass' approach to be a suitable alternative

to the WTO's traditional multilateral negotiating modalities. Hence, the 'critical mass' approach may not be viable alternative for all present and future WTO agreement negotiation. In the end, the possibility of a 'critical mass' negotiating method in the WTO should be considered on a case-by-case basis.



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## APPENDIX

Negotiation Group of Rules

TN/RL/W/276/Rev.1  
30 June 2021

### NEGOTIATING GROUP ON RULES – FISHERIES SUBSIDIES REVISED DRAFT CONSOLIDATED CHAIR TEXT

*Note: This document is without prejudice to any Members' positions or views, whether or not reflected herein.*

#### ARTICLE 1: SCOPE

1.1 This [Instrument] applies to subsidies, within the meaning of Article 1.1 of the SCM Agreement that are specific within the meaning of Article 2 of that Agreement, to marine wild capture fishing and fishing related activities at sea.<sup>1,2</sup>

1.2 [Notwithstanding paragraph 1 of this Article, this [Instrument] also applies to fuel subsidies to fishing and fishing related activities at sea that are not specific within the meaning of Article 2 of the SCM Agreement.]

#### ARTICLE 2: DEFINITIONS

For the purpose of this [Instrument]:

- (a) "fish" means all species of living marine resources, whether processed or not;
- (b) "fishing" means searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish;
- (c) "fishing related activities" means any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or

transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea;

- (d) "vessel" means any vessel, ship of another type or boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities;
- (e) "operator" means the owner of the vessel, or any person on board, who is in charge of or directs or controls the vessel.

**ARTICLE 3: PROHIBITION ON SUBSIDIES TO  
ILLEGAL, UNREPORTED AND UNREGULATED FISHING<sup>3</sup>**

3.1 No Member shall grant or maintain any subsidy to a vessel or operator<sup>4</sup> engaged in illegal, unreported and unregulated (IUU) fishing.

3.2 For purposes of Article 3.1, a vessel or operator shall be considered to be engaged in IUU fishing if an affirmative determination thereof is made by any of the following<sup>5, 6</sup>:

- (a) a coastal Member, for activities in waters under its jurisdiction; or
- (b) a flag State Member, for activities by vessels flying its flag; or
- (c) a relevant Regional Fisheries Management Organization or Arrangement (RFMO/A), in accordance with the rules and procedures of the RFMO/A and relevant international law, in areas and for species under its competence.

3.3

- (a) An affirmative determination<sup>7</sup> under Article 3.2 refers to the final finding by a Member and/or the final listing by an RFMO/A that a vessel or operator has engaged in IUU fishing.
- (b) [The prohibition under Article 3.1 shall apply where the determination under Article 3.2(a) is based on positive evidence and follows due process.]



(c) [For the purpose of subparagraph (b), the coastal Member shall promptly notify the flag State Member and, if known, the subsidizing Member, of the initiation of an IUU fishing investigation [, and shall provide an opportunity to the flag State and subsidizing Member to submit information to be taken into account in the determination].]

3.4 The subsidizing Member may take into account the nature, gravity and repetition of IUU fishing committed by a vessel or operator when setting the duration of application of the prohibition in Article 3.1. In any case, the prohibition in Article 3.1 shall apply as long as the sanction<sup>8</sup> resulting from a determination triggering the prohibition remains in force, or as long as the vessel or operator is listed as engaged in IUU fishing, whichever is the longer.

3.5 Where a port State Member notifies a subsidizing Member that it has clear grounds to believe that a vessel in one of its ports has engaged in IUU fishing, the subsidizing Member shall give due regard to the information received and take such actions in respect of its subsidies as it deems appropriate.

3.6 Each Member shall have laws, regulations and/or administrative procedures in place to ensure that subsidies referred to in Article 3.1, including such subsidies existing at the entry into force of this [Instrument], are not granted or maintained.

3.7 Each Member shall notify to the [Committee] its laws, regulations and/or administrative procedures referred to in Article 3.6. This notification shall be made no later than the entry into force of this [Instrument]. Each Member shall promptly notify any subsequent amendments to its relevant laws, regulations and/or administrative procedures.

3.8 [For a period of [2] years from the date of entry into force of this [Instrument], subsidies granted or maintained by developing country Members, including least-developed country (LDC) Members, for low income, resource-poor and livelihood fishing or fishing related activities up to

12 nautical miles measured from the baselines shall be exempt from actions based on Articles 3.1 and 10 of this [Instrument].]

#### **ARTICLE 4: PROHIBITION ON SUBSIDIES CONCERNING OVERFISHED STOCKS**

4.1 No Member shall grant or maintain subsidies for fishing or fishing related activities regarding an overfished stock.

4.2 For the purpose of this Article, a fish stock is overfished if it is recognized as overfished by the coastal Member under whose jurisdiction the fishing is taking place or by a relevant RFMO/A in areas and for species under its competence based on best scientific evidence available to it.

4.3 Notwithstanding Article 4.1, a Member may grant or maintain subsidies referred to in Article 4.1 if such subsidies [and/or measures] are implemented to promote the rebuilding of the stock to a biologically sustainable level.<sup>9</sup>

4.4 [For a period of [2] years from the date of entry into force of this [Instrument], subsidies granted or maintained by developing country Members, including LDC Members, for low income, resource-poor and livelihood fishing or fishing related activities up to 12 nautical miles measured from the baselines shall be exempt from actions based on Articles 4.1 and 10 of this [Instrument].]

#### **ARTICLE 5: PROHIBITION ON SUBSIDIES CONCERNING OVERCAPACITY AND OVERFISHING**

5.1 No Member shall grant or maintain subsidies to fishing or fishing related activities that contribute to overcapacity or overfishing. For the purpose of this paragraph, subsidies that contribute to overcapacity or overfishing include:

- (a) subsidies to construction, acquisition, modernisation, renovation or upgrading of vessels;

- (b) subsidies to the purchase of machines and equipment for vessels (including fishing gear and engine, fish-processing machinery, fish-finding technology, refrigerators, or machinery for sorting or cleaning fish);
- (c) subsidies to the purchase/costs of fuel, ice, or bait;
- (d) subsidies to costs of personnel, social charges, or insurance;
- (e) income support of vessels or operators or the workers they employ;
- (f) price support of fish caught;
- (g) subsidies to at-sea support; and
- (h) subsidies covering operating losses of vessels or fishing or fishing related activities.

5.1.1 A subsidy is not inconsistent with Article 5.1 if the subsidizing Member demonstrates that measures are implemented to maintain the stock or stocks in the relevant fishery or fisheries at a biologically sustainable level.<sup>10</sup>

## 5.2

- (a) No Member shall grant or maintain subsidies contingent upon, or tied to, actual or anticipated fishing or fishing related activities in areas beyond the subsidizing Member's jurisdiction (whether solely or as one of several other conditions), including subsidies provided to support at-sea fish-processing operations or facilities, such as for refrigerator fish cargo vessels, and subsidies to support tankers that refuel fishing vessels at sea.<sup>11</sup>
- (b) Subparagraph (a) shall not apply to the non-collection from operators or vessels of government-to-government payments under agreements and other arrangements with coastal Members for access to the surplus of the total allowable catch of the living resources in waters under their jurisdiction, provided that the requirements under Article 5.1.1 are met.]

5.3 No Member shall grant or maintain subsidies provided to fishing or fishing related activities outside of the jurisdiction of a coastal Member and outside the competence of a relevant RFMO/A.

5.4 [No Member shall grant or maintain subsidies for a vessel not flying the flag of the subsidizing Member.]

**[ALT 1**

5.5

- (a) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by LDC Members for fishing or fishing related activities.
- (b) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by developing country Members for fishing or fishing related activities within their territorial sea.
- (c) The prohibition under Article 5.1 shall apply to subsidies granted or maintained by developing country Members, including LDC Members, for fishing or fishing related activities within their EEZ and the area of competence of RFMO/A if all the following criteria are met:
  - i. the Member's GNI per capita exceeds US\$5,000<sup>12</sup> (based on constant 2010 US dollars) for three consecutive years;
  - ii. the Member's share of the annual global marine capture fish production exceeds 2% as per the most recent published FAO data;
  - iii. the Member engages in distant water fishing<sup>13</sup>; and
  - iv. the contribution from Agriculture, Forestry and Fishing to the Member's annual national GDP<sup>14</sup> is less than 10% for the most recent three consecutive years.]

**[ALT 2**

5.5

- (a) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by LDC Members for fishing or fishing related activities.
- (b) The prohibition under Article 5.1 shall not apply to subsidies granted or maintained by developing country Members for low income, resource-poor and livelihood fishing or fishing related activities up to 12 nautical miles measured from the baselines.
- (c) For subsidies other than those referred to in subparagraph (b), a developing country Member may grant or maintain the subsidies referred to in Article 5.1 for fishing and fishing related activities within its EEZ and the area of competence of a relevant RFMO/A for a maximum of [5] years after the entry into force of this [Instrument]. A developing country Member intending to invoke this provision shall inform the [Committee] in writing before the date of entry into force of this [Instrument].
- (d) If a developing country Member whose:
  - i. share of the annual global volume marine capture fish production does not exceed [0.7%] as per the most recent published FAO data; and
  - ii. subsidies to fishing or fishing related activities at sea do not exceed US\$[25 million] annually

deems it necessary to apply subsidies referred to in subparagraph (c) beyond the [5] years provided for in that subparagraph, it shall not later than one year before the expiry of the applicable period enter into consultation with the [Committee], which will determine whether an extension of this period is justified, after examining all the relevant needs of the developing country Member in question. If the [Committee] determines that the extension is justified, the developing country Member concerned shall hold annual consultations with the [Committee] to determine the necessity of maintaining the subsidies. If no such determination is made by the [Committee], the developing country Member shall phase out the remaining subsidies prohibited under Article 5.1 within two years from the end of the last authorized period.]

## **ARTICLE 6: SPECIFIC PROVISIONS FOR LDC MEMBERS**

6.1 [Provisions relating to LDC Members shall continue to apply for a transitional period of [X] years after the entry into force of a decision of the UN General Assembly to exclude a Member from the "Least Developed Countries" category.]

6.2 A Member shall exercise due restraint in raising matters involving an LDC Member and solutions explored shall take into consideration the specific situation of the LDC Member involved, if any.

## **ARTICLE 7: TECHNICAL ASSISTANCE AND CAPACITY BUILDING**

[Targeted technical assistance and capacity building assistance to developing country Members, including LDC Members and land-locked developing country Members shall be provided for the purpose of implementation of the disciplines under this [Instrument]. In support of this assistance, a voluntary WTO funding mechanism shall be established in cooperation with relevant international organizations such as the Food and Agriculture Organization of the United Nations (FAO) and International Fund For Agricultural Development.]

## **ARTICLE 8: NOTIFICATION AND TRANSPARENCY**

8.1 Without prejudice to Article 25 of the SCM Agreement and in order to strengthen and enhance notifications of fisheries subsidies, and to enable more effective surveillance of the implementation of fisheries subsidies commitments, each Member shall

(a) provide the following information as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement<sup>15,16</sup>:

- i. type or kind of fishing activity for which the subsidy is provided; and
- ii. catch data by species in the fishery for which the subsidy is provided;

and

(b) [to the extent possible,] provide the following information as part of its regular notification of fisheries subsidies under Article 25 of the SCM Agreement<sup>17</sup>:

- i. status of the fish stocks in the fishery for which the subsidy is provided (e.g. overfished, maximally sustainably fished, or underfished) and whether such stocks are shared with any other Member<sup>18</sup> or are managed by an RFMO/A;
- ii. conservation and management measures in place for the relevant fish stock;
- iii. name and identification number of the fishing vessel or vessels benefitting from the subsidy; and
- iv. fleet capacity in the fishery for which the subsidy is provided.

8.2 Each Member shall notify the [Committee] in writing on an annual basis of:

(a) any list of vessels and operators that it has determined as having been engaged in IUU fishing; and

(b) a list of any fisheries access agreements in force with another government or governmental authority, and such notification shall consist of the titles of the agreements and a list of their parties.

8.3 A Member may request additional information from the notifying Member regarding the notifications and information provided under paragraphs 1 and 2. The notifying Member shall respond to that request as quickly as possible in writing and in a comprehensive manner. If a Member considers that a notification or information under paragraphs 1 and 2 has not been provided, the Member may bring the matter to the attention of such other Member or to the [Committee].

8.4

- (a) A Member may only invoke Article 4.3, Article 5.1.1, or Article 5.5 in respect of subsidies which it has notified to the [Committee] under Article 25 of the SCM Agreement and Article 8.1 of this [Instrument].
- (b) In addition, a Member may only invoke Article 4.3 or Article 5.1.1 if the Member has provided information called for in Articles 8.1(b)(i) and 8.1(b)(ii).

8.5 [Members shall notify to the [Committee] in writing, on an annual basis, of any RFMO/A to which they are parties. This notification shall consist of at least, the text of the legal instrument instituting that RFMO/A, the area and species under their competence, the information on the status of the managed fish stocks, a description of the conservation and management measures, the regime governing the adoption of IUU fishing determinations, and the updated lists of vessels and/or operators that it has determined as having been engaged in IUU fishing. The [Secretariat to the Committee] shall maintain a list of RFMO/A notified pursuant to this Article.]

#### **ARTICLE 9: [INSTITUTIONAL ARRANGEMENTS]**

[9.1 There is hereby established a [Committee] composed of representatives from each of the Members. The Committee shall elect its own Chair and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this [Instrument] at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this [Instrument] or by the Members and it shall afford Members the opportunity of consulting on any matter relating to the operation of this [Instrument] or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.]

9.2 Each Member shall, within one year of the date of entry into force of this [Instrument], inform the [Committee] of measures in existence or taken to ensure the implementation and administration of this [Instrument], including the steps taken to implement prohibitions set out in Articles 3, 4 and 5. Each Member shall also inform the [Committee] of any changes to such measures thereafter.



The [Committee] shall review annually the implementation and operation of this [Instrument], taking into account the objectives thereof.

9.3 Each Member shall, within one year of the date of entry into force of this [Instrument], provide to the [Committee] a description of its fisheries regime with references to its laws, regulations and administrative procedures relevant to this [Instrument], and promptly inform the [Committee] of any modifications thereafter. A Member may meet this obligation by providing to the [Committee] an up-to-date electronic link to the Member's or other appropriate official web page that sets out this information.

9.4 The [Committee] shall examine all information provided pursuant to Articles 3 and 8 and this Article not less than every two years.

9.5 The [Committee] shall maintain close contact with the relevant international organizations in the field of fisheries management, especially with FAO and relevant RFMO/As [with the objective of exchanging best practices and providing for a better understanding about the procedures for adopting IUU fishing determinations and evaluating the status of the fish stocks or fisheries pursuant to the implementation and administration of this [Instrument]].

9.6 Not later than [X] after the date of entry into force of this [Instrument] and periodically thereafter, the [Committee] shall review the operation of this [Instrument] with a view to making all necessary modifications to improve the operation of this [Instrument], taking into account the objectives thereof.

#### **ARTICLE 10: DISPUTE SETTLEMENT**

The provisions of Articles XXII and XXIII of the GATT 1994 as elaborated and applied by the Dispute Settlement Understanding, and Article 4 of the *Agreement on Subsidies and Countervailing Measures* shall apply to consultations, the settlement of disputes, and remedies under this [Instrument], except as otherwise specifically provided herein.

#### **ARTICLE 11: FINAL PROVISIONS**

11.1 [Nothing in this [Instrument] shall be construed or applied in a manner which will affect the rights of land-locked country Members under public international law.]

11.2 Members shall take special care and exercise due restraint when granting subsidies to fishing or fishing related activities regarding stocks the status of which is unknown.

11.3 Except as provided in Articles 3 and 4, nothing in this [Instrument] shall prevent a Member from granting a subsidy for disaster<sup>19</sup> relief, provided that the subsidy is: limited to the relief of a particular disaster;

(a) limited to the affected geographic area;

(b) time-limited; and

(c) in the case of reconstruction subsidies, limited to restoring the affected area, the affected fishery, and/or the affected fleet up to [a sustainable level of fishing and/or fishing capacity as established through a scientific-based assessment of the status of the fishery and in no case beyond] its pre-disaster level.

11.4

(a) This [Instrument], including any findings, recommendations, and awards with respect to this [Instrument], shall have no legal implications regarding territorial claims or delimitation of maritime boundaries.

(b) A panel established pursuant to [Article 10 of this Instrument] shall not entertain any claim that would require it to address any issues of territorial claims or delimitation of maritime boundaries that is contested by a party or third party.

### ***Endnotes***

<sup>1</sup> For greater certainty, aquaculture and inland fisheries are excluded from the scope of this [Instrument].

<sup>2</sup> For greater certainty, government-to-government payments under fisheries access agreements shall not be deemed to be subsidies within the meaning of this [Instrument].

<sup>3</sup> "Illegal, unreported and unregulated (IUU) fishing" refers to activities set out in paragraph 3 of the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* adopted by the UN Food and Agriculture Organization (FAO) in 2001.

<sup>4</sup> For the purpose of Article 3, the term "operator" means the operator within the meaning of Article 2(e) at the time of the IUU fishing infraction. For greater certainty, the prohibition on granting or maintaining subsidies to operators engaged in IUU fishing applies to subsidies provided to fishing and fishing related activities at sea.

<sup>5</sup> Nothing in this Article shall be interpreted to obligate Members to initiate IUU fishing investigations or make IUU fishing determinations.

<sup>6</sup> This Article shall have no legal implications regarding the competence under other international instruments of any of the listed entities to make an IUU fishing determination.

<sup>7</sup> Nothing in this Article shall be interpreted to delay, or affect the validity or enforceability of, an IUU fishing determination.

<sup>8</sup> Termination of sanctions is as provided for under the laws or procedures of the authority having made the determination referred to in Article 3.2, including by way of, for example: re-issuance of a suspended license; full prosecution of the matter; and delisting, forfeiture, sinking or scrapping of the vessel concerned.

<sup>9</sup> For the purpose of this paragraph, a biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using reference points such as maximum sustainable yield (MSY), or other reference points based on indicators such as [level of depletion, or level of or trend in time series data on catch per unit effort, commensurate with the data available for the fishery]; or by a relevant RFMO/A in areas and for species under its competence.

<sup>10</sup> For the purpose of this paragraph, a biologically sustainable level is the level determined by a coastal Member having jurisdiction over the area where the fishing or fishing related activity is taking place, using reference points such as MSY, or other reference points based on indicators such as [level of depletion, or level of or trend in time series data on catch per unit effort, commensurate with the data available for the fishery]; or by a relevant RFMO/A in areas and for species under its competence.

<sup>11</sup> With respect to Article 5.2(a), the mere fact that a subsidy is granted or maintained to vessels or operators that may be engaged in fishing or fishing related activities in areas beyond the subsidizing Member's jurisdiction shall not for that reason alone be considered a prohibited subsidy within the meaning of Article 5.2(a).

<sup>12</sup> US\$5,000 (based on constant 2010 US dollars) as per published data of the World Bank.

<sup>13</sup> A Member is deemed not to be engaged in distant water fishing if its operators or vessels normally fish in FAO Major Fishing Area(s) that is(are) adjacent to the natural coastline of the flag State.

<sup>14</sup> Based on the latest published data of the World Bank.

<sup>15</sup> For the purpose of Article 8.1, Members shall provide this information in addition to all the information required under Article 25 of the SCM Agreement and as stipulated in any questionnaire utilized by the SCM Committee, for example G/SCM/6/Rev.1.

<sup>16</sup> For developing country Members, including LDC Members, the notification of the additional information in this subparagraph may be made every four years.

<sup>17</sup> For developing country Members, including LDC Members, the notification of the additional information in this subparagraph may be made every four years.

<sup>18</sup> The term "shared stocks" refers to stocks that occur within the exclusive economic zones (EEZ) of two or more coastal Members, or both within the EEZ and in an area beyond and adjacent to it.

<sup>19</sup> For greater certainty, this provision does not apply to economic or financial crises.

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The University of Western Ontario, London, Ontario  
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**Certificates**

Introduction to Corporate Finance (Corporate Finance Institute) June 2020

White & Case Virtual Experience (White & Case LLP)  
June 2020

**Publications**

Panaceas: Dumping and Trade Remedies in Nigeria (2019).

Outlook: An Examination of Anti-Arbitration Injunctions in International Commercial Disputes in Nigeria (2019).

A Critical Appraisal of the Use of Force in International Law (Unpublished LL.B Thesis, 2016).

**Professional Memberships**

Nigerian Bar Association (NBA), 2017

**Languages**

English

**Hobbies**

Reading, Writing and Traveling