

Original Paper

Energy and Trade in the Time of Destabilized Multilateralism: Innovative Economic Policies for the WTO

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Abstract

The multilateral trade system has been in trouble for over a decade. The set of international trade agreements managed by the World Trade Organization (WTO) has never meaningfully expanded beyond its 1990s founding package. Instead, since early 2000s bilateral trade deals done outside the WTO have multiplied. The WTO is better known today for the troubled trajectory of the unfinished Doha Round. The rhetoric of economic nationalism by the current US Administration does not help. It is time to consider new creative options before the world trading system becomes irreparably fragmented by politics. To this extent the following article advocates an initiative of creating an open plurilateral agreement on services related to energy sector under the framework of the WTO's GATS (General Agreement on Trade in Services). Energy security remains the key international issue. Initiating talks among interested countries on energy related services under GATS can move the WTO forward towards pragmatic solutions and encourage international cooperation on the critical economic matter.

Keywords

WTO, negotiating impasse, GATS, services trade, open plurilaterals, energy security

1. Introduction

Even before the current Trump Administration threatened to introduce tariffs on foreign goods and clouded the global economic outlook with a protectionist tone, the multilateral system was facing a crisis. Most observers believe that the miserably slow progress of the Doha Round has seriously undermined the position of the WTO as a capable driver of international trade. The eleventh WTO Ministerial Meeting that took place in 2017 in Buenos Aires ended without a formal declaration. Perhaps the most memorable concluding statement belonged to the EU's Commissioner for trade:

“We failed to achieve all our objectives, and did not achieve any multilateral outcomes. The sad reality is that we did not even agree to stop subsidizing illegal fishing. I hope all delegations reflect carefully about the message this sends to our citizens, stakeholders and our children about the state of the WTO. Luckily, we still have the WTO’s current agreements, its structures of cooperation, and its invaluable dispute settlement system” (EU Commission, 2017).

While the above statement shows frustration, it also recognizes the WTO as an important rule-based institution. Despite many setbacks, the WTO remains valuable, especially because the set of trade agreements under its legal umbrella has facilitated the steady growth of international trade for decades. In fact, WTO’s multilateral agreements reflect progressive global market integration that goes back to GATT 1947. The WTO secures the impressive level of liberalizing commitments made by over hundred-sixty countries, brings rules to the complexity of international trade relations and resolves disputes according to the principle of compulsory adjudication via its legally binding Dispute Settlement Understanding (DSU). Without a doubt, DSU is the most advanced multilateral mechanism for resolving trade problems between nations (Sacerdoti, 2017, pp. 147-174). The broad participation of WTO Members in DSU, which is grounded in international law, and the subsequent evolution of its case law testifies about the maturity of the WTO jurisprudence (Rubini, 2017, pp. 276-317). Recently, however, even the DSU is facing politically charged disputes between WTO Members (Kerr, 2017; Cocco, 2018; FT, 2018). To deter Members from contaminating the organization with their political fights and to take advantage of the WTO’s achievements, this article suggests a reformist move: an open plurilateral agreement on energy related services among interested parties. The concerns over energy security remain high on the international agenda. Given the importance of the issue and the perilous state of the Doha Round, it is worth to consider such an agreement as an innovative way of rebooting the WTO.

The article is organized in the following way: first, the paper argues for rebooting the WTO by utilizing the existing General Agreement on Trade in Services (GATS); second, it explains why the timing is right for an intergovernmental initiative to cooperate on energy security; third, the paper examines the challenges associated with negotiating a more advanced agreement on energy under multilateral rules. It must be said that this work does not address a treaty-design process. Its goal is to re-focus the policy making within the WTO away from the dysfunctional Doha Round towards productive options that would revitalize the organization and make constructive use of its legal and institutional framework.

2. WTO Needs Creative Rebooting

The Doha Round of multilateral trade negotiations, the only round of talks conducted under the legal framework of the WTO, has stalled. The disagreements between negotiating parties proliferated soon after the Round was launched in 2001 and became more pronounced with time. Throughout the last decade, various attempts to revitalize the Doha talks have largely failed. During the WTO Ministerial meetings in Bali (2013) and Nairobi (2015) some progress was made mainly on trade facilitation and

agricultural export subsidies (Matsushita, Schoenbaum, & Mavroidis, 2017, p. 27). These achievements, however, pale in comparison with the depth of the systemic problems lingering over the Round (Valenzuela, 2011).

Arguably, a concept of universal multilateralism as advanced by the WTO presents a challenge. The idea that all 160-plus WTO Members of vastly different size and capability have to work in concert and be signatories to the same agreements has proven to have serious operational weaknesses (Steger, 2010). For over 17 years since Doha talks were launched WTO Members have been unable to reach consensus on a deal to complete the Round. Furthermore, many of the smaller WTO Members could be deterred from engaging in the negotiations because of the principle of *single undertaking* (Wolfe, 2009). In particular, many developing countries continue to incur large implementation costs associated with the agreements created when the WTO was born (Mukerji, 2000). As a result, accepting additional legal commitments in the form of agreements that may not be aligned with these countries' developmental priorities, may not be a good idea. The decision-making by consensus and the principle of *single undertaking* are thus often mentioned as the reasons behind the current state of paralysis at the WTO. Still, multiple economic benefits derived from multilateral disciplines managed by the WTO should not be underestimated. Complex processes of measuring the performance of the WTO confirm this fact and prove that the WTO's performance should never be reduced to single indicators (Elsig, Hoekman, & Pauwelyn, 2017). The critical problem is how to advance the organization beyond the Doha debacle.

Some scholars suggest radical solutions. According to Steger, the key to the WTO's problems is "the lack of formal mechanisms at the initial and intermediate stages of the rule-making process and the absence of a management or executive body, analogous to the executive boards of the International Monetary Fund and World Bank" (Steger, 2009, p. 803). However, this kind of proposal does not seat well with the developing Members of the WTO. They worry that the establishment of an executive board could instigate a return of a power-based system where only selective representative countries would set the agenda of the WTO. In particular, the emerging economies want to ensure that the multilateral system works for the benefit of all participants and insist that their voices need to be taken into consideration (Hopewell, 2016). No country should be pressured to sign an agreement, which brings with it large implementation costs but unclear benefits.

Consequently, this article argues that the key to unlocking the WTO's potential is General Agreement on Trade in Services (GATS). The agreement was one of the top achievements of the GATT Uruguay Round of negotiations that transformed the world trading system by establishing the legally binding WTO in 1995 (Lanoszka, 2009, pp. 47-61). Although Members of the WTO must now comply with the new WTO agreements together with the old GATT as a single package (*single undertaking*), GATS is exceptional in allowing individual countries to become self-liberalizing agents. There are multiple issues and opportunities arising from making GATS an integral part of the WTO (Sauv e & Stern, 2000). My argument focuses on the agreement's inherent flexibility, which allows WTO Members to liberalize their services sectors according to their own priorities. GATS can be used for future negotiations

dealing with investment because some of the commitments already made under its framework—under commercial presence of Mode 3—would have to be reconciled with any new investment agreement. And since today's new technologies are increasingly blurring boundaries between goods and services, GATS offers opportunities for the progressive integration of GATT and GATS (Feketekuty, 2000, pp. 108-110). GATS can provide a much welcome escape route for the WTO towards open plurilateral agreements among interested parties (Adlung & Mamdouh, 2018).

Trade agreements are easier to negotiate among countries who can calculate immediate reciprocal benefits. As a result, we have seen the proliferation of regional and bilateral preferential agreements while the multilateral Doha Round has been falling apart. However, these preferential trade deals signed outside the WTO lead to the fragmentation of the international trade system (Johnston & Trebilcock, 2013). Such deals create layers of sometimes conflicting and/or overlapping rules that go against the principles of predictability and transparency that the WTO is based on. Consequently, another option is suggested. This option bridges the benefits of the WTO's managed rules-based system with the possibility of negotiating an open agreement among interested parties by utilizing GATS.

2.1 Utilizing the WTO's Unique Agreement (GATS)

GATS was the first multilateral agreement dealing with trade in services. It has a unique architecture, which combines new ideas with the old principles (Matsushita, Schoenbaum, & Mavroidis, 2017, pp. 555-632). I will focus here only on those aspects of GATS that are the most relevant to my argument. Article I of GATS defines trade in services as the supply of a service through any of four modes of supply: 1) cross-border (supply of a service happens from the territory of one country into the territory of another); 2) consumption abroad (a. the consumer goes into the territory of another country and buys services there; or b. the property of a consumer is sent abroad for servicing); 3) commercial presence (involves direct investment in the export market through the establishment of a commercial presence there for the purpose of supplying a service); 4) the presence of natural persons (short-term presence in the export market of an individual for the purpose of supplying a service). The mode 3 makes GATS into an important multilateral agreement because it contains obligations on the treatment of foreign investors who are service providers.

More recently, trade practitioners identified additional forms of supplying services that are not covered by the traditional four modes. These are services that add value to manufacturing goods during the production process. The final value of these services is currently absorbed in the final goods and these goods often face tariffs. For example, where relevant commitments were made, software alone can be traded as a duty free service under Mode 1 of GATS but once software becomes embedded inside an industrial equipment used, for example, in oil exploration, it becomes subject to duties on goods. It is then proposed that services, which critically enhance certain manufactured goods—especially R&D, engineering, design, energy, logistics, and IT services—should be treated under a new Mode 5 supply of service consistent with the present GATS terminology (Antimiani & Cernat, 2018). In this context the initiative to create an open plurilateral agreement framed by GATS can also address the issue of

Mode 5. Future negotiators can take advantage of GATS architecture and formally incorporate Mode 5 within its structure to address the growing importance of Mode 5 services in different sectors including oil and gas exploration, storage, and transportation.

GATS's distinctiveness among the family of multilateral trade agreements stems from its flexible structure that allows countries to take leadership with their own individual commitments (Lanoszka, 2009, pp. 107-133). As a result talks conducted under GATS can be expanded by a group of interested countries in the critical areas of economic activities. The agreement consists of two parts. The first part of GATS is the legal text of the agreement and the second part is the schedule of a country-specific commitments undertaken by every WTO Member. Every schedule is different and hence there are as many schedules as there are WTO Members. Obligations resulting from the GATS are divided into two groups: (1) universal obligations that all WTO Members have to comply with; and (2) country-specific obligations whose depth is limited only to the sectors where a WTO Member has decided to make market access and national treatment commitments with respect to foreign services suppliers. Under Article II of the GATS, WTO Members are obliged to extend MFN treatment universally to services or services suppliers of all other Members. Still the exemptions are allowed at the time of acceptance of the GATS. Another universal obligation is the principle of transparency (Article III of GATS) under which WTO Members are required to publish all relevant measures and respond to other WTO Members' information requests. There is also a requirement to establish disciplines on the operation of monopolies and exclusive suppliers.

When it comes to a country-specific obligations, even in these sectors where market access commitments are made WTO Members still can put a number of legally permissible limitations to restrict the way a particular services sector is being liberalized. Under Article XIV of GATS general exemptions for regional arrangements, balance of payments, public order and health, also apply. In summary, every WTO Member can custom-design its strategy for liberalizing the domestic services sector. To be sure, as of September 2018 the WTO has 164 Members and there are as many distinct country-specific schedules of liberalizing commitments. Under Article XVI of GATS a market access commitment can be controlled as limitations may be imposed on the number of services suppliers, service operations or employees in a sector, the value of transactions, the legal form of the service supplier, or the participation of foreign capital. Under GATS Article XVII the principle of national treatment applies, however, such treatment does not need to be identical to that afforded to domestic firms. Consequently, foreign businesses cannot be treated less favorably than domestic forms, but they can be treated better.

There are twelve main service sectors identified for the purpose of scheduling the country-specific commitments under GATS. All of these sectors include a number of subsectors with the possibility of adding new ones (GATT/WTO, 1991):

1. Business services (including professional services and computer services)
2. Communication services (including telecommunication and audio-visual services)

3. Construction and related engineering services
4. Distribution services
5. Educational services
6. Environmental services
7. Financial services (including insurance and banking)
8. Health-related and social services
9. Tourism and travel-related services
10. Recreational, cultural and sporting services
11. Transport services
12. Other services not included elsewhere.

The sectors, particularly relevant in the context of energy related services are: construction, distribution, and transport. In summary, GATS can be expanded not only by adding Mode 5 but also by defining and including under its scope another service sector or by adding new sub-sectors to the existing schedules of commitments.

Most importantly, strong evidence already exists in favor of utilizing GATS to advance sectoral trade talks. After the WTO was created, a series of additional negotiations on deepening liberalizing commitments in telecommunications and financial sectors were held in the late 1990s. The results of these talks were added as protocols to GATS. The protocols also contained specific procedural requirements guiding the process of entering into force (WTO, 1997; WTO, 1996). In the words of experts: “such protocols may thus serve as legal instruments to give effect to a negotiated outcome by making it an integral part of a pre-existing treaty, in this case the GATS” (Adlung & Mamdouh, 2018, p. 91). Protocols cannot be blocked by political reasons because there is no legal requirement for a consensus decision by the WTO Membership to adopt them. Fourth and Fifth protocols to GATS were the outcomes of plurilateral negotiations, but being open agreements within the WTO their results were implemented on a MFN basis, although most of the participants took a number of MFN exceptions. In this context, it is helpful to recall that special consideration has been traditionally given to LDCs (Least Developed Countries). One of the outcomes of the 2011 WTO Ministerial Meeting is a special waiver that allows all WTO Members, notwithstanding the MFN principle, to extend preferences to services and services suppliers from LDCs identified as such by the UN (WTO, 2011).

2.2 Why an Open Plurilateral under GATS is the Only Option?

It is important to clarify what is meant by an open plurilateral agreement and why this is the only option this article contemplates. After all, the concept of a plurilateral deal implies exclusivity for the countries involved. Yet the WTO is a multilateral organization, which centers on the principle of non-discrimination framed around MFN and national treatment provisions. An exclusive and closed plurilateral agreement would be a contradiction within the multilateral trade system. Although, it should be noted that it is still possible, in principle, to negotiate a closed plurilateral agreement within the WTO. One of the main functions of the WTO is to provide the forum for trade negotiations as

mandated in Article III:2, which allows the form of the outcomes as well as exact provisions guiding the process to be determined in every negotiating case (Adlung & Mamdouh, 2018, p. 90). In fact, the rules permit to negotiate any kind of agreement in the WTO as long as the Membership allows it to exist by consensus. Consequently, we are back in the decision-making corner where political maneuvering among WTO Members works against a consensus decision. I believe that it is sensible to say that an exclusive non-MFN based plurilateral agreement would never be accepted by all WTO Members. Hence the only remaining option is an open plurilateral agreement on services. As long as the negotiators work within the existing legal structure, Article III:2 permits creative solutions and the flexible GATS offers an available framework for such initiatives.

The depth of commitments made under an open plurilateral agreement can be somehow limited by the fact that its benefits have to be automatically extended to all WTO members on a MFN basis. But the MFN concerns can also be dealt with. In the previous cases when the telecommunication and financial talks concluded under GATS as protocols, the signatories used MFN exemptions to shield themselves from the full application of the MFN principle. As a result open plurilateral agreements are a prudent way forward for the WTO. Any attempt to reform the decision-making processes in the WTO to allow negotiations on exclusive closed plurilateral deals will be confronted with the consistent resistance from non-participating countries. Developing countries, especially cherish the consensus principle and worry about the return of a GATT-like system formally dominated by the developed countries (Lanoszka, 2009, pp. 59-60). The 2015 Nairobi Ministerial Declaration reaffirms that any new deals outside the Doha Round would have to be approved by all Members (WTO, 2015, para. 34).

Developing countries traditionally attach importance to the multilateral idea of non-discriminatory trade. Consider, for example, the Decision, which concluded the 1970s Tokyo Round of trade talks. The 1979 GATT Decision was drafted at the insistence of developing countries who were unhappy about the weakening of the MFN principle by the apparent move towards conditional MFN treatment. The concerns were raised because 9 out of the 11 agreements negotiated during the Tokyo Round were essentially separate agreements with the benefits being only extended to their signatories. The resulting Decision stated that the existing rights and benefits of those GATT's Contracting Parties which were not parties to the Tokyo Round agreements were not affected by these agreements (Winham, 1986, pp. 354-355).

The push for the formal 1979 Declaration on the issue as a condition for concluding the Tokyo Round signaled a clear dissatisfaction of developing countries with their weak bargaining position and the lack of coherence within the GATT system. Eventually, these sentiments would facilitate the acceptance of the single undertaking and the continuation of decision-making by consensus. The consensus principle in effect gives veto power to every WTO Member, which is something developing countries lacked under the GATT and hence are now unwilling to change under the WTO. In fact, the past GATT practice of operating by consensus became formalized under Article X of the Marrakesh Agreement Establishing the WTO in relation to adding any new agreement under the WTO framework (Article X,

Para 9).

To summarize, it is judicious to consider an opportunity of working within the existing agreements as the pragmatic solution to the current impasse in the WTO. Radical solutions, which propose significant organizational reforms will not meet the test of reality. However, the creative option for the WTO suggests utilizing GATS for talks on important economic matters, for example, on energy security.

2.3 The Need for Cooperation on Energy and Trade

Why should we consider the WTO as a framework for cooperation on energy? Four main reasons: 1) the WTO—given its legal status and the dispute settlement mechanism—remains a legitimate source of authority embedded within the body of international law; 2) the WTO's agreement on trade in services (GATS) can be utilized to create a sectoral agreement on energy related services; 3) negotiations on energy related services can pave a way for even more substantial cooperation on energy security among interested countries; 4) in the time of destabilized multilateralism this kind of initiative sustains international collaboration on vital economic matters.

Oil is the driving force of our economic systems. And yet there is no international treaty that would help countries manage the exploration, processing, transportation, and sale of these essential commodities. There is no legally binding multilateral agreement that would aim at ensuring the cooperation of states with respect to trade in oil and, by extension, the energy security. On the contrary, for most of its history the political economy of oil is known for conflicts, unpredictable developments, and fluidity of prices (Yergin, 1991).

Multiple factors shape global oil prices. For example, during that momentous 2008 summer before the financial crisis, the price of oil continued to stay above 125 USD per barrel. However, as the global economy took a dive in the fall, the lower global demand for oil caused its price to go down. By January 2009, it fell below 40 USD per barrel. New technologies increasingly impact global oil markets too. During 2008 the US production of crude oil reached a low point of 5.0 million of barrels per day (bpd). However, just as President Obama took office, the new drilling technology led to incredible efficiency gains in the shale sector resulting in the unprecedented surge of US gas and oil production. In 2015 US oil production reached 9.4 million bpd (Rapier, 2016). One of the consequences of this development was the decreased appetite in the US for the imported oil leading yet again to lower market prices. Falling oil prices created revenue concerns among the major oil producers, especially those whose economies tend to be oil-dependent. Always volatile and sensitive to international developments the price of oil eventually went up and reached over 70 USD per barrel in May 2018 just as President Trump announced the US withdrawal from the 2015 nuclear deal with Iran (Landler, 2018).

Against this continuous instability of energy markets the global consumption of energy is expected to grow from 549 quadrillion British thermal units (Btu) in 2012 to 629 quadrillion Btu in 2020 and to 815 quadrillion Btu in 2040, which is a 48 percent increase from 2012 to 2040 (EIA, 2016). As the world's population and the global economy keep expanding, the issue of energy security remains a top

priority.

Over the years, countries had employed different strategies meant to ensure stable supplies of oil and gas. Most of these strategies resulted in bilateral arrangements. Even the most substantial international treaty on energy, Chapter 6 of North American Free Trade Agreements (NAFTA), the so-called Energy Chapter, remains a two-country deal despite being part of a regional trade agreement. Mexico refused to participate based on its constitution. It was a very difficult negotiation since the US demanded that Mexico provided a similar type of assurances that Canada did (von Bertrab, 1997, pp. 57-58). Under NAFTA's proportional clause (Articles 315 and 605) Canada cannot reduce US access to Canadian oil, gas, coal, electricity and other petroleum projects. The clause effectively obliges Canada to maintain the ratio of energy exports versus supply proportionally consistent, "which, in effect, makes Canadian exports of oil and other energy resources to the US compulsory" (Clarke, 2008, p. 138). In the long term, the proportionality clause ensures energy security for the US creating one integrated energy market. The newly renegotiated NAFTA known as the USMCA agreement retains the energy provision as well as NAFTA's investor-state dispute settlement mechanism for selected sectors, including oil and gas (Grandoni, 2018).

The 1991 European attempt to create a formal framework on energy cooperation, the Energy Charter Treaty, turned out to be a very limited endeavor. As of 2018 the Charter has only forty-eight Contracting Parties that ratified it and with the exemption of Kazakhstan, none of the signatories is a major oil-producing country. The Charter was negotiated prior to the establishment of the WTO when the scope of the new transformed multilateral trade system was not known. The Charter's reliance on GATT 1947 and its untested references to the agreement establishing the WTO weakened this structurally complicated treaty from the beginning (Swaak-Goldman, 1996). As it stands now the EU Energy Charter is a positive, but not a very effective attempt to extend multilateral trade rules to the energy sector by dealing with the issues of transit, investment, competition, and the environment.

On the other side of the spectrum, there is a distinctive pact by certain oil producers meant to control oil prices. OPEC (Organization of Petroleum Exporting Countries) was born in 1960 when four Persian Gulf nations (Iran, Iraq, Kuwait, and Saudi Arabia) and Venezuela become concerned over protectionist policies of the US among abundant supplies. As other countries continued to join OPEC, it initially remained a low key organization. OPEC finally became a formidable player in the energy markets when it cut oil exports to the US following the Arab-Israeli Yom Kippur War in 1973. Oil prices soared from \$2.9 per barrel to \$11.65 per barrel over the course of four months. Facing already dwindling supplies in the US, the governments around the world took notice as Americans queued in gas lines (Yergin, 1991, chapter 26). The events of 1973 altered the course of energy-related policies of many countries. Throughout the next two decades OPEC remained important for its ability to shape global oil prices.

In recent years, however, OPEC's influence has greatly diminished partially because of the internal squabbles and partially because of the emergence of new players. Michael Klare first analyzed this new

international dynamics a decade ago (Klare, 2008). At that time OPEC and other old energy players in the West, known for their private companies (historically known as Seven Sisters), were being contested by the newcomers: Venezuela, Kazakhstan, Russia, Brazil, China. Reflecting on the changing geopolitics of energy, Carola Hoyos in the *Financial Times* on 12 March 2007, identified the “New Seven Sisters” as the most influential and mainly state-owned national oil and gas companies: Saudi Aramco (Saudi Arabia), JSC Gazprom (Russia), CNPC (China), NIOC (Iran), PDVSA (Venezuela), Petrobras (Brazil), Petronas (Malaysia).

Ten years later we observe that some of those early predictions have not materialized. The most interesting case is the US. In 2008 the US oil production started to grow at a staggering rate of 60 percent. Since 2010 US gas production also grew by 25 percent, making the US a powerful energy producer no longer dependent on imports (Morse, 2014). This development has been largely explained by the use of the fracking technology (technique of injecting liquid at high pressure into deep-rock formations to create and force open existing cracks and extract oil or gas), which is successful in reaching previously untapped supplies, but also quite expensive as it produces negative environmental externalities (Krupp, 2014). By taking advantage of this technology, the US has made a remarkable turnaround in asserting its strong position as an energy producer. Yet other actors cannot be ignored. In the late summer of 2018 combined oil production of all OPEC Members continued to be impressive at 32.6 million barrels a day (Smith, Lee, & Mahdi, 2018). However, the OPEC’s internal conflicts persist and Venezuela is essentially a failed state in 2018.

Countries with abundant oil supplies may not be successful economies overall. The argument about the resource curse rings true for economies, who become dependent on their resources such as Nigeria, Angola, and Venezuela (Murshed, 2018). In countries where state-owned oil companies, finance the state budget the price of oil has a political dimension. Diminishing oil revenues were arguably behind the 2016 announcement by the Saudi Arabia about the proposal to sell shares of its state-owned Aramco. Two years later, however, the deal seems uncertain. Coincidentally, the US companies are experiencing infrastructure problems (Crooks, 2018). Saudi Arabia still continues to produce about 10 percent of global oil, although its bargaining power is diminished (Blass & Kennedy, 2018). The same time, oil production from non-OPEC countries has overtaken OPEC and currently represents about 60 percent of world oil production. Given the instability of energy markets even China is in a challenging position since it is the world’s biggest importer of oil and gas (EIA, 2018).

The present situation on the energy markets is volatile as ever, but it is also peculiar. A number of factors recently converged to provide an impetus for a coordinated approach to energy security among interested countries. These factors are: 1) the weakening of OPEC, and its gatekeeper Saudi Arabia, as a major force impacting world’s energy market; 2) the emergence of the globally influential state-owned oil companies, most notably in Russia, China, Brazil, and Iran; 3) remarkable growth of the US as a major oil and gas producer; 4) absence of one dominant player in the energy markets capable of unilaterally influencing these markets. The convergence of these factors created a more

equal level-playing field for both exporters and importers of oil while making each of them individually more vulnerable to price fluctuations. Such unusual Geo-economics of oil invites cooperation among interested countries to prevent the continuation of systemic uncertainties and raising costs. In this context, the time is right to launch a negotiating group aimed at cooperation on global energy matters. The first step is to create an agreement on energy related services. Anchored within the WTO's legal system the proposed agreement may progress towards a more substantial international deal on energy.

2.4 Future Possibilities: Commodity Agreement on Energy

Can a modest WTO agreement on energy related services lead to more substantial negotiations aiming to produce a commodity agreement on energy—a deal between producers and importers? It is difficult to say, but GATT started as a provisional deal among 23 countries and grew into a major force of economic globalization. Early pioneers of international economic cooperation tried to address the issue of primary commodities. The challenges associated with creating formal international arrangements that manage trade in commodities were recognized early on. The ambitious 1948 Havana Charter that was supposed to constitute the framework of the International Trade Organization (ITO) contained a separate chapter (Chapter VI) dedicated to intergovernmental commodity agreements. The ITO never materialized because the Havana Charter was effectively abandoned when it became clear that the US Administration would not ratify it. However, it is useful to revisit those provisions of the Charter that relate to commodities as they ring true so many years later.

Chapter VI of the Havana Charter begins with the following two articles.

Article 55: Difficulties relating to Primary Commodities

The Members recognize that the conditions under which some primary commodities are produced, exchanged and consumed are such that international trade in these commodities may be affected by special difficulties such as the tendency towards persistent disequilibrium between production and consumption, the accumulation of burdensome stocks and pronounced fluctuations in prices. These special difficulties may have serious adverse effects on the interests of producers and consumers, as well as widespread repercussions jeopardizing the general policy of economic expansion. The Members recognize that such difficulties may, at times, necessitate special treatment of the international trade in such commodities through an intergovernmental agreement.

Article 56: Primary and Related Commodities

1. For the purposes of this Charter, the term “primary commodity” means any product of farm, forest or fishery or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

These two articles indicate that the main reasons behind including a special chapter on commodities were: 1) the need to have stable and predictable commodity prices in the world's markets, 2) the hope to maintain the adequate supplies without creating over-supply or to prevent shortages. It is worth noting that Article 56 defines “primary commodity” and by doing so it creates a separate category

distinguished from manufactured goods.

The Charter's negotiators supported the establishment of commodity agreements that would include both producing and consuming countries. Article 57 provides the relevant explanation why such agreements should be created:

Article 57: Objectives of Inter-governmental Commodity Agreements

The Members recognize that inter-governmental commodity agreements are appropriate for the achievement of the following objectives:

- (a) to prevent or alleviate the serious economic difficulties which may arise when adjustments between production and consumption cannot be effected by normal market forces alone as rapidly as the circumstances require;
- (b) to provide, during the period which may be necessary, a framework for the consideration and development of measures which have as their purpose economic adjustments designed to promote the expansion of consumption or a shift of resources and man-power out of over-expanded industries into new and productive occupations, including as far as possible in appropriate cases, the development of secondary industries based upon domestic production of primary commodities;
- (c) to prevent or moderate pronounced fluctuations in the price of a primary commodity with a view to achieving a reasonable degree of stability on a basis of such prices as are fair to consumers and provide a reasonable return to producers, having regard to the desirability of securing long-term equilibrium between the forces of supply and demand;
- (d) to maintain and develop the natural resources of the world and protect them from unnecessary exhaustion;
- (e) to provide for the expansion of the production of a primary commodity where this can be accomplished with advantage to consumers and producers, including in appropriate cases the distribution of basic foods at special prices;
- (f) to assure the equitable distribution of a primary commodity in short supply.

Clair Wilcox, who was at the head of the American negotiating team, was aware that the Havana Charter was quite generous in allowing countries to retain a considerable degree of autonomy in regulating domestic economies. Indeed, Wilcox's critics thought that the Havana Charter risked undermining the principles of free trade by providing too many exemptions from the rules. Wilcox, however, understood that it would be impossible for major trading nations to resist helping domestic businesses. In his own words: "There is no hope and no danger that such negotiations would result in the elimination of all protective barriers. The world can move toward freer trade without going all the way to free trade. No nation has proposed and none is ready to adopt complete free trade" (Wilcox, 1949, pp. 190-191). This sensible approach led Wilcox to seek a compromise that would appease both sides of the debate over the extent of protectionist measures permitted by the Havana Charter. In particular, some sensitive economic sectors were identified, such as agriculture, mining, and oil

exploration. The negotiators were aware that many countries due to their geographical disadvantage would rely on imports of commodities. Consequently, one of the avenues pursued by the Charter's negotiators—in order to protect the non-discriminatory trade—was an international commodity agreement (Wilcox, 1949, p. 115).

The Havana Charter provided its signatories with the flexibility to create commodity agreements as needed and as long as these agreements could be justified by the general principles of the Charter. In the end, the Havana Charter was never ratified by the US and the ITO never materialized. Peter Kenen believes that the growing resistance against the ITO in the US had to do with the fact that Charter allowed for too much government intervention. Other countries had problems with its excessive exemptions that in effect nullified the idea about having a fundamental set of multilateral rules (Kenen, 1994, p. 14).

The fiasco of the Havana Charter did not destroy the emerging world trading system because of the previous adoption of the GATT. The GATT consisted of 38 legal provisions closely derived from Chapter IV (*Commercial Policy*) of the Havana Charter. The GATT was meant to protect the results of technical meetings, which took place in 1947. During these meetings the representatives from twenty-three countries conducted 123 bilateral tariff-cutting negotiations resulting in about 50,000 tariff cuts, with the average tariff being cut by 35 percent (Odell, 2000, pp. 162-164). The GATT was accepted by means of adopting the Protocol of Provisional Application but stayed in place until 1995 when it was absorbed into the WTO.

Under the GATT agreement (which is still an integral part of the WTO) general exceptions are listed as GATT Article XX. This is what became of Havana Charter Article 45 Paragraph (ix) under the GATT system:

GATT Article XX (h)

(h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;

It is somehow surprising that the framers of the GATT decided to keep the provision allowing to create commodity agreements despite the fact that this issue was so divisive during the Havana Charter negotiations. Subsequently, it is possible to establish commodity agreements under the WTO since GATT remains firmly in place as the foundational part of the WTO legal framework.

3. Conclusion

The possibility of negotiating open plurilateral agreements under its purview makes GATS particularly appealing as an instrument facilitating international economic cooperation. The WTO is a rules-based organization operating on the principle of single undertaking. In the recent years, this principle, which means the obligatory implementation of all negotiated multilateral agreements by all WTO Members, has become quite problematic. Therefore, a plurilateral WTO agreement on energy related services will

not only benefit economies seeking improvement on energy security issues. Focused plurilateral talks can overcome the stalemate in the WTO. An open plurilateral agreement negotiated within the GATS architecture would revitalize cooperation among interested WTO Members by encouraging participants to make commitments they are capable of implementing. This kind of flexibility needs to be re-introduced into the world's trading system given the diverse interests of WTO Members. The time is ripe to move beyond Doha and try to advance multilateralism in the WTO by pursuing open plurilateral solutions.

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