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Exploring Future Application of Plurilateral Trade Rules: Lessons from the ITA and the ACTA

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Abstract

Since the establishment of the WTO in 1995, major changes and liberalization of its rules have been realized by issue-based plurilateral agreements, as exemplified by the Financial Services and Telecommunication Services Agreement, the Information Technology Agreement (ITA), and the Anti-Counterfeiting Trade Agreement (ACTA). The WTO Doha Round is in a stalemate under the principle of consensus decision making and a single undertaking, leading to accelerating competition among free trade agreements (FTAs)/regional trade agreements (RTAs). In order to maintain global governance of the trade regime, the necessity for utilizing issue-based plurilateral agreements is expected to increase. Based primarily on the analyses of the ITA and the ACTA in which the author was heavily involved, this paper looks at the various issues related to issue-based plurilateral agreements from multi-faceted angles including legal and proposes the utilization of plurilateral agreements and their limitations. It analyzes, inter alia, 1) Necessity and Characteristics, 2) Incorporation into WTO Agreements and Limitations, 3) Ensuring Consistency with Existing WTO Agreements and Limitations, 4) Relationships with Non-participating WTO Members in Rights and Obligations, 5) Secretariat Functions, 6) Incentives for Non-participants to Participate, and so forth, and also proposes possible specific areas/issues where issue-based plurilateral agreements can be developed.

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I Introduction

1 Issues

The regime of the General Agreement on Tariffs and Trade (GATT) was founded on two types of rules: the GATT 1947, in which all member states participate, and “codes,” which refer to a series of non-MFN (most favoured nation) based agreements binding on limited groups of participating member states. The Kennedy Round (1964–1967) and the Tokyo Round (1973–1979) produced a number of codes, namely, the Agreement on Subsidies and Countervailing Measures, the Anti-dumping Agreement, the Agreement on Technical Barriers to Trade, the Agreement on Import Licensing Procedures, the Customs Valuation Agreement, the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement, and the International Bovine Meat Agreement. These codes have since been functioning fairly well.

At the same time, however, the number of subscribing countries was not necessarily large even for key agreements and generally ranged from 10 to 40 out of the 128 member states.¹ The situation changed dramatically through the Uruguay Round, resulting in the launch of the World Trade Organization (WTO).

The Uruguay Round concluded at the end of 1993, and the WTO came into being in 1995. The single undertaking principle, adopted at the conclusion of the

¹ Among 128 contracting parties (as of June 1, 1995), 18 subscribed to the Agreement on Subsidies, 24 to the Anti-dumping Agreement, 38 to the Agreement on Technical Barriers to Trade, 26 to the Agreement on Import Licensing Procedures, 18 to Customs Valuation Agreement, 18 to the Agreement on Trade in Civil Aircraft, and 13 to the Agreement on Government Procurement (quoted from “GATT Analytical Index”).

Uruguay Round, tremendously strengthened the rules regarding the rights and obligations of WTO member states and enhanced the stability and predictability of the global trading order in comparison to the pre-WTO period (i.e., the GATT 1947 era). However, from the viewpoint of at least some of the developing countries, this meant making commitments beyond their capacity and accepting enforcement of rulings of the WTO Dispute Settlement Body.

The universality of rules under the WTO agreements should offer a high level of predictability and stability to member states and their industries, provided that they have capacity for implementing the rules. Under the present situation in which many developing countries are without such capacity, however, the universality of the rules is an obstacle preventing the WTO from flexibly dealing with new economic issues.

After the creation of the WTO in 1995, the Information Technology Agreement (ITA) was concluded in 1996, followed by the Financial Services Agreement and the Basic Telecommunication Agreement—both of which had been inherited from the Uruguay Round as part of the built-in agenda—in December 1997 and February 1997 respectively.

All of them were concluded as issue-based plurilateral agreements by a limited number of like-minded countries, not as agreements applicable to all WTO members. It may be said that these plurilateral agreements are the foremost achievements since the creation of the WTO.

After these three plurilateral agreements came into force, the WTO launched a negotiation round, the Doha Round, in 2001.

However, the negotiations under the Doha Round have been nothing but stagnant. 11 years into them, there are no signs of any prospect for the conclusion of the round. The Eighth WTO Ministerial Conference in December 2011 could not set a direction for the future of the Doha Round either.

The current round is known as the Doha Development Agenda, and it is needless to say that developing countries play a key role in the negotiations. However, the current negotiation mechanism, which requires 157 WTO

members to accept the outcome of negotiations as a single undertaking and provides each of them with veto power, has been causing delays and stalemates in the negotiation process.²

Under such circumstances, member states are losing their confidence in the WTO as a vehicle for making global trade rules and promoting liberalization. In the meantime, the “FTA competition” is intensifying as more governments and business communities look to free trade agreements (FTAs) as a means to gain benefits. The number of FTAs reported to the WTO has reached 505.³

It is only natural for those in the business community to feel that they cannot afford to continue to rely solely on the WTO, which has been unable to make tangible progress in liberalization and rulemaking 18 years after the completion of the Uruguay Round.

Issue-based plurilateral agreements are multinational agreements just like FTAs. Plurilateral frameworks have the potential to break the ongoing impasse in the WTO Doha Round and change the current international trading system.

A recent achievement of this plurilateral approach is the conclusion of the Anti-Counterfeiting Trade Agreement (ACTA), for which Japan has been an advocate and took the initiative in the negotiation. Its signing ceremony was held in October 2011 in Tokyo with major participating countries.

Coming at a time when the Doha Round continues to face a difficult situation, the successful conclusion of the ACTA suggests the possibility of promoting rulemaking and liberalization under an issue-based plurilateral framework, as an additional channel complementary to the multilateral approach under the WTO and efforts through FTAs.

Plurilateral agreements are expected to reduce excessive reliance on FTAs and provide a stimulus to sustain a return to multilateralism.

² Russia, Montenegro, Samoa, and Vanuatu joined the WTO at the Eighth WTO Ministerial Conference, bringing the total number of WTO members to 157.

³ As of November 15, 2011

This paper aims to analyze the positive roles that issue-based plurilateral agreements, as an additional framework complementary to the WTO and FTAs, have played in rulemaking and liberalization in the area of international trade, thereby exploring the future prospects and possibilities of the plurilateral approach.

The scope of discussion on plurilateral agreements is confined to trade-related issues. Also for the purpose of this paper, the term “plurilateral” as in issue-based plurilateral agreements is defined as indicating the involvement of “three or more” countries, with a view to their contribution to rulemaking and liberalization in trade. Furthermore, the discussion on trade-related issues is made within the scope associated with rulemaking and liberalization under the WTO with an aim to link the resulting suggestions to the international trade system with the organization as its center and the improvement of its governance.

The relationship between multilateral agreements and plurilateral agreements on trade-related issues is as shown in Attachment 1. This paper examines plurilateral agreements (shaded in gray in Attachment 1) from various points of view.

Regional trade agreements (RTAs) and FTAs are “country-based” plurilateral agreements that are, in principle, required to liberalize “substantially all trade”⁴ and have “substantial sectoral coverage.”⁵ In contrast, plurilateral agreements to be considered in this paper are “issue-based (or issue-oriented)” plurilateral agreements.

Among the above mentioned issue-based plurilateral agreements, the Information Technology Agreement (ITA) is subject to a case study to illustrate the reality, success factors, legal form, and problems of or associated with plurilateral agreements, as the author of this paper was involved in every stage of the ITA negotiation as a representative of Japan. The author also led a team of Japanese delegates for ACTA negotiations from the latter half of 2005 to August 2008. Thus, the paper examines the ACTA as another case study, focusing on

⁴ GATT Article XXIV

⁵ GATS Article V

the experience of such direct involvement in the negotiations and relevant facts.

The main features of WTO, FTAs, and issue-based plurilateral agreements are summarized in Attachment 2 as a reference (details are discussed in this paper).⁶

⁶ For the historical orientation of the GATT and the WTO, which is discussed later in this paper, see also Attachment 3.

II Case Study: ITA

1 Background

During the Uruguay Round, Japan called for the abolition of tariffs on electric appliances but was met with strong opposition mainly from the European Union. The Uruguay Round negotiators agreed basically on tariff reductions instead of tariff elimination in the area.

On the domestic front, there were mounting calls from the industry urging the government to press for further reductions and elimination of overseas tariffs on electric appliances, a major export item, since Japan had already eliminated almost all tariffs in this area ahead of other countries.

Meanwhile, the U.S. and European industries—i.e., electric appliance and electronics manufacturers—were showing intense interest in further reductions and elimination of tariffs.

2 History

1) Proposal from Industries

Against this background, the U.S. industry, including the Information Technology Industry Council (ITI), put forward a proposal in February 2005 calling for the abolition of tariffs in the field of information and communication. The Japanese and European industries joined in this initiative, leading to a joint proposal for tariff elimination. This marked the beginning of discussions that eventually led to the ITA.

In the summer of 1995, the United States and the EU held dialogue without preparing any product lists. In the meeting of the TransAtlantic Business Dialogue (TABD) held shortly afterward, the business communities and governments of the United States and the EU confirmed their intentions to promote the removal of tariffs in the information technology (IT) sector.

In the New Transatlantic Agenda (NTA) adopted at the EU-U.S. summit in December 1995, the launch of specific work toward the conclusion of an IT agreement was officially declared. Then, in concluding their GATT Article XXIV:6 negotiations (for compensation) in the same month following the 1995 EU

enlargement (in which three North European countries acceded), the United States and the EU agreed to pursue such an agreement with Quad partners (Japan and Canada) and through other forums.

The Japanese government and industry were yet to be involved at that point in time.

2) Japan's Participation and Developments toward the Quadrilateral Trade Ministers' Meeting in Kobe (April 1996)

Turning to 1996, the United States and the EU brought forth a fundamental discussion intended to produce an agreement on tariff elimination in the IT sector, for instance, taking the opportunity of the Quad meeting on market access⁷ as a forum for government-level talks. The author, then Director of the Tariff Division, International Economic Affairs Department, International Trade Policy Bureau, Ministry of International Trade and Industry (MITI), was deeply involved in the process. Japan, although it was asked for its support, avoided clarifying its position on the matter due to the lack of clarity regarding the proposed agreement.

At the same time, however, MITI started considering how to respond to this ITA effort at the government level.

As a consequence, it was decided that Japan should support the ITA initiative and participate in the negotiation because:

- (1) Tariffs in the IT field were almost zero,
- (2) It had to produce a tariff initiative in preparation the First WTO Ministerial Meeting in Singapore in 1996, and
- (3) Tariff elimination in the electronics sector was one of the country's goals in the Uruguay Round.

From January to February 1996, the United States provided a list of products it targeted for tariff reduction. The EU expressed its intention to consider the list but offered no specific comments. Japan, on the other hand, found no essential problems in the list of products (mainly computers, semiconductors, semiconductor manufacturing equipment, and telecommunication apparatus),

⁷ This meeting was held in Geneva by trade officials from the Quadrilaterals (the United States, the EU, Japan, and Canada) in preparation for the WTO Singapore Ministerial Meeting.

but also explored the possibility of adding consumer electronics, one of the areas for which it had been insisting on for tariff elimination.

As anticipated, the EU raised opposition to the inclusion of consumer electronics, for which its tariff rates were kept as high as 14%, and the region's consumer electronics industry was firmly opposed to tariff elimination.

It is widely known that the EU still maintains this high tariff rate, constituting a key tariff barrier.

Concerted efforts at the industry level were essential in considering the technical aspects of the proposed ITA for its realization. For this purpose, a working group was set up under the initiative of the Japanese Electronic Industry Development Association (JEIDA) around February 1996. This strong support from the Japanese industry and its collaboration with its counterparts from the other Quad countries played a vital role for the creation of the ITA.

Just before the Kobe Quadrilateral Trade Ministers Meeting in April 1996, MITI's Machinery and Information Industries Bureau was informed by the European Commission (EC) of its intention to participate in the ITA under the following conditions:

- (1) Reducing tariffs in areas other than IT,
- (2) Including non-tariff issues as subject to ITA negotiations, and
- (3) Inviting the EU to the Semiconductor Council (SC).

The background of this was that the EU, keeping generally high tariff rates on IT products, was certain to end up with a net duty loss from the proposed ITA package of tariff elimination.

At that point, however, the EU did not provide the details of its demand for tariff reductions in areas other than IT. Regarding non-tariff measures, it cited the conclusion of a mutual recognition agreement (MRA), the protection of intellectual property rights, and the harmonization of standards as examples but fell short of providing specifics.

On April 16, 1996, right before the Quadrilateral Trade Ministers' Meeting in

Kobe, industry representatives from the Quad countries—the ITI, EUROBIT, the JEIDA, and the Information Technology Association of Canada (ITAC)—gathered in Geneva for the so-called GII (Global Information Infrastructure) meeting. It was confirmed then that Quad industries were not asking for tariff reductions in areas other than IT or the inclusion non-tariff issues as subject to ITA negotiations.⁸

This indicated that the inclusion of non-tariff issues, requested by the EC, was not in line with the interest of the EU industries.

At the Kobe Quadrilateral Trade Ministers' Meeting, U.S. Trade Representative Charlene Barshefsky and EU Trade Commissioner Sir Leon Brittan had a heated discussion on the treatment of non-tariff issues and tariff reductions in non-IT areas. Both of them went so far as to draft a communiqué personally, but no specific conclusion was reached.⁹

3) Developments toward the Quadrilateral Trade Ministers' Meeting in Seattle (September 1996)

Following the Kobe Quadrilateral Trade Ministers Meeting, work on the ITA initiative was halted as the EU, following Brittan's policy, refused to cooperate unless the semiconductor issue (such as the EU's participation in the SC) was resolved in a satisfactory manner. The work under the Quad framework remained suspended till the next ministerial meeting in Seattle.

In the meantime, however, the promotion of the ITA initiative was referred to in a series of important meetings held in 1996, namely, the Ministerial Council Meeting of the Organisation for Economic Co-operation and Development (OECD) in May, the Lyon Summit in June, and the Trade Ministers' Meeting of the Asia-Pacific Economic Cooperation (APEC) in July.

At the working-level Quad meeting on market access in Geneva, which was held in the run-up to the Quadrilateral Trade Ministers' Meeting in Seattle in

⁸ See the communiqué issued by the Quad industries in Attachment 4.

⁹ On April 21, 1996, the communiqué issued at the Kobe Quadrilateral Trade Ministers' Meeting includes only the following: "We, the Quad, strongly support the negotiation of an Information Technologies Agreement (ITA), which is an initiative for trade liberalization in the IT industry, and reaffirm our efforts towards its realization on the basis of mutual benefit."

September 1996, a scenario for the WTO Ministerial Meeting in Singapore was discussed. In addition to the ITA initiative and the expansion of the list of pharmaceutical items subject to reciprocal tariff elimination under the so-called zero-for-zero initiative proposed by some countries, matters in areas for which the U.S. government had been given a mandate to negotiate (e.g., chemical goods, scientific instruments, paper, and oilseeds) were assessed for the probability of successful outcomes in an effort to put together a negotiation package.

In the course of this process, Japan tried to drive the negotiation to focus on the areas of IT and pharmaceutical products in order to prevent the ITA initiative from extending to non-IT areas and creating a Christmas tree situation.

At the Quadrilateral Trade Ministers' Meeting in Seattle in September, Japan, the United States, and the EU confirmed that they would work together to conclude an ITA before the WTO Ministerial Meeting in Singapore in December, and that the EU would join the cooperative efforts in the area of semiconductors subject to the successful conclusion of an ITA.¹⁰

4) Developments toward the WTO Ministerial Meeting in Singapore (December 1996) and the Conclusion of the ITA

After the ministerial meeting in Seattle in September 1996, the Quad countries resumed work at the experts' level to consider specific items proposed for inclusion in the ITA coverage. Within the month, the EU proposed a list of items, which became the basis for subsequent discussions on product coverage.

Non-tariff Issues

With this proposal (put forward on September 28), the EU revived its demand for the inclusion of non-tariff issues in the ITA coverage. In particular, the EU cited government procurement in telecommunications as an issue of special concern.

Faced with objections from Japan and developing countries, the EU dropped the idea of focusing on government procurement in telecommunications and

¹⁰ See Attachment 5 regarding the agreement on the ITA initiative between Japan, the United States, and the EU at the Quadrilateral Trade Ministers Meeting in Seattle.

instead made a new proposal calling for including non-tariff issues in general within the ambit of an ITA (November 17).

At this stage, the discussion on the following points was initiated among Quad countries:

- (1) Whether or not to include result-oriented provisions;
- (2) Whether or not to accept WTO-consistent non-tariff measures;
- (3) How to deal with not only measures currently in force but also situations that exist as a result of measures taken in the past;
- (4) Whether or not to make rules on non-tariff measures bound by the schedule of concessions (i.e., whether or not to make non-tariff issues subject to dispute settlement); and
- (5) How to deal with non-violation nullification of benefits (NVNB) claims.

Below are the basic positions held by the Quad countries at that time on each of the issues listed above:

- (1) Japan was strongly opposed to the inclusion of result-oriented provisions because of its belief that tariff abolition does not necessarily lead to quantitative market access improvement and its bitter experience with numerical targets and result-oriented approaches in its relationships with the United States and the EU. Needless to say, Japan was also concerned that the inclusion of result-oriented provisions would cause developing countries to hesitate to participate in the ITA.
- (2) Japan, the United States, and Canada insisted that WTO-consistent non-tariff measures should be accepted, thus opposed to the EU.
- (3) Japan, the United States, and Canada objected to the EU which insisted that situations and the impact of past measures should be made subject to rules on non-tariff measures.
- (4) The EU set forth its position that non-tariff measures should be made subject to concessions, and any violation of the rules on non-tariff measures referenced above should be subject to dispute settlement. Japan objected, noting that including non-tariff measures in the schedule of concessions would lead to the creation of new super agreements on government procurement, technical barriers to trade (TBT), etc. that would go beyond the WTO agreements and that such inclusion is tantamount to launching a new negotiation at this stage. Canada also

objected and the United States expressed concerns.

- (5) The EU insisted that ITA provisions should include those on NVNB cases so as to make them subject to dispute settlement. Japan devoted efforts to eliminate any wording that may provide basis for result-oriented claims, because the lack of market access improvement could be considered to constitute an NVNB case.

Linkage with Tariff Abolition in Non-IT Areas

In October, preparatory work for the WTO Ministerial Meeting in Singapore went into full gear in Geneva. In this process, Japan tried to seek consensus from other countries concerned in the direction of citing only the ITA (and pharmaceutical products) as accomplishments in the area of market access in the Ministerial.

Legal Form of the ITA

Meanwhile, no progress had been made in discussions on the legal form that the proposed agreement should assume. It was not until October 9 that the first basic proposal was made regarding the general direction.

Around the same time (October 28), Japan proposed concluding an agreement in the same manner as the Agreement on Pharmaceutical Products (Record of Discussion) but failed to elicit meaningful discussion. (Under the method proposed by Japan, each signatory member would define its tariff elimination commitments in the form of Record of Discussion communication and incorporate such commitments in its schedule of concessions for implementation. For details, see Attachment 6.)

In the end, it was agreed that each participating member should modify its schedule of concessions to reflect the Ministerial Declaration on Trade in Information Technology Products (hereinafter referred to as the "ITA Declaration"), which itself is not legally binding. This conclusion was reached only after many twists and turns.

Product Coverage

The United States and the EU continued to be at loggerheads over the coverage of products, while Japan insisted on the exclusion of electrical wires. As such, it

was determined that the matter should be settled at the Ministerial Meeting in Singapore.

The EU initially proposed a list of products for tariff elimination defined by the Harmonized System (HS) as Annex I-A, a list of products for tariff elimination defined by words as Annex I-B, and a list of products exempted from tariff elimination as Annex II. However, as a result of discussions, it was agreed that a list of products for tariff elimination defined by the HS as Attachment A and a list of products defined by words and subject to tariff elimination regardless of HS classification as Attachment B should be created and that there should be no list of products exempted from tariff elimination.

Regarding products listed in Attachment B, the inclusion of the phrase, “wherever they are classified,” based on Japan’s proposal¹¹ turned out to have a significant impact in future disputes over tariff classification. This effectively paved the way for bringing disputes over the tariff classification of products listed in Attachment B to a WTO panel for settlement.¹²

Participating Countries

The Quad took the same view that the expansion of participating countries was necessary for the success of the ITA and hosted a series of presentation meetings in Geneva, starting from October.

At the APEC Ministerial and Leaders’ Meetings in Manila in November 1996, Japan and the United States jointly called on other APEC members to participate and earned their support for the ITA. This gave momentum to the drive for an increase in the number of participating countries.

During the Singapore Ministerial Meeting in December, EU Trade Commissioner Brittan and U.S. Trade Representative Barshefsky had several sessions of negotiations and eventually reached an agreement on product coverage. On the issue of non-tariff measures, compromise was made referring to obligations

¹¹ October 28

¹² Concerned of the possibility that the list of products defined by words could cause confusion or manipulation on the part of customs agents, Japan insisted on the use of HS codes to the maximum extent possible, limiting definitions by words to those products for which HS codes are not available.

under GATT Article XXIII. The EU softened its position on non-tariff measures. The United States also accepted the language presumably based on the reasoning that non-tariff measures were beyond its mandate for negotiations. A consultation clause on non-tariff measures was also included as part of the ITA Declaration.

Eventually, the ITA Declaration (see Attachment 7) was adopted at the WTO Singapore Ministerial Conference, and 29 economies expressed their intention to participate. This became the basis for the ITA.

(Note: The 29 economies are: Japan, the United States, Canada, 15 EU member states, Hong Kong, South Korea, Indonesia, Taiwan, Australia, Norway, Singapore, Switzerland, Lichtenstein, Turkey, and Iceland.)

5) Developments in 1997 and Entry into Force of the ITA

In late January 1997, a technical meeting was held in Geneva where it was determined to uphold the Singapore Ministerial Declaration version of the list of products, and exceptions to (or flexibility on) the staging of tariff reductions were discussed and adjusted.

In February, the staging issues of Thailand and Malaysia were settled. Then, at the review meeting held on March 26, the participation of 40 economies—together accounting for more than 92% share of world trade in IT products—was confirmed, clearing the approximately 90% trade coverage criteria. Hence, it was officially decided that the ITA would be entered into force.

3 Agreement¹³

Twenty-nine economies (including 15 EU countries) agreed to remove tariffs on IT products by 2000 in the ITA Declaration issued at the Singapore Ministerial Meeting.

In line with this accord, it was agreed upon to decide before April 1, 1997 on whether the ITA should be brought into force.¹⁴

Criteria for the entry into force of the ITA are:

- (a) Participants representing approximately 90% of world trade in IT products

¹³ See Attachment 8.

¹⁴ The ITA Declaration has no legal binding force despite its name.

- have notified their acceptance of the agreement (critical mass criteria);
and
- (b) Staging of tariff reductions has been agreed to the participants' satisfaction.

Covered products include: semiconductors, computers, telecommunication apparatus, and semiconductor manufacturing equipment. Their definitions were provided in the form of Attachment A (list of products defined by HS codes) and Attachment B (list of products defined by words and covered by the ITA regardless of tariff classification).

It was also decided upon to have regular meetings to review the existing product coverage for possible modifications in the light of technological developments and changes to the HS nomenclature (see paragraph 3 in Annex to the ITA Declaration).

Attachment B was intended to deal with differences among tariff classifications of participating countries and to prevent changes to the HS nomenclature from affecting the scope of concessions. However, major disputes arose later over the scope of concessions.

The following were agreed upon concerning the schedule of tariff elimination:

- (a) In principle, elimination of tariffs should take place through rate reductions in equal steps over four stages between July 1997 and January 2000.
- (b) Some developing countries were entitled to the extended staging of tariff reductions on some products for elimination by 2005 (as a result of a technical meeting).

4 Demands for Tariff Reductions and Compensation in Non-IT Areas and the ITA

As explained in the History section, discussions on the ITA took place in parallel with the market access negotiations in the run-up to the WTO Ministerial Conference in Singapore. In the light of strategies in international tariff negotiations, it might have been natural for the EU—for which the elimination of tariffs in the area covered by the ITA would result in a net duty loss—to demand tariff reductions in non-IT areas in the early stage of the ITA negotiations.

However, the ITA would never have been concluded if such demand had been accepted.

It should have been impossible to adjust duty gains and losses across countries in the short period before the WTO Ministerial Conference in Singapore while, at the same time, obtaining the participation of many countries. Also, as discussed above, the Quad IT industries were not demanding tariff reductions in other areas.

One of the biggest factors for the successful conclusion of the ITA is the effort to define it as a standalone initiative and to separate it from demands for compensation and tariff reductions in other areas.

5 Non-tariff Issues

As discussed in the History section, the treatment of non-tariff measures was another focal point in the ITA negotiations. The EU insisted on including this issue in the coverage of the ITA. Again, if such measures had been made subject to negotiation as requested by the EU, it must have been impossible to strike a deal in time for the WTO Ministerial Conference in Singapore.

The term “non-tariff measures” can be interpreted as “all measures other than tariffs,” and it is no exaggeration to say that non-tariff issues concern the entire scope of the WTO. There could not be any simple solution to address them.¹⁵

Japan’s intention behind its objection to tariff reductions in other fields and the inclusion of non-tariff issues was to make the ITA “less demanding,” and by doing so, to gain as many participating countries as possible.

While sharing the common goals of increasing the number of participating countries and realizing the ITA, the Quad countries continued painstaking negotiations to the last minute, anguishing over how non-tariff issues should be referenced in the ITA Declaration from a legal point of view. Eventually, they managed to settle on the wording of non-tariff provisions that would do no harm in practice yet satisfy the EU which needed to persuade its member states.

¹⁵ Likewise, it is not surprising at all that non-agricultural market access (NAMA) negotiations on non-tariff barriers (NTB) under the Doha Round have been facing difficulties.

In the meantime, Japan, the United States, and the EU managed to settle the issues of semiconductor collaboration, which had been negotiated in parallel with the ITA negotiations, in a manner that provided a gain for the EU in the non-tariff area. This probably led to changes in the EU's stance in the ITA negotiations. It is assumed that progress made in the area of telecommunications (such as the EU-South Korea framework agreement in November 1996 and progress in the WTO negotiations on market access for telecommunication services) also helped soften the EU's stance.

The wording of non-tariff provisions in the ITA Declaration issued at the WTO Ministerial Conference in Singapore is as shown below:

ANNEX

3. ... (*abbreviated*) ... and to consult on non-tariff barriers to trade in information technology products. Such consultations shall be without prejudice to rights and obligations under the WTO Agreement.

6. The participants understand that Article XXIII of the General Agreement will address nullification or impairment of benefits accruing directly or indirectly to a WTO Member participant through the implementation of this Declaration as a result of the application by another WTO Member participant of any measure, whether or not that measure conflicts with the provisions of the General Agreement.

Paragraph 3 above is intended to enable consultations on non-tariff issues separate from the WTO dispute settlement. Regarding paragraph 6, the following points should be noted:

- (1) Nullification or impairment of benefits to a WTO member will be dealt only when it was caused "as a result of the *application* by another WTO Member participant of any measure," which means the "maintenance" of certain situation resulting from a measure taken in the past is not considered. Non-tariff barriers are defined as "measures."
- (2) The first sentence starts with "The participants understand" and uses "will" instead of "shall" that implies obligation.
- (3) The phrase, "whether or not that measure conflicts with the provisions of

the General Agreement,” indicates the coverage of both violation and non-violation cases. However, this is no more than a confirmation of GATT Article 23 (this article covers non-violation cases anyway). As long as this paragraph is just a confirmation, it is not a problem.

(4) Result-oriented provisions are not included.

As such, the wording of the ITA was set in a manner that would neither lead to the creation of a new set of rules for non-tariff measures nor make them subject to the WTO dispute settlement process. In addition, the inclusion of provisions that would have led to the creation of super agreements affecting the entire spectrum of non-tariff issues in the IT area was avoided. With this, the dispute over the treatment of non-tariff issues, which could have affected prospective participants’ decisions and hence the achievement of the critical mass participation, was brought to a successful end.

6 Legal Constraints on Making Changes to WTO Agreements

What became clear in the course of defining the legal form of the ITA was the rigidity of the consensus-based, decision-making rules and process involved in making changes to WTO agreements to incorporate agreements reached under a plurilateral framework.

To begin with, making amendments to Annex 1 Agreement to which all WTO Members are parties, or adding a new agreement (Annex 1 agreement) to it requires, in principle, consensus among all the WTO members (Article X. 1 of the Marrakesh Agreement Establishing the WTO).

Next, what does it take to establish a plurilateral agreement under the WTO?

Annex 4 to the WTO Agreement provides for the type of agreements that do not assume participation of all members. The Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement fall into this category.

Each of these types of plurilateral agreements has a specific amendment procedure set by its signatories. However, establishing a new Annex 4 agreement requires consensus among all the WTO members (Article X. 9 of the WTO Agreement; no voting provision). It was unrealistic to achieve this within a

limited timeframe as would have been the case in amending any Annex 1 agreement. Because the ITA was eventually defined as an agreement on nothing but a tariff reduction mechanism, all that was necessary was for the signatories to make appropriate changes to their respective schedules of concessions for tariff reductions. Had it been concluded in the manner that also provides for non-tariff measures, it might have been decided that the ITA should be an Annex 4 agreement, a preferable legal form from the viewpoint of clarifying its relations with other agreements.

In order to enable the WTO to respond flexibly to the newly arising needs of its members and their industries, it is considered necessary to review the procedure for creating a new Annex 4 agreement (see IV.3).

7 Technological Progress and Tariff Classification

The area targeted by the ITA is one characterized by particularly remarkable technological progress and innovation. Therefore, defining the product coverage involved close cooperation with industry members.

Tariff classification had been a source of headaches not only for the Japanese IT industry but also for those in the United States and the EU¹⁶. Any agreement reached would be of no help where an importing country applies a tariff classification system that is different from the one provided under the agreement. In the course of the ITA negotiations, a great deal of effort was put into finding ways to avoid the occurrence of such situations.

On October 9, 1996, the EU put forward its tariff classification proposal, and it was decided that two types of product lists—one defining products by HS codes and the other by words—should be created. This decision was made because: 1) tariff classifications varied across countries and regions, 2) a number of disputes were occurring over the tariff classification of new products especially in the IT area (this problem was particularly serious in exports to the EU because tariff rates differed significantly depending on classification), and 3) it was expected that technological progress would continue to give rise to new tariff

¹⁶ Tariff classification problems faced by the U.S. and European IT industries are discussed in detail in *The Information Technology Agreement: Building a global information Infrastructure while avoiding customs classification disputes* by Joseph Tasker and Jr. Brook. J. (INT'L L).

classification disputes in the future.

It was also decided that the ITA should provide for a consultation process to review the tariff classification and discuss the possible expansion of the product coverage (see paragraphs 3 and 5 in Annex to the ITA Declaration).

Throughout the course of negotiations, Japan sought to achieve the broadest possible product coverage within the IT area. At the same time, from the viewpoint of minimizing the occurrence of tariff classification disputes, it insisted that the list of products definable by HS codes should be finalized before the WTO Ministerial Conference in Singapore. Then, regarding those that cannot be defined by HS codes, Japan strongly supported the idea of creating a list of products defined by words and make them subject to tariff elimination “wherever they are classified in the HS.”

8 Background of Agreement

The history of the establishment of the ITA is as discussed above. But then, why was it possible to conclude it over such a short period? Back then, countries around the world were gearing up to the first ever ministerial conference under the WTO, and there certainly was strong enthusiasm for trade liberalization. However, the following factors should also be counted.

1) Sector-specific Approach

It was not long after the completion of the Uruguay Round in 1993 that the ITA initiative was launched. Thus, as a general background, countries were not yet showing much interest in improving comprehensive market access and no sectors other than IT and pharmaceuticals were voicing specific concerns.

Had it not been for this background, many sector-specific market access initiatives would have sprouted, creating a situation that may be described as a “Christmas tree with too many wishes dangling.” In the process leading to the conclusion of the ITA, demands for compensation—such as the one requested by the EU—would have been made, causing serious confusion.

Back then, the Quad countries were busy enough adjusting differences among themselves over the coverage of IT products and the handling of non-tariff

issues. As such, they could not have afforded time for negotiations in a bigger circle—including non-Quad participants—to make adjustments among different demands for compensation toward the WTO Ministerial Meeting in Singapore. The possibility of clinching an agreement on compensation under such circumstances would have been almost zero.

2) Support for the WTO Process and Cooperation among the Quad Countries

ITA discussions were launched shortly after the establishment of the WTO. Therefore, all members—including the Quad countries and others—were sharing strong support for the WTO process and a strong motivation to bring the first-ever WTO ministerial conference to a successful conclusion. It is fair to say that these factors contributed to the successful conclusion of the ITA.

It is true that there was strong confrontation among the Quad countries over the product coverage and the treatment of non-tariff issues. But they shared a strong commitment to the realization of the ITA and the expansion of its membership and, indeed, their concerted efforts were instrumental to the successful conclusion of the ITA.

3) Industry to Industry Cooperation

From the very outset, cooperation among industry members led by the ITI, EUROBIT, the JEIDA, and ITAC, along with the clarification of the goal (i.e., defining the ITA as a tariff reduction initiative), played an important role in guiding the ITA negotiations. Their activities were also crucial to the expansion of participating countries.

4) Circumstances Unique to the IT Sector: Achievement of the critical mass

What enabled the ITA to achieve the critical mass?

First, it should be noted that the Quad countries at the time accounted for about 80% of the world trade in the products covered by the ITA. Importantly, this means that once an agreement had been reached among the Quad countries, all that was required to achieve the critical mass (approximately 90%) and hence bring the agreement into force was to secure the remaining 10% by inviting

some other WTO members.

Second, products covered by the ITA—broadly classified into the four categories of computers, semiconductors, semiconductor manufacturing equipment, and telecommunication apparatus—were seen as “the crude oil of industry” or “the basis of industry” by many countries. Defining them as elements essential to maintaining the overall industrial competitiveness in the global market, many countries found it necessary to lower tariff barriers for those products. In other words, they were afraid that maintaining barriers would make them losers and drive out investments. This sense of crisis also contributed to the realization of the ITA.

Third, the fact that Northern European countries were asked to raise their tariffs on IT products in joining the EU also worked to strengthen EU member states’ support for the ITA.¹⁷

GATT Article I ensures that any commitments undertaken under the ITA would be applicable to all WTO members, including those not participating, on an MFN basis, which presented an option not to participate if a country was not satisfied with the product coverage or staging. In addition, the Quad countries did not make any compromise on the product coverage agreed upon among them. It is surprising that they were able to bring in as many countries as necessary to satisfy the critical mass criteria just by availing some countries of extended staging for a limited number of products.

Since the establishment of the ITA in 1997, the world trade structure has changed drastically. The share of Japan, the United States, and the EU in world trade has declined while that of developing countries such as China, India, and Brazil has been increasing rapidly.

Obviously, sector-specific agreements cannot be concluded if participating countries hold to such ideas as “making other countries remove their tariff barriers” and “turning things to our advantage.” Therefore, it is important to

¹⁷ *The Information Technology Agreement: Building a global information infrastructure while avoiding customs classification disputes* by Joseph Tasker and Jr. Brook. J. (Int’l L). Vol.XXXVI:3, p.928

define the scope and composition of participants, product coverage, and target areas (tariffs and non-tariffs) carefully and thoughtfully so as to ensure that all participating countries will stand to gain economic benefits.¹⁸

Looking at the ITA against three yardsticks measuring the realizability of an international agreement—i.e., the scope of participating countries, the level of ambition, and the timing of realization—to be discussed in more detail in Chapter III (Case Study: ACTA), it was inevitable to lower the level of ambition because the WTO Ministerial Conference in Singapore had been chosen as the timing for the realization of the ITA at the very outset of negotiations and given the premise of achieving a critical mass of approximately 90% of world trade. Thus, there was no space for additional goals such as negotiating rules for “non-tariff issues” and “tariff reductions in non-IT areas” in the first place.

5) Utilization of the APEC

As part of their efforts to expand ITA membership, Japan and the United States took the opportunity of the 1996 APEC Summit in Manila, which took place shortly before the WTO Ministerial Conference in Singapore, to reach out jointly to their APEC partners to participate in the ITA. Their success in securing many APEC economies’ commitment to participate was a critical contribution to ITA membership expansion. Indeed, it was a shared idea of the Quad countries that participation of APEC economies was crucial to achieve the critical mass. Japanese government officials (including this author) also poured themselves into this effort, traveling back and forth between Geneva and Manila to drive the participation of APEC economies.

This is the reason why the ITA is often referred to as a key contributor to liberalization in APEC.

6) Utilizing Comprehensive WTO Knowledge

The ITA involved more than just market access negotiations. It became realized only after considering and clearing various legal issues, which include:

¹⁸ “The Southerland Report” (*World Trade and the Doha Round* by High Level Trade Experts Group (2011), p.40) is proposing not to oblige countries representing less than 1% of world trade in a given sector to participate in the sectoral agreement until their share exceeds 1% in order to facilitate the conclusion of sector-specific tariff agreements. Aside from realizability, this is interesting and worth considering.

procedure for amending WTO agreements, the legal nature of the resulting agreement, the legal nature of concessions, violations and non-violations, problems with tariff classification, and the positioning of non-tariff issues within the WTO.

9 Implications of the Conclusion of the ITA

From the global viewpoint, the conclusion of the ITA meant the elimination of IT tariffs worth \$500 billion (U.S. estimate at the time) and greatly impacted international trade of IT products.

For Japan, it was estimated that Japanese exporters would be able to save 200 billion-300 billion yen on tariffs per year (i.e., duty gain) provided that 80%-90% of the nation's IT product exports (approximately 10 trillion yen in 1995) were to be covered.¹⁹ Meanwhile, customs revenues for the EU and the United States were to decrease by \$1.8 billion and \$1 billion respectively (i.e., duty loss), according to the Japanese government's estimates.

The ITA—particularly the elimination of tariffs on major IT products—has significantly impacted global trade and investment in the IT area.

In Asia, major economies (China, Hong Kong, India, Indonesia, Japan, South Korea, Macao, Malaysia, the Philippines, Taiwan, Singapore, Thailand, and Vietnam at this point, along with Australia and New Zealand from Oceania) promised to eliminate IT tariffs. As a result, IT-related tariff barriers were reduced significantly in the region, greatly contributing to trade liberalization.

This also led to the rapid increase in intermediary goods trade in Asia. The ITA is a big reason why there are no serious tariff escalations in the IT field in East Asia.

¹⁹ See the discourse of Minister of International Trade and Industry on the ITA (December 13, 1996) in Attachment 9.

III Case Study: ACTA

1 Background

The WTO Agreement on Trade-related Intellectual Property Rights (TRIPs Agreement) imposes a degree of discipline on trade in counterfeit and pirated goods. However, TRIPs provisions to this effect are neither sufficient nor clear enough *per se*. Furthermore, the TRIPs Agreement is not implemented satisfactorily, particularly in developing countries, and, as a result, trade in counterfeit and pirated goods remains rampant, causing damage in various forms.

This means that legitimate rights holders are being deprived of profits that should have belonged to them, which may directly lead to the dampening of business motivation to innovate and create. The ongoing situation also poses a serious problem to the general public because counterfeit products can be hazardous to the health and safety of consumers, and illicit trading can become the sources of revenue for criminal organizations.

This gave rise to the notion that more effective and stringent international discipline must be put in place to address damage and risks associated with trade in counterfeit and pirated goods, which is the concept underlying the Anti-Counterfeiting Trade Agreement (ACTA).

2 History

1) G8 Summit in Gleneagles

In response to and in alignment with mounting calls from the business community for action on the proliferation of counterfeit and pirated goods, the Japanese government—with the Intellectual Property Strategy Headquarters playing the pivotal role—advocated for the establishment of an international treaty to combat counterfeiting and piracy. At the Group of Eight (G8) Summit held in Gleneagles, Scotland in July 2005, then Prime Minister Junichiro Koizumi called for international efforts to address counterfeiting and piracy, pointing to the necessity of creating an international treaty to that effect.

Such was the beginning of the ACTA initiative.

However, other G8 countries' responses to the new treaty proposal were far from forthcoming.

2) Support from the United States and G8 Summit in St. Petersburg

With the beginning of 2006, Japan launched major lobbying efforts in a bid to secure more support for its proposal before the G8 Summit in St. Petersburg in July of that year. Government officials travelled to other G8 countries to explain and secure support for Japan's proposal.

At the time, however, the response from Russia, the host country, was nothing but a cold shoulder, and the prospect of making any progress at the summit looked bleak. Japan's efforts vis-à-vis other G8 countries—including the United States, France, Germany, and the United Kingdom—turned out to be more rewarding. Specifically, the United States, which had shown a relatively positive attitude to the proposal, clearly expressed its support in June 2006. Thanks to Japan's diligent spadework and the United States declaring its support, G8 leaders adopted a joint statement on "Combating IPR Piracy and Counterfeiting," whereby instructing experts to "study the possibilities of strengthening the international legal framework" for the enforcement of intellectual property rights (IPRs).

3) EU Participation, Competence/Mandate Problem, and Breaking Out of the G8 Framework

Having introduced its new treaty proposal under the G8 framework, Japan initially focused its lobbying efforts toward the EU on those member states that were also G8 members. However, the European Commission (EC), which is the executive branch of the EU, expressed strong opposition to consulting under the G8 framework and/or without its involvement.

Lying behind the EC's stern opposition was, in essence, the competence problem, i.e., the question of who has the competence to negotiate IPR issues. Apparently, the question of authority over criminal procedures was also involved. Although EU member states had said that each of them had a mandate and competent authority, Japan changed its strategy to focus its efforts on seeking the participation of all of the 27 EU member states, based on the judgment that

doing so would be crucial to creating truly effective international discipline. In line with this new strategy, it was decided to wait till the EC and EU member states resolved their competence/mandate problem.

In the meantime, Japan tried to keep other G8 countries informed of its communications with the EC as clearly and detailed as possible in an effort to secure support not only from the EC but also from the G8 members of the EU. The EC, for its part, participated in consultations on an informal basis and gradually leaned toward supporting the idea of creating a new international anti-counterfeiting treaty.

In October 2007, the EC officially launched a process to seek a mandate from the EU member states to negotiate the ACTA. All of the pending issues—including those regarding the authority over criminal procedures—were resolved in April 2008, and the EC has since been formally engaged in ACTA consultations as the competent authority on behalf of the 27 member states (and together with the one holding the rotating presidency of the European Council).

The resolution of the competence/mandate problem in the EU, although time-consuming, definitely brought the ACTA initiative closer to realization.

4) Japan-U.S. Joint Proposal

Initially, consultations on the ACTA initiative were made based on a concept paper prepared by Japan. However, after announcing its support for the initiative in June 2006, the United States put forward its counter proposal. Subsequently, Japan and the United States launched joint efforts to prepare a discussion paper to serve as the basis for further discussions. The name Anti-Counterfeiting Trade Agreement (ACTA) was proposed by the United States.

5) Expansion of ACTA Membership

As discussed above, the ACTA initiative started with the Koizumi proposal put forward at the July 2005 G8 Summit. In parallel with its lobbying efforts vis-à-vis other G8 members, Japan also worked to expand the scope of prospective participants though keeping to a disciplined approach. Talking points were prepared based on consultations between Japan and the United States. Then, starting from August 2006, outreach efforts were made vis-à-vis Switzerland,

Germany, France, Korea, Singapore, Italy, Australia, New Zealand, the EC, and Canada.

6) Five-party Talks and G8 Summit in Heiligendamm

Five-party consultations—involving Japan, the United States, the EC, Canada, and Switzerland—began in February 2007. A total of eight meetings, including teleconferences, were held through July of that year. In this process, they deepened their understanding and ironed out differences with respect to key points at issue and future direction. They agreed on a common discussion paper in July 2007.

In the course of the five-party consultations, Japan gave particular consideration to the relationship with Germany, the host country of the G8 Summit in 2007. However, Germany was keeping a distance from the ACTA initiative because of its policy of emphasizing cooperation with developing countries, a general stance not limited to issues related to IPRs (This German attitude of giving high regard to cooperation with developing countries was later materialized as the Heiligendamm Process, a forum for dialogue between G8 members and key emerging economies). Japan insisted that the German approach of including developing countries into a global political process would be able to coexist with the ACTA initiative, an attempt by concerned countries to create a high-level international disciplinary instrument. Eventually, Germany agreed not to object to the ACTA since Japan promoted the initiative in a low key manner in the period running up to the G8 Summit.

As it turned out, at the G8 Summit in Heiligendamm, not only Germany but also the United States hesitated to make reference to the ACTA, in part, out of consideration for developing countries. As such, the communiqué adopted at the summit indicated no big progress on the ACTA initiative.

7) French Proposal to Create an FATF-like Framework

While taking a positive stance on the ACTA initiative, France put forward its own proposal in January 2007 to address counterfeiting by creating a framework similar to the Financial Action Task Force (FATF), an intergovernmental body with proven success in tackling money laundering, and began lobbying its Group of Seven (G7) partners. Though discussed at a meeting of the G8 Intellectual

Property Experts' Group (IPEG) and referenced in the communiqué issued at the G8 Summit in Heiligendamm, the idea did not develop as no subsequent proposals were made for its materialization.

8) Preparatory Meeting (October 2007) and Informal Meetings (December 2007–March 2008)

Outreach efforts for membership expansion were launched in August 2007 under the initiative of Japan and the United States. Japan reached out to such countries as South Korea, Australia, and Singapore.

A preparatory meeting was held in October 2007, followed by three informal meetings from December 2007 through March 2008. In addition to the members of the five-party talks, five FTA partners of the United States (South Korea, Singapore, Australia, Mexico, and Morocco) and some developing countries (Jordan and Uruguay) participated in those meetings (though the composition of participants differed from one meeting to another).

For the sake of participants' convenience, all of the above meetings were held in Geneva. Consultations at this stage took place without using any text.

9) Launch of Formal Negotiations

After the resolution of the mandate problem in the EU and the development of a common understanding on the basic framework of the ACTA through a series of small group meetings, the first negotiation meeting was held in Geneva in June 2008. This marked the beginning of formal negotiations based on draft text. Three years had passed since Japan proposed the initiative in the G8 Summit in Gleneagles.

At the G8 Summit in Toyako in July 2008, Japan took the initiative to include an explicit reference to the ACTA and a call for completing the negotiation by the end of the year in the communiqué. (Note: The author's involvement in the ACTA negotiations ended in August 2008.)

10) Agreement in Principle (October 2, 2010)²⁰

²⁰ This section was written by Shimpei Yamamoto, then director for intellectual property of the Ministry of Economy, Trade and Industry.

The negotiations failed to reach an agreement within 2008 because of an extremely broad range of issues which had to be addressed, and consensus building within the respective participating countries and the EU took much longer than expected. However, in July 2009, after a six-month hiatus due to the change of the U.S. administration, it was agreed at a working level that the ACTA negotiations should be concluded by the end of 2010, which accelerated them. At the 10th round of negotiations in August 2010, a consensus was made that a basic agreement should be reached at the next round of meeting held in Tokyo. At that moment, however, there remained a gulf of differences between the old and new continents over the handling of geographic indications (GIs) in border measures. The former group—the EU and its member states plus Switzerland—demanded that goods infringing the rights to geographic indications be made subject to border measures, whereas the latter group—particularly, the United States, Canada, Australia, and New Zealand—was firmly opposed to the inclusion of any TRIPs-plus measures in the GIs. With no ground for compromise in sight, pessimism prevailed among the Japanese negotiators regarding the outcome of the Tokyo meeting.

The first five days of the Tokyo meeting were devoted to working-level sessions which primarily sought to solve technical issues, and the remaining three days to vice-ministerial level sessions to work out policy issues. Most of the technical issues were solved in the working-level sessions.

The vice-ministerial level sessions were chaired by Yoichi Otabe, deputy minister of foreign affairs of Japan, on the first day and by Crawford Falconer, deputy secretary of New Zealand's Ministry of Foreign Affairs and Trade, from the second day onward, with participants including Hideichi Okada, vice minister for international affairs of Japan's Ministry of Economy, Trade and Industry, Miriam Sapiro, deputy U.S. trade representative, David O'Sullivan, director general for trade in the European Commission, and Bruce Gosper, deputy secretary of Australia's Department of Foreign Affairs and Trade (Note: All titles are as of October 2010). Despite vigorous efforts to find common ground, the confrontation over the GI issue was so intense that the talks at the negotiation table made little headway. In the meantime, during informal talks outside the negotiation room, some participants urged for an agreement among themselves, that is, without those who opposed. As the initiator of the ACTA initiative, Japan

steadfastly rejected this idea and barely managed to avoid an agreement that would have excluded some negotiating members, an outcome that would have been against the intended goal of making the ACTA a de facto international standard.

As of the early evening of October 1, the final day of the negotiations, the confrontation between the old and new continents over the GI issue remained as intense as ever with senior officials from the two camps squaring off against each other with a single draft between them. Indeed, the negotiations were close to collapse. A reconciliatory proposal put forward by the Japanese delegation broke this deadlock. Japan's proposal was appreciated by both sides, and it became a basis of the agreement on the text of Article 13, which provides for the handling of GI in border measures. Helped by the momentum created through the settlement of the GI issue, negotiations on the remaining issues proceeded constructively and came to completion in the subsequent 12 hours.

Hence, at 5:00 a.m. on October 2, 2010, two years and four months since the launch of formal negotiations, ACTA participants reached an agreement in principle in their meeting in Tokyo.

Ever since it began advocating the idea that eventually evolved into the ACTA, Japan consistently acted as an honest broker, an attitude that gained strong trust from its negotiating partners. This no doubt contributed to the conclusion of the basic agreement.

11) Signing (October 1, 2011)

The governments of eight countries—Japan, the United States, Australia, Canada, South Korea, Morocco, New Zealand, and Singapore—signed the ACTA at a ceremony on October 1, 2011 in Tokyo, while the EU, Mexico, and Switzerland confirmed their commitment to make preparations to sign the agreement as soon as practicable.

3 Contents of Agreement (See Attachment 11)

It was decided that all categories of intellectual property that are the subject of Sections 1 through 7 of Part II of the TRIPs Agreement be covered by the ACTA. Regarding geographic indications (GIs), for which the EU had demanded greater

protection and the United States did not, it was proposed and agreed at the final round of negotiations in Tokyo that provisions under Article 13 (Scope of the Border Measures) should read as follows: "... a Party should do so in a manner that does not discriminate unjustifiably between intellectual property rights and that avoids the creation of barriers to legitimate trade." This put an end to the dispute between the EU and the United States.

Major points of agreement are as follows:

First, regarding civil enforcement, ACTA provisions for damages—which are intended to be supplementary to the TRIPs Agreement—stipulate that judicial authorities have the authority to order the infringer to pay the rights holder profits obtained through infringement, and that the amount of such profits obtained by the infringer may be presumed as the amount of the damages suffered by the rights holder.

Second, regarding border measures, ACTA provisions provide for enforcement procedures with respect to import and export shipments under which competent authorities (i.e., customs authorities) may act upon their own initiative, whereas the relevant TRIPs provisions simply provide for the suspension of release of counterfeit and pirated goods upon request from the rights holder.

Third, regarding criminal enforcement, ACTA provisions define "acts carried out on a commercial scale" as including "those carried out as commercial activities for direct or indirect economic or commercial advantage," thereby clarifying that the distribution of pirated copyright goods via the Internet is subject to criminal penalties. The importation of counterfeit labels is taken as a criminal offense. It is also stipulated that competent authorities have the authority to order the forfeiture of profits obtained through trademark counterfeiting and copyright piracy.

The ACTA also includes provisions for enforcement of IPRs in the digital environment and those for enforcement practices and international cooperation in the relevant areas, modeling after the World Intellectual Property Organization (WIPO) Internet treaties, namely, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Those are the provisions

that are either non-existent or nearly non-existent in the TRIPs Agreement.

4 Three Yardsticks for Defining Success

One of the things to which Japan has always given consideration and sought other countries' understanding in promoting the ACTA initiative is the concept of finding the optimal mix of three key factors, namely, 1) level of discipline (ambition), 2) scope of participating countries, and 3) timing of realization (see Attachment 12; used in negotiations).

Consider these three factors are measured by the yardsticks of X , Y , and Z respectively. Then, countries negotiating a certain agreement must seek to achieve the optimal mix of these three factors, that is, maximizing the value of $F = \alpha X \times \beta Y \times \gamma Z$. Needless to say, it is possible to add more yardsticks or factors to consider. However, a simple model such as this tends to work better in considering a plurilateral agreement involving a large number of players, and, as a matter of fact, the above model worked well for the ACTA negotiations.

However, these three factors are in conflict with each other.

First, let's take a look at the level of discipline or ambition measured by yardstick X . In the early stage of the ACTA negotiations, the United States called for achieving the so-called "golden standard." However, had such U.S.-style golden standard been embodied in the ACTA provisions (for instance, by including provisions mandating the establishment of a triple damage system), it would have been impossible to secure the participation of many countries. Besides, whether or not certain rules or disciplines constitute the golden standard should not and cannot be for any single country to decide. Rather, truly effective rules or disciplines can emerge through the dedicated efforts of all concerned parties to find common ground in the course of negotiations. Focusing solely on achieving a high level of discipline would not only limit the scope of participants but also delay the conclusion of negotiations. Any rules or disciplines should not be called a "golden standard" unless the United States, the EU, Japan, and so forth together find them acceptable.

At the same time, however, there was a certain level of discipline that had to be satisfied at the minimum. Because the goal of the ACTA was to set rules that

constitute “TRIPs-plus.” If it includes no provisions beyond the TRIPs Agreement, the ACTA would have no legal significance. Furthermore, even if some TRIPs-plus elements are included, it would not be worthwhile negotiating if the plus portion is insignificant.

In this respect, the issue that continued to complicate the ACTA negotiations till the last minute was the scope of rights covered in this agreement, more specifically, the treatment of GIs. Confrontation between the EU and the United States continued, as the EU refused to back off from its demand of making GIs subject to border measures. A compromise was reached only at the last round of negotiations in Tokyo in October 2010.

Next, let’s consider the scope of participating countries measured by yardstick Y . Concerning this point, there was some confusion at the initial stage, that is, when the ACTA initiative was first introduced at the G8 Summit in Gleneagles in 2005. Japan was no exception.

There were calls for the participation of “as many countries as possible” and “major infringing countries.” However, focusing efforts solely on achieving a greater number of participants could minimize value-added in terms of disciplinary level (X), while attempting to achieve a large number of participants and a high level of discipline would delay the conclusion of negotiations (Z) indefinitely.

In the case of the ACTA, a consensus regarding the three factors and the maximization of F emerged gradually in the process of negotiations with the United States, the EU, and other participating countries. This was crucial to the realization of the ACTA.

In setting target levels for X and Y , it is often necessary to distinguish between the ultimate strategic goal and short-term tactical objectives. In the case of the ACTA, it was impossible in a short-term perspective to secure the participation of major infringing countries while at the same time achieving a high level of discipline. Thus, as a short-term tactic, it was decided to prioritize the achievement of a high level of discipline, hence an early conclusion of the ACTA by a limited number of participants led by Japan, the United States, and the EU.

Here, securing the participation of major infringing countries was defined as a long-term (strategic) goal to be realized after the conclusion of the ACTA.

In negotiating a plurilateral agreement, it is always important to confirm, among participants, the priority order and target levels for the three factors. Otherwise, negotiations would be bound to get derailed and go nowhere.²¹

5 Secretariat Functions

Having defined the ACTA as an initiative undertaken primarily by developed economies, Japan initially considered, as an option, the OECD as a forum for pursuing the idea following the G8 Summit in Gleneagles, whereby the OECD would serve as the secretariat during the consultation stage. This idea, however, was dropped as Japan found it impracticable to consult or negotiate the ACTA at the OECD, due partly to opposition by the United States and the EC.

Japan also considered seeking consultation under the G8 framework because it was under that framework that the basic concept of the ACTA had been introduced. This idea was also dropped because Russia took a negative stance, and the participation of the 27 EU member states was thought to be indispensable. Japan decided to utilize the G8 as a supporting framework rather than a negotiating one. In the end, it settled upon the idea of pursuing the realization of the ACTA through consultations and negotiations under the initiative of concerned parties.

The final text of the ACTA provides for the establishment of the ACTA Committee (Article 36) but includes no provisions for secretariat functions. Matters related to the administration of the agreement were discussed at the final stage of the negotiations. And in the course of this process, some proposals were put forward regarding secretariat functions, such as rotating the role of the secretariat among signatories and designating an appropriate international organization as the secretariat. However, in order to avoid causing a delay in the conclusion of the ACTA, participants compromised on provisions for administrative provisions, limiting them to the minimum.

²¹ In the case of the WTO Doha Round, negotiations could drag on indefinitely (Z) under the current situation in which the 157 members of heterogeneous nature (Y) must agree on a large number of issues at once (= a very high level of ambition (X)).

Going forward, if new issues arise concerning the management of the ACTA, it would be realistic to launch a new round of discussion to define the secretariat functions for the implementation of the agreement.

6 TRIPs Agreement as a Minimum Set of Rules

A legal factor that contributed to the conclusion of the ACTA is that the TRIPs Agreement is intended to establish a minimum set of rules for the protection of IPRs (see Article 1 of the TRIPs Agreement). Therefore, including provisions that are more detailed and specific but in line with those set out under the TRIPs Agreement—often merely as normative provisions—is generally not deemed as contravening the TRIPs Agreement. This worked to advantage in defining the legal structure of the ACTA, which is often referred to as a TRIPs-plus agreement.²²

7 Dispute Settlement

Regarding dispute settlement, the ACTA provides for consultations between parties concerned but does not include any provisions for the establishment of an independent panel or the introduction of other frameworks such as alternative dispute resolution (ADR). Rules for dispute settlement must be considered against the need to expand the scope of participants in the future. Indeed, in the course of the ACTA negotiations, such need was regarded as a critical factor that had to be taken into due consideration because setting a “weighty” dispute settlement process would discourage developing countries from joining the agreement.²³

It was necessary to find a delicate balance between the need to ensure the implementation of the agreement and the need to alleviate burdens on participants. In this regard, provisions set forth in the final text of the ACTA—which call for the establishment of the ACTA Committee (Article 36) and

²² “Mini-symposium: The future geometry of WTO law” (Thomas Cottier in *Journal of International Economic Law Vol.9 No. 4* (p.793, pp.813-814)) discusses the possibility of introducing the schedules of commitment approach (similar to those under the GATT and the GATS) into the TRIPs Agreement. Although the ACTA does not use this approach, it may be said that ACTA’s approach, under which participating countries accept TRIPs-plus obligations and apply them to non-member countries on an MFN basis, has an almost similar effect as the schedules of commitment approach.

²³ The WTO is a case example of a weighty dispute settlement process driving developing members into a cautious mode, thereby causing stagnation in decision-making.

prescribe a member-to-member consultation process to discuss any dispute regarding the implementation of the agreement—are expected to provide a realistic and balanced solution.

8 Background and Japan's Contribution to the Successful Conclusion of the ACTA

The ACTA came as the fourth major plurilateral trade agreement concluded after the establishment of the WTO, following the conclusion of the ITA and that of the Basic Telecommunication Agreement and the Financial Services Agreement, both of which were part of the built-in agendas. As discussed in the previous chapter, Japan played an active role in the establishment of the ITA. Meanwhile, the ACTA has important implications as a plurilateral agreement initiated by Japan. Particularly, as a pioneering case of rulemaking outside the framework of the WTO, the ACTA approach has set a model that can be applicable to similar plurilateral initiatives in other areas.

1) Worthiness of Advocating the ACTA Initiative

The TRIPs Agreement came into force in 1995, incorporated as an annex to the WTO Agreement. Back then, it was received as an epoch-making agreement as the first-ever international pact on the protection of IPRs. The United States, the leading advocator of the TRIPs Agreement, attached so much importance to this agreement that it was reluctant to renegotiate, fearing that doing so could lead to the weakening of discipline. Because of this, the number of IPR-related disputes brought before a WTO panel remains relatively small, and the United States was against putting the TRIPs Agreement on the negotiating agenda in launching the Doha Round in 2001.

In the meantime, however, the number of IPR infringement cases—such as counterfeiting and piracy—in developing countries was on the rise. In due time, both the United States and the EU became alarmed by the seriousness of the problem and the inability of the TRIPs Agreement, a normative agreement in nature, to address the situation properly.

It was against this backdrop that Japan pointed to the need to create a new international treaty to combat counterfeiting and piracy at the G8 Summit in Gleneagles. This call for a new legal initiative inspired other developed

economies, including the United States and the EU, and eventually drew them into the ACTA initiative.

The ACTA is also counted on to bring a major change to the situation in which no major plurilateral trade agreements have been concluded after the ITA in 1996 and the Basic Telecommunication Agreement and the Financial Services Agreement in 1997.

2) Development of a Japan-U.S. Joint Proposal

A draft text of the ACTA, prepared based on the initial text proposed by Japan and reflecting changes and additions made by the United States, was presented to other negotiating partners as a Japan-U.S. joint proposal. The EU was unable to participate in text-based negotiations at this stage because the conflicts between the EC and EU member states over the mandate to negotiate had not been resolved yet.

Finding significant value in the realization of the ACTA, Japan decided to act in step with the United States, setting aside the background of the proposal. The successful working of this partnership has contributed to the successful conclusion of the ACTA.

3) Small Group Meetings

Another key to the successful conclusion of the ACTA was a small group meeting approach, which turned out to be efficient and effective. In addition to the close cooperation between Japan and the United States, the five-party consultations held from February through July in 2007 among Japan, the United States, the EU, Canada, and Switzerland played a crucial role as a forum for reconciling differences in their intended goals and objectives. In the course of these consultations, the five parties deepened their shared understanding of the significance and framework of the ACTA initiative, which in turn provided the basis for facilitating text-based negotiations from 2008 onward.

4) Stagnation of the WTO Doha Round

The stalemate in the WTO Doha Round also worked in favor of the ACTA. Since its launch in 2001, the Doha Round has been unable to produce tangible results. Growing calls among major WTO members, including the United States and the

EU, for progress in trade liberalization provided momentum to the ACTA initiative.

5) Serious Damage

As discussed above, the seriousness and growing magnitude of economic damage caused by counterfeiting and piracy were driving factors behind the ACTA. Indeed, the amount of damage increased from about \$200 billion in 2005 to \$250 billion in 2007, according to the OECD estimates.

9 Future of the ACTA

In October 2011, eight participating countries signed the ACTA in Tokyo, bringing the ACTA initiative into the implementation stage. On March 31, 2011, the author attended a seminar in Paris hosted by Union des Fabricants (UNIFAB), which is one of the largest IPR advocating organizations in Europe. The following is a summary of the author's personal presentation made at the seminar (see Attachment 14):

1) Resetting the Three Yardsticks

The conclusion and signing by major participants of the ACTA paved the way for resetting the three yardsticks for the level of ambition, the scope of participating countries, and the timing of realization.

First, it is necessary to launch efforts toward expanding the scope of participating countries beyond the current 37 countries. In particular, how to bring in infringing countries—mostly developing countries—is a critical challenge and subject to joint efforts by all ACTA members.

Second, regarding the level of ambition, although ensuring the smooth operation of the ACTA is prerequisite, it is necessary to consider enhancing the disciplinary provisions under the ACTA and expanding its scope of coverage beyond counterfeit and pirated goods to include IPR issues in general going forward.

2) Bicycle Theory

The fact that the main part of the TRIPs Agreement is left outside the scope of issues subject to negotiations under the Doha Round has been a cause of stagnant rulemaking in the area of IPRs.

International organizations and agreements, including the WTO, are just like bicycles. Once they stop moving forward, they would not even be able to maintain the status quo. The ACTA is no exception, and it is necessary for its member countries to combine their knowledge and efforts for the further enhancement of this agreement.

Consider the ACTA as a bicycle. Only by keeping on pedaling will it be possible to influence the TRIPs regime and start a new discussion for the future of the TRIPs Agreement. The ACTA members should work toward achieving this end.

3) Cooperation and Capacity Building

In order to increase the number of participating countries, it is necessary to provide technical assistance and help prospective participants build capacity, in addition to explaining the contents of the agreement. In this regard, expectations are high on the smooth and thoroughgoing implementation of international cooperation provisions under the ACTA and the working of the ACTA Committee.

It is a plain fact that many developing countries are just not prepared to join the ACTA in terms of their domestic legal infrastructure and the reality of custom house operations, even if they wish to do so. Those countries that are already in the ACTA must help developing countries improve their capacity to join the ACTA.

4) FTAs and the ACTA

In order to make the ACTA a *de facto* international standard, it is important to incorporate ACTA provisions into FTAs besides seeking to bring in more members. Japan has already incorporated some ACTA provisions into its FTA with Switzerland. Going forward, doing the same in concluding FTAs with other countries—including non-ACTA members, needless to say about ACTA members such as Australia—is instrumental to elevating the ACTA into a *de facto* international standard.²⁴

5) Setting a Model for Rulemaking at the WTO

²⁴ Needless to say, it is also necessary to cooperate with other ACTA members to ensure that each of them looks in the same direction in establishing new FTAs or amending existing ones.

In terms of its relationship with the WTO, it is worthwhile considering amending plurilateral agreements annexed to the WTO Agreement, i.e., Annex 4 agreements, as well as the TRIPs Agreement per se modeling after the ACTA.

The ACTA initiative was intended to create a TRIPs-plus agreement, and its ultimate goal is to become part of the WTO rules. Although this goal appears far-fetched at the moment, it is necessary to start making efforts now toward achieving that end.

Just like FTAs, plurilateral agreements are not universal by nature and definition. From the viewpoint of creating global trade rules, it is important to seek always to multilateralize international agreements.

IV Future of Plurilateral Agreements

1 Necessity and Characteristics

Today, 18 years since the conclusion of the Uruguay Round and 10 years since the launch of the Doha Round, it has become undeniably clear that the WTO system is defunct (see Attachment 15: Toward the Reform of the WTO and the Early Conclusion of the Doha Round).

Frustrated with the continuing stagnation, WTO members are increasingly turning to FTAs as a substitute vehicle for trade liberalization, heading into the era of FTA competition. However, FTAs—which may be defined as country-based plurilateral agreements—are not the only possible way to fulfill the shortcomings of the multilateral system of the WTO.

As shown in the case studies of the ITA and the ACTA in the previous two chapters, issue-based plurilateral consensus building can be a powerful tool to supplement the WTO in the areas of liberalization and rulemaking.²⁵

What follows summarizes why plurilateral agreements are necessary and what benefits they can bring.

1) Benefits of Plurilateral Agreements

(1) Paving the way for addressing specific issues and areas

The most prominent feature of issue-based plurilateral agreements is that participating parties can freely choose issues and areas upon which they intend to establish an agreement. This may sound like nothing special. However, in the case of the WTO, a succession of negotiations is treated as a “round,” whereby their outcomes must be accepted in a single undertaking. This makes it difficult to promote an initiative for liberalization or rulemaking in a specific area while the round is in process.

Furthermore, adding a new initiative to an already weighty agenda for the round is virtually impossible. Indeed, the reality is to the contrary with the scope of

²⁵ Craig VanGrasstek and Pierre Sauve provide detailed analysis on conflicts between the single undertaking requirement for a WTO round of negotiations and the need to accommodate diversity (variable geometry) in “The Consistency of WTO Rules: Can the Single Undertaking Be Squared with Variable Geometry” (*Journal of International Economic Law* Vol.9 No.4).

issues on agenda for the Doha Round shrinking rather than expanding. In particular, the outcome of the WTO Ministerial Conference in Cancun in 2003, in which two issues of utmost importance for industries—“trade and investment” and “trade and competition”—were dropped, seriously undermined the credibility of the WTO. In contrast, the plurilateral approach enables the launch of discussions on issues in a specific area—whether liberalization or rulemaking—among countries concerned with a good chance of reaching a meaningful conclusion that can impact the participating countries and their industries.

(2) Allowing flexibility in the choice of participants

Another distinctive feature of the plurilateral approach is flexibility in the choice of participants. Whereas negotiations under the multilateral framework of the WTO must, in principle, involve all members (157 economies), such is not the case for that under a plurilateral framework. It is therefore possible to discuss specific issues among specific countries in preparation for discussions under a broader framework in the future.

(3) Getting around the decision-making ordeal of the WTO

Decisions at the WTO are, in principle, taken by consensus of all of the members, inhibiting its ability to respond with agility. An issue-based plurilateral agreement provides various options to get around this constraint.

(4) Responding to the changing needs of industries with agility

Developing global value chains, businesses and industries around the world are engaged in trade and investment activities by making tough and difficult decisions on a daily basis. It is no exaggeration to say that the WTO is a world apart from those working at dog years' pace. As a result, businesses and industries are showing less and less interest in the WTO apart from its dispute settlement mechanism.

In contrast, FTAs and issue-based plurilateral frameworks can respond to and address the changing needs of businesses and industries in a more practical time frame.

(5) Preparing for multilateral rulemaking in the future

Needless to say, plurilateral agreements may not include any provision contradictory to WTO rules, to the extent that participants are WTO members. However, an issue-based plurilateral agreement struck by a group of countries—each of them firmly committed to the improvement of the WTO system—in a specific area of their concern in a manner ensuring consistency with WTO rules can provide an important basis for improving these rules in the future (the same can be said for provisions under major FTAs). In view of the governance of the global trade system, it is critically important to define issue-based plurilateral agreements as a tool for governance and link them to the WTO.

2) Differences between Plurilateral Agreements and FTAs

This section discusses how issue-based plurilateral agreements differ from sector-specific initiatives under the framework of FTAs. Although both issue-based plurilateral agreements and FTAs are agreements that are complementary to the WTO and have the potential to provide a basis for multilateral rulemaking in the future, they differ in the following points:

(1) Focusing on specific areas or sectors

In order for two or more WTO members to negotiate and form an agreement discriminatory against other members, it is necessary in the first place to satisfy conditions provided for in GATT Article XXIV:5 and GATS Article V. In other words, FTAs can be defined as country-based plurilateral agreements.

Furthermore, GATT Article XXIV requires that an FTA cover “substantially all of the trade”—which is construed to mean about 90% or more of the existing trade—between the signatories to the FTA. Therefore, FTAs are, by nature, not suitable as a vehicle for issue-specific or sector-specific negotiations.

Indeed, WTO members may form a service sector FTA, a deal specifically on trade in services. Yet, such an agreement is required to have “substantial sectoral coverage” (GATS Article V), and liberalizing just a specific service sector is not permitted under the GATS.

WTO members may negotiate measures for addressing sector-specific problems in the course of discussing overall bilateral trade issues under the

framework of FTAs. However, the aforementioned requirements would, in many cases, impose significant constraints on an attempt to address sector-specific problems. (Needless to say, discussing rules and liberalization measures for various areas comprehensively under the framework of multinational, regional FTAs such as the Trans-Pacific Partnership (TPP) agreement and economic integration agreements (EIAs) is possible and offers some significant benefits.)

(2) Flexibility in selecting members

In the case of issue-based plurilateral agreements, a selected group of like-minded countries can discuss specific areas or issues. In contrast, FTAs are country-based, meaning that whether trade liberalization between a specific pair or group of countries should be pursued or not is determined first and foremost.

(3) Relationships with non-members in terms of rights and obligations

In the case of FTAs, GATT Article XXIV and GATS Article V provide for exceptions to the WTO principle, allowing for discriminatory application of FTA rules. As such, FTAs are in principle applied on a non-MFN basis. (As the TRIPs Agreement does not provide for such provisions, IPR-related arrangements agreed to as part of an FTA must be applied on an MFN basis.)

Issue-based plurilateral agreements do not necessarily have such discriminatory nature.²⁶ Rather, as in the ITA, the Basic Telecommunication Agreement, and the Financial Services Agreement, liberalization commitments made under plurilateral agreements are, in many cases, applied to non-party members on an MFN basis.

There exist no general provisions setting forth requirements for plurilateral agreements to be regarded as WTO-consistent, those that are equivalent to GATT Article XXIV for FTAs, meaning that no deviation from the WTO principles is permitted for plurilateral agreements. Thus, in this regard, it may be necessary to take a more cautious approach in pursuing a plurilateral agreement.

GATT Council's decision in 1979 (L/4905), made at the time of adopting the Tokyo Round codes, stipulates that "existing rights and benefits under the GATT of contracting parties not being parties to [plurilateral agreements], including

²⁶ Things differ depending on the nature of each plurilateral agreement.

those derived from Article I [i.e., the right to MFN treatment], are not affected by these agreements.”

2 Incorporation into WTO Agreements and Limitations

In the light of consistency with WTO rules, it is preferable and natural for plurilateral trade agreements to be incorporated into the WTO system and hence part of the WTO agreements.

Achieving this end, however, is extremely difficult due to the consensus rule of decision-making under the WTO, which is applicable even in establishing a new Annex 4 agreement and not surprisingly in amending Annex 1 agreements, given the sheer number of WTO members and the increasingly intense confrontation between developing and developed members.

What follows takes a look at the judgments that had been made in the course of achieving the ITA and the ACTA, using the Basic Telecommunication Agreement and the Financial Services Agreement as reference where appropriate.

1) ITA: Making changes to the schedules of concessions

In the case of the ITA, participating countries and regions made necessary changes to their respective schedules of concessions, in accordance with an agreement reached at the WTO Ministerial Conference in Singapore, to eliminate tariffs on the products covered under the agreement eventually. This approach does not present serious legal issues because tariff reduction and elimination commitments under the ITA became commitments (on an MFN basis) under the WTO once they were reflected on the schedules of concessions. This ITA approach is expected to be followed in future plurilateral initiatives for tariff reduction and elimination.

However, an agreement reached under a plurilateral framework does not necessarily have to be confirmed in the form of a ministerial declaration (for instance, such confirmation may be made in the form of a record of discussion as in the Agreement on Pharmaceutical Products). Indeed, the use of a ministerial declaration may draw objections from WTO members.

Next, is there any way to have non-tariff commitments bound by the schedule of

concessions?

In the case of the ITA, it was expected that including non-tariff measures in its coverage would lead to a lower number of participants. Thus, as discussed earlier in this paper, Japan lobbied against, and the EU eventually compromised on its demand for, the inclusion of non-tariff issues as subject to the ITA.

However, if the ITA signatories had agreed on the inclusion of non-tariff obligations, one possible way of realizing this would have been for signatory members to add non-tariff obligations to their respective schedules of concessions or commitments. (Note: The EU had called for binding non-tariff obligations by including them in the schedules of concessions.) This point must continue to be studied further.

Furthermore, it could have been possible to draft and define the ITA Declaration in such a way to bind signatories to perform their non-tariff obligations. In the case of the ITA, an agreement on non-tariff measures did not materialize because arguments in this regard were too unrefined and failed to specify intended rules. However, it is necessary to continue to explore ways to govern non-tariff issues under a plurilateral framework.

2) ACTA: Concluding as a standalone agreement

The incorporation of the ACTA into WTO agreements was not an option from the very beginning because the TRIPs negotiations under the Doha Round are limited in scope, and the establishment of a new plurilateral agreement (Annex 4 agreement) is subject to consensus by all WTO members. However, from the viewpoint of the need for the WTO to respond flexibly to initiatives in the so-called Singapore issues or new areas of negotiations, strongly called for by industries, it is worthwhile studying, as a matter of legislative theory, the possibility of changing the WTO process for the establishment of a new plurilateral agreement.

3) Plurilateral Agreements in the Area of Trade in Services

The Basic Telecommunication Agreement and the Financial Services Agreement serve as good reference in considering plurilateral agreements in the area of trade in services. Both agreements were concluded under the auspices of the

WTO and by means of amendments to the signatories' schedules of commitments and lists of exemptions from GATS Article II (MFN treatment) through the conclusion of protocols to GATS regarding basic telecommunications and financial services, respectively.²⁷ Each of them was reached on the basis of critical mass participation (i.e., consensus by a large number of the WTO members) and the MFN application of benefits resulting from the agreements.

Thereafter, no such plurilateral agreements have been reached in the area of trade in services. The broadening of negotiation areas in the Round is one reason. Other reasons include: 1) difficulty of achieving the critical mass participation, and/or 2) participants' reluctance to apply benefits of their agreement to non-members on an MFN basis due to free rider concerns.

However, both in the light of past experience and from the viewpoint of the need to secure consent from non-participating WTO members, taking the same approach as those for the Basic Telecommunication Agreement and the Financial Services Agreement appears to be the quickest way to achieve a plurilateral agreement in the area of trade in services.²⁸

Readers are advised to refer to Attachment 2 for the legal treatment of various matters discussed above under the ITA, the ACTA, the Basic Telecommunication Agreement, and the Financial Services Agreement, and each agreement's relationship with the existing WTO rules.

3 Procedures for Incorporating Plurilateral Agreements into WTO Agreements

Incorporating a new plurilateral agreement into WTO agreements (as an Annex 4 agreement) involves securing consensus among all of the WTO members. Meanwhile, amendments to the existing WTO agreements without creating a new Annex 4 agreement are leading to amendments to the Annex 1 agreements. This also requires consensus among all of the WTO members.

²⁷ Participants' schedules of commitments and lists of exemptions from GATT Article II (MFN treatment) relevant to the Basic Telecommunication Agreement and the Financial Services Agreement were amended by annexing the amended schedules and lists respectively to the Fourth and Fifth Protocols to the GATS.

²⁸ In principle, all benefits resulting from a new agreement must be applied on an MFN basis. The treatment of areas exempted from the MFN principle is subject to controversy.

There are strong calls for maintaining decision-making by consensus, which is also part of the tradition of the GATT/WTO. However, continuing to focus solely on consensus at a time when the WTO has lost its nature as a “club” poses serious risk of undermining its *raison d’être* by further accelerating the FTA race. The WTO as the main architect supporting the global trade system is being faced with the need to examine its variable geometry, and discussions to that effect are now underway.²⁹

Presented below are two ways of thinking derived from the above viewpoint and some discussion on the possible revival of the code approach.

1) Plurilateral Decision-making Approach Based on Critical Mass and MFN

As a matter of legislative theory, there is an argument that a departure from the principle of decision by consensus should be allowed under certain circumstances where there exists an agreement among a critical mass of the WTO members, on the premise that all of the benefits resulting from such plurilateral agreements be applied to non-participating WTO members on an MFN basis.³⁰ This argument should be studied further going forward.³¹

Referring to precedents set by the ITA, the Basic Telecommunication Agreement, and the Financial Services Agreement, the Report of the First Warwick Commission (hereinafter referred to as the “Warwick Report”) points to the need to introduce critical mass decision-making under the WTO based on the condition that benefits resulting from a new critical mass agreement be extended to all WTO members. The report also discusses criteria that must be fulfilled to protect the rights of the WTO members, specifying seven conditions including the following:

²⁹ The principle of variable geometry is being discussed in consideration of the diversity of the WTO members from the viewpoint of promoting the further development of the WTO system. While such discussion looks at variable geometry in the forms of plurilateral agreements, special and differential treatment (S&D) including the “graduation” of developing countries, and regional trade agreements (RTAs), this paper focuses solely on variable geometry in the form of plurilateral agreements.

³⁰ See the Report of the First Warwick Commission, *The Multilateral Trade Regime: Which Way Forward?* University of Warwick (2007), pp.30-32.

³¹ The scope of application of this proposal is not clear but definitely includes the establishment of new Annex 4 agreements. In addition, amendment to Annex 1 agreements may be included.

- (1) New rules are required to protect or refine the existing balance of rights and obligations under the WTO and/or that the extension of cooperation into new regulatory areas will impart a discernible positive global welfare benefit:³²
- (2) The disciplines be binding and justiciable so as to attain the objectives laid out in the first criterion above;
- (3) The rights acquired by the signatories to an agreement shall be extended to all WTO members on a non-discriminatory basis, with the obligations falling only on signatories;
- (4) WTO members shall consider any distributional consequences arising among Members from cooperation in new regulatory areas and shall consider means of addressing any such adverse consequences that they anticipate.

Regarding the above criteria, the following viewpoints need to be taken into account:

- (1) According to the proposed criteria, signatories to a new plurilateral agreement must be prepared to apply benefits derived from the agreement to non-signatory WTO members on an MFN basis when incorporating the agreement into WTO agreements.³³
- (2) Those criteria are extremely stringent, and, if fully applied, the outcome might be akin to the “empty set.”³⁴ This may be taken as indicating just how deeply the culture of decision-making by consensus is built into the GATT/WTO system.

³² Low (p.8) argues that a plurilateral agreement which boosts the welfare of one group at the expense of another without improving economic welfare as a whole should be disallowed, whereas a plurilateral agreement that is welfare-improving globally is desirable even if it involves compensation to losers.

³³ Regarding this point, Craig VanGrasstek and Pierre Sauve (pp.857-8) discuss that, unlike the case of tariff reduction and elimination and investment, the risk of free riding is generally small in such areas transparency in procurement, trade facilitation, and competition.

³⁴ See Elsig (p.69).

- (3) The next question that must be discussed is how and who decides that all of the criteria have been met. Leaving the decision to signatories to the plurilateral agreement would obviously lead to arbitrary judgment. However, making the matter subject to consensus among all of the WTO members means doing nothing to change the situation. Therefore, it is necessary to discuss not only the criteria but also specific ways to determine their fulfillment.

Now, take a look at some specific cases in the area of trade in services.

In the case of the Basic Telecommunication Agreement and the Financial Services Agreement, protocols—which are plurilateral reference papers in substance and call for the application of the negotiation outcome on an MFN basis—were adopted by consensus of all of the WTO members. The question is whether a future critical mass agreement reached under a plurilateral framework can be made into a protocol automatically, without seeking consensus among all of the WTO members, subject to the condition that all of the benefits resulting from the agreement be applied to non-signatory WTO members on an MFN basis.

The Warwick Report signals strong support to the inclusion of plurilateral agreements into WTO agreements, providing theoretical and ideological grounds to explain why such incorporation should not be blocked at the least.

- (4) Next, it is necessary to define clearly what “critical mass” means.

In the context of tariff reduction and elimination, critical mass is typically discussed in terms of trade volume, and a plurilateral agreement is perceived to have achieved the critical mass when the designated threshold—such as approximately 90% of world trade as in the ITA—was covered by the agreement. From the viewpoint of businesses based in a country committed to eliminating tariffs under a plurilateral agreement, it is crucial that all major exporting countries also participate

in the agreement because they need to maintain equal footing with their rivals from those countries. Otherwise, they could lose market shares in importing signatory countries for their competitors from non-signatory countries. However, numerical criteria for the critical mass may differ across sectors or areas, and there exists no specific target level.

Meanwhile, in its application in the area of trade in services and the rules negotiations, the concept of critical mass is not necessarily clear.

In the course of negotiating the Basic Telecommunication Agreement and the Financial Services Agreement, the issue of critical mass was not discussed in terms of numerical value. Thus, it should be construed that the participation of all major countries as deemed necessary by negotiating countries constitutes the critical mass. As is the case for an agreement on tariff reduction and elimination, the coverage of participants matters a lot in concluding an agreement on the liberalization of services because service sector companies also need to secure equal footing with their competitors in terms of market access. Indeed, the coverage of participants in service access agreements can determine the *success or failure* of business per se and, in that sense, can be more critical than that in goods access agreements in which the *level* of tariffs is all that matters in negotiations. Meanwhile, in terms of the impact of rules such as domestic discipline, service access agreements do not pose significant risk of free riding because the application of rules has a smaller direct impact on equal footing with competitors in the service sector. This means that there is no need to be extra sensitive in forming a critical mass.

The risk of free riding is also smaller for agreements in the areas of technical barriers to trade (TBT) and rules negotiations.

What must be remembered in considering the concept of critical mass—whether for tariff-related agreements or those on non-tariff measures—is the fact that a critical mass itself is a function of time. Plurilateral initiatives tend to hit difficulties if they try to expand the coverage of participants over a short period of time, which is why having

a long-term strategy is crucially important.

The proposals outlined above require serious consideration, which is also conducive to the revitalization of the WTO. It is hoped that active discussion will take place on these proposals including the viewpoints just discussed.³⁵

A significant number of studies have been conducted on this notion of critical mass decision-making.

Low supports critical mass decision-making, stating that “the critical mass defines itself” in the sense that “those prepared to go ahead with an agreement consider the agreement to have sufficient support and commitment among the membership” despite the risk of free riding, while those left outside the agreement are “presumably considered too small in the market to undermine the agreement.”³⁶

Cottier calls for dividing WTO rules into two groups—constitutional rules and secondary rules—to define clearly the elements and issues that should be made subject to critical mass decision-making and those that should not, noting that the critical mass approach provides a solution to those defined as secondary rules.³⁷

Elsig warns that the critical mass approach is bound to fail from the outset if the distribution of benefits on an MFN basis is made an absolute requirement. He also calls for greater discussion on creating incentives for non-members to join by separating cases in which negotiating parties anticipate and prepare measures against free riding by non-members (as in the case in which some leading trading nations agree to increase generic standards through a critical mass approach) from those cases of abusive free riding.³⁸

³⁵ Robert Wolfe is critical to critical mass decision-making. See “Can the Trading System Be Governed? Institutional Implications of the WTO’s Suspended Animation” by Robert Wolfe in *Working Paper No.30* published in September 2007 by The Center for International Governance Innovation (pp.16-24).

³⁶ Low (p.9).

³⁷ “A Two-Tier Approach to WTO Decision Making” by Thomas Cottier in *NCCR TRADE WORKING PAPER No 2009/06* (p.16).

³⁸ Elsig (pp.69-70).

Meanwhile, Jaime Tijmes-Lhl argues that the introduction of two-thirds supermajority voting should be considered as a mode of decision-making for the establishment of new plurilateral agreements.³⁹

By continuing to build up these discussions, we must seek to break the impasse in consensus-based negotiations at the WTO and put the brakes on the current pattern in which FTAs proliferate as the only available venue for trade liberalization and rulemaking, which is crucial to maintaining and enhancing the credibility of the WTO.

2) Enhanced Application of Schedules of Concessions and Commitments

As a legislative theory concerning a procedure for incorporating a plurilateral agreement into WTO agreements, there are calls for introducing schedules of concessions and commitments as a means to promote liberalization in broader areas. At the moment, this approach is adopted under WTO agreements on tariffs and trade in services (including the Agreement on Government Procurement as an example of Annex 4 agreements). It is being argued that WTO members should utilize this approach as a tool to expand their respective obligations under the WTO to promote liberalization in areas other than tariffs and trade in services.

Concessions and commitments listed in respective members' schedules are defined as their obligations under the WTO. Such schedules of concessions and commitments can be utilized as a means to check voluntary promises made by respective members. Also, as a way of making an agreement reached under a plurilateral framework, WTO-binding commitments, schedules of concessions, or commitments render an interesting idea that deserves further debate.⁴⁰

3) Reintroduction of the Codes Approach

Both 1) and 2) from above assume a buildup approach, whereby outcomes of

³⁹ "Consensus and majority voting in the WTO" by Jaime Tijmes-Lhl in *World Trade Review Vol.8, No.3* (p.431).

⁴⁰ "Mini-symposium: The future geometry of WTO law introduction" by Thomas Cottier (*Journal of International Economic Law Vol.9 No. 4*, pp.813-814 and pp.819-820) discusses the possibility of introducing schedules of concessions or commitments, similar to those annexed to the GATT and the GATS, in the areas of TRIPs, TBT, SPS, import licensing, customs valuation, agriculture, dumping, and industrial subsidies.

plurilateral negotiations will be built upon the basis of existing rights and obligations under the WTO, rather than pursuing the establishment of non-MFN-based Annex 4 agreements.

It is legally possible to conclude a non-MFN-based Annex 4 agreement, one that allows for an opt-in/opt-out approach, as is the case for the Agreement on Government Procurement and the Agreement on Trade in Civil Aircraft. Thus, theoretically speaking, the establishment of an agreement of the Tokyo Round codes type is a feasible option.

In reality, however, it is deemed extremely difficult to take this code approach at this point in time because doing so would split WTO members into two tiers. Yet, considering the fact that the universal application of rights and obligations to all WTO members in disregard of their differences and diversity has been causing significant problems, it is necessary to study a new system that assumes multi-layered memberships in terms of rights and obligations.⁴¹

WTO members must face the fact that the ongoing decision-making paralysis at the WTO and its inability to address problems in reality are driving many members to FTAs and undermining its credibility.

Since the establishment of the GATT, the legal treatment of plurilateral agreements under the GATT/WTO regime has changed drastically through the introduction of the Tokyo Round codes and the launch of the WTO. Readers are advised to refer to Attachment 3 for the changes in the treatment of plurilateral agreements to date and possible treatments under the WTO in the future.

4 Ensuring Consistency with Existing WTO Agreements and Limitations

Plurilateral agreements reached in the area of trade need to be incorporated into or made consistent with existing WTO agreements, except for those totally unrelated with the WTO. What follows discusses the steps required to ensure

⁴¹ Council Decision (L/4905) allows the establishment of new Tokyo Round codes on the premise that they do not affect existing rights and obligations of non-participating WTO members. It would be easy to obtain consensus among the WTO members to an agreement if it extends the rights acquired by signatories to non-signatory WTO members while imposing the obligations only on signatories. However, such an agreement would not be appealing to participating members.

WTO consistency and limitations to such efforts, drawing on some specific examples.

1) Tariffs

When some—and not all—WTO members conclude an agreement on tariffs, benefits resulting from it must be extended to all WTO members on an MFN basis without exception (GATT Article I). In such plurilateral agreements concluded in the past, signatories chose to bind their tariff elimination commitments under plurilateral agreements to their respective schedules of concessions annexed to the WTO Agreement, as was the case with the ITA. In the case where signatories wish to eliminate tariffs only on imports from specific countries, an agreement must be in the form of an FTA, and an exception to the MFN principle based on GATT Article XXIV must be secured.

2) Services

The Financial Services Agreement and the Basic Telecommunication Agreement provide good reference for agreements in the area of trade in services. Both are plurilateral agreements to which only some specific WTO members are signatories. In each of these cases, a protocol was adopted by consensus among all WTO members, and signatories' schedules of commitments and lists of exemptions from GATT Article II (MFN treatment) were amended. This was possible because, first and foremost, both the Financial Services Agreement and the Basic Telecommunication Agreement were designed to establish new obligations only on the specific countries (i.e., signatories), and it was assumed that whatever benefits resulting from the agreements would be extended to all WTO members on an MFN basis. In addition, because liberalization of telecommunications and financial services was part of the built-in agenda inherited from the Uruguay Round, the scope of negotiation areas was limited from the very beginning, which was another major factor that contributed to the successful conclusion of these agreements.

3) TRIPs

As discussed in the case study on the ACTA, the TRIPs Agreement is normative in nature and is intended to set a minimum set of rules as provided for in Article 1 thereof.⁴² This worked in favor of promoting the ACTA initiative because the

⁴² Concluding a TRIPs-minus plurilateral agreement constitutes a violation of the TRIPs

ACTA can be defined as a TRIPs-plus agreement that is intended to set forth more extensive and detailed provisions, building on the minimum rules under the TRIPs. To the extent that a plurilateral agreement is construed as setting forth detailed provisions of a higher level for the implementation of the TRIPs Agreement, the agreement would not pose any problems in its consistency with the WTO.

Needless to say, the ACTA will not impose any new obligations on non-signatory countries. Meanwhile, new commitments made by ACTA signatories will be applied to non-signatories on an MFN basis as per Article 4 of the TRIPs Agreement.

Though subject to case-by-case considerations, it is deemed possible to establish plurilateral agreements in areas covered by other WTO agreements in a manner that is complementary to and consistent with the relevant WTO agreement, provided that such agreement is normative in nature as is the case with the TRIPs Agreement.⁴³

4) TBT

Next, take a look at the Agreement on Technical Barriers to Trade (TBT Agreement). With respect to the interpretation of Article 2 of the TBT Agreement, it is deemed quite possible for major WTO members to agree on a set of voluntary rules by typifying their best practices, drawing on relevant discussions at various forums including the OECD, the WTO, and the APEC.⁴⁴ Although the discipline cannot be imposed on third-party countries, the direct problem of free riding as in the case of tariffs may not occur.

Furthermore, if major economies—including Japan, the United States, and the

Agreement.

⁴³ The ACTA is criticized by some as being a hard-law approach vis à vis the soft-law approach that has been developed within the WTO (see Mary E. Footer, *The (Re)Turn to Soft Law in Reconciling the Antinomies in WTO Law*, p.271; Meanwhile, the ITA, in which signatories' tariff elimination obligations are bound to their schedules of commitments, is cited as an example of the soft-law approach (*ibid.*, pp.254-255)). In response to such criticism, it may be possible to say that the ACTA, though it does not take the schedules of commitments approach, has the same effect because the signatories accept TRIPs plus obligations and apply them to non-signatories on an MFN basis.

⁴⁴ Cottier cites TBT, SPS, import licensing, customs valuation, agriculture, dumping, and (industrial) subsidies in addition to TRIPs as potential areas in which the schedules of commitments approach can be introduced (*op. cit.*, pp.813-814).

EU—manage to establish guidelines for international standards in the form of a plurilateral agreement, such guidelines will definitely serve as a supplementary agreement to the TBT Agreement insofar as they do not contradict the interpretation of the TBT Agreement.

5) Subsidies

This section examines the Agreement on Subsidies and Countervailing Measures, which is often cited as an area in which rulemaking under the FTA framework is difficult.

For instance, countries negotiating plurilateral agreements are not allowed to make any changes to the existing green (permissible), yellow (actionable), and red (prohibited) categories of subsidies. Doing so would immediately constitute non-compliance with WTO rules because, as a general rule, the granting of subsidies is considered to have an impact on any country on the other side of trade. Likewise, introducing a new type of countervailing duty applicable to third-party countries would be regarded as non-compliance with WTO rules.

On the other hand, plurilateral agreements on additional types of prohibited subsidies, which go beyond the rules under the Agreement on Subsidies and Countervailing Measures, are not considered contradictory to WTO rules. Such agreements would not cause any inconsistencies because they simply mean signatories taking up additional obligations.

As such, each plurilateral agreement—or even each provision therein—needs to be examined for its WTO consistency. However, as demonstrated by the ACTA, the potential scope of provisions that may be set under a plurilateral framework without contradicting WTO rules is considerably broad.

Especially, in cases where signatories are prepared to extend the benefits of their plurilateral agreements to non-signatories on an MFN basis, it is relatively easy to satisfy the criteria of WTO consistency. It is necessary to examine further on an area-by-area basis using the agreements on basic telecommunications and financial services as well as the ITA and the ACTA as reference. The possibilities for establishing WTO-consistent plurilateral agreements seem to be far greater than expected.

Needless to say, it must be intended that plurilateral agreements will eventually provide a basis for a future multilateral order under the WTO, and the “spaghetti bowl” of plurilateral agreements is not a desirable event.

At the same time, however, offering new menu options to address the business and economic needs through international cooperation is far more desirable than having nothing to offer. FTAs and plurilateral agreements negotiated with an eye on multilateral rulemaking in the future will be a good shot in the arm for the WTO and stagnant negotiations under the Doha Round. They are also vital elements in promoting trade liberalization and rulemaking in a way to address emerging needs properly.

5 Relationships with Non-participating WTO Members in Rights and Obligations

In principle, plurilateral agreements must not affect the existing rights and obligations of non-participating WTO members, including the right to MFN treatment under GATT Article I.⁴⁵ At the same time, the MFN principle (under GATT Article I, etc.) mandates the non-discriminatory distribution of benefits derived from such agreements.

In the case of the ITA, it was agreed that signatories must represent at least approximately 90% of world trade in products covered by the agreement as a prerequisite to its entry into force. The minimum threshold for the coverage of participants was set in order to avoid free riding by non-participating WTO members, a problem arising from the MFN application of benefits. This is a standard criterion used in plurilateral initiatives for tariff reduction and elimination, an area in which the free riding concern is particularly strong. The threshold value does not have to be, but is typically set at, 90% to deal effectively with the problem of free riding.

As such, even though agreements are concluded under a plurilateral framework, the relationship with non-participating WTO members is always taken into account in decision-making.

⁴⁵ Council Decision (L/4905) on November 28, 1979.

Including major WTO members as signatories is the key to success. Without the participation of major players, plurilateral agreements cannot materialize because they would distort competition among businesses. The distribution of benefits on an MFN basis would not be a problem insofar as major WTO members participate. However, in the case where the coverage of participants is less than satisfactory (such as when not all of the major countries participate), whether signatories can agree to extend benefits on an MFN basis poses a critical question. As such, critical mass and MFN-based benefit distribution are closely interrelated.

Regarding critical mass decision-making, consideration needs to be given on how to deal with the situation when today's uncompetitive countries emerge as powerful economies with large shares in the future.⁴⁶ As a matter of legislative theory, there is an argument that, in order to prevent free riding, plurilateral agreements should adopt a criterion under which those countries with market shares above a threshold level would be required to participate and accept obligations under the agreements.⁴⁷

6 Non-MFN-based Plurilateral Agreements and Membership Expansion

The Agreement on Government Procurement (GPA) has long remained extremely limited in membership because its rules are very demanding (refer to the section discussing the three yardsticks in Chapter III; the level of ambition for an agreement is inversely related with the scope of participating countries).

It was an epoch-making event that the renegotiation of the agreement concluded successfully at the WTO Ministerial Conference in 2011. As the GPA is a non-MFN-based plurilateral agreement, rights and obligations under it are applied only to signatories. Thus, some non-signatory members, including China, are seeking to join it in a bid to obtain access to the procurement market of GPA signatories. This should be seen as a welcome development.

If this kind of mechanism, one in which the conclusion of plurilateral agreements arouses those outside them to participate, can be built around plurilateral

⁴⁶ Low (p.9).

⁴⁷ *Sutherland Report* (May 2011), (p.40).

initiatives, benefits derived from such initiatives will be further enhanced. This is an important viewpoint to consider, particularly, in expanding the membership of plurilateral agreements concluded outside the framework of the WTO.

7 Secretariat Functions

Who should perform secretariat functions at different stages of plurilateral initiatives—i.e., conceptual development, negotiations, and the implementation of plurilateral agreements as negotiation outcomes—is an issue that requires extensive debate.

In pursuing plurilateral agreements in the future, careful consideration must be given to the issue of secretariat functions at preparatory and implementation stages by taking into account the composition of participants and the nature and characteristics of areas or sectors subject to negotiations. The ITA and the ACTA can serve as a useful reference in this regard.

Some nature and characteristics are unique to a specific area or sector. Regarding rulemaking in the area of standards and certification or for behind-the-border measures, initiatives at the APEC and the OECD can offer some lessons.

The question of who should perform secretariat functions under a plurilateral framework is closely linked with the questions of who should be included in the membership and in which forum to promote negotiations. In this regard, it is important to have a viewpoint of utilizing existing institutions and frameworks with relevant knowledge and expertise to facilitate consultations and negotiations.

8 Dispute Settlement Mechanism and Participants

The crucial question in designing the architecture of plurilateral agreements is what to do with the design of the dispute settlement mechanism. The heavier the mechanism, the greater is the certainty of the implementation of obligations under the agreements. However, this also means heavier burdens for signatories, thus posing an obstacle to membership expansion.

How to strike a balance between the two goals of ensuring the implementation of

the agreements and securing a sufficient number of participants is a crucial task that requires finely-tuned adjustments.

9 Transparency and Information Disclosure

In both the cases of the ITA and the ACTA, keeping non-participants informed of the status and progress of negotiations was critically important. Since the conclusion of the ITA, the state of affairs at the WTO has changed drastically. For the realization of plurilateral agreements in the future, it will be necessary to make even more rigorous information disclosure to non-participants and ensure the transparency of the negotiation process. Otherwise, critical mass cannot be achieved.

Governments are not the only players. For instance, the support and backup provided by the industries in the Quad countries—the United States, Japan, Canada, and the member states of the EU—were essential to the successful conclusion of the ITA. Close cooperation with industries will continue to be a crucial factor to the realization of plurilateral agreements in the future.

In addition, it may be necessary to seek support from non-governmental organizations (NGOs). Experience with the attempt to conclude the Multilateral Agreement on Investment (MAI), an initiative that was abandoned after failing to secure support from NGOs, shows that ensuring appropriate information disclosure, the transparency of negotiation process, and good communication with the civic society are crucial to achieving a plurilateral agreement.

10 Capacity Building

Capacity building is also important for the realization and smooth operation of plurilateral agreements. By definition, plurilateral agreements assume the participation of less than all WTO members. In order to expand the membership, it is essential to help non-participating members improve their capacity so that they can join plurilateral initiatives.

11 Incentive for Non-participants to Participate

The points discussed in Sections 5 through 10 above are all closely related with the expansion of membership. But there are many other factors that need to be taken into consideration.

- (1) What is important first and foremost is to design an institutional mechanism that enables participants to derive economic and other benefits from being part of the plurilateral initiatives. It is believed that participants in the ITA initiative were motivated by the expectation that its successful conclusion would increase the inflow of investment and improve the global competitiveness of their industries. Meanwhile, those involved in the negotiations for the Basic Telecommunication Agreement expected that it would provide them access to the information superhighway. As such, plurilateral agreements must be designed to deliver a broad range of economic benefits to its participants. In the case of the ACTA, it is necessary to strengthen cooperation among authorities concerned and enhance the capacity building of signatories so that participation in the initiative, in its own right, constitutes an incentive to allure more investment from abroad and/or leads to business expansion.
- (2) It is also important for the secretariat and participants to continue to provide appropriate information on trade, regulations, and other matters in the area covered by the agreements, as such continuous flow of information can serve as an important incentive for participation. If a plurilateral framework can be designed to function as an information infrastructure that is accessible only by joining the network, incentive for participation will be greater.
- (3) Cooperation among participants is also important. In particular, by ensuring that each participant incorporates the contents of plurilateral agreements in negotiating new FTAs or amending existing ones, the effect of plurilateral agreements can be extended to a greater scope of countries. It is important to define a clear policy among participants in this regard in plurilateral initiatives.⁴⁸
- (4) Furthermore, there may be situations where the introduction of more direct economic incentive constitutes a viable option. For instance, in the case where participation in a plurilateral agreement means the lowering of certain economic risk, differentiation in the conditions in the areas of finance and

⁴⁸ See III, 9, 4).

insurance should be considered.

Designing and operating an institutional mechanism by taking all of those points into comprehensive consideration will provide a basis for membership expansion.

12 Three Yardsticks

During the course of negotiations for the ACTA, Japan consistently used three yardsticks—the scope of participating countries, the level of ambition, and the timing of realization—as a measurement for the realizability of the agreement. These yardsticks, which contributed to the successful conclusion of the ACTA, can also be instrumental in promoting other plurilateral initiatives.

V Potential Areas for Future Plurilateral Agreements

1 Overview

As discussed hitherto, experiences with the ITA and the ACTA have not only revealed the nature and difficulty of plurilateral agreements but also provided many valuable lessons regarding their potential. At a time when the WTO and the Doha Round are stuck in a quagmire, issue-based plurilateral agreements may be a light of hope as they have the potential to play the pivotal role to enhance the governance of the entire global trade system.

Since future prospects for the ITA and the ACTA were already discussed in earlier chapters, this chapter will look into the possibility of new plurilateral agreements in areas other than IT and IPRs.

2 Specific Possibilities

1) Tariff Reduction and Elimination

First, possible plurilateral or sectoral agreements in the area of tariff reduction and elimination include those on the expansion of the ITA and the elimination of tariffs on environmental goods. The key points at issue and approaches in this regard have been discussed in the section that analyzed the ITA.

Basically, it is necessary to develop a negotiation package by always considering the combination of three yardsticks measuring the realizability of agreements, namely, the level of ambition, the timing of realization, and the scope of participants.

Regarding the scope of participants, the coverage of countries is usually too small if the membership comprises only developed countries, and such an agreement is prone to exploitation by free riders. In order to avoid this, it is vitally important to involve major developing economies, and the success of this task hinges on the formulation of a mutually beneficial negotiation package that is enticing enough to attract them. For instance, lowering the level of ambition by narrowing down the coverage of products is one way to achieve that end.

Furthermore, as was the case with the ITA, some consideration needs to be given to responses to non-tariff issues and a possible linkage to tariff reduction

and elimination packages in other areas. In doing so, it should be kept in mind that trying to deal with non-tariff issues will naturally cause negotiations to drag on and tend to reduce the number of participants.

2) Services

The Financial Service Agreement and the Basic Telecommunication Agreement can be cited as pioneering cases of plurilateral agreements in the area of trade in services, and approaches employed for their realization are well known.

Although much depends on how services negotiations under the Doha Round will turn out, it will be necessary going forward to explore the possibility of concluding plurilateral agreements on specific service sectors (e.g., agreement on environment services) or issue-specific plurilateral agreements (e.g. agreement on domestic regulations). As the global economy becomes more service sector oriented and more and more service companies move into the global market, there will be a wide range of potential areas for plurilateral initiatives.⁴⁹

3) Government Procurement

To begin with, the successful conclusion at the 2011 WTO Ministerial Conference of the renegotiation of the Agreement on Government Procurement (GPA) should be welcomed.

In this area, a very high level of discipline imposed by the GPA, a non-MFN-based plurilateral agreement, long hampered the expansion of its membership. However, it is noteworthy that a range of non-signatory economies, including China, are now showing interest in joining the agreement, allured by the government procurement market of signatory economies.

If the recent conclusion of the GPA renegotiation serves as an impetus and drives membership expansion going forward, interest in plurilateral initiatives in general will likely increase as well. Now that the renegotiation has ended

⁴⁹ Lee-Makiyama, Hosuk. "Future-proofing World Trade in Technology: Turning the WTO IT Agreement (ITA) into the International Digital Economy Agreement (IDEA)" in *ECPE Working Paper No. 04/2011*. In this paper, Lee-Makiyama calls for establishing the IDEA, an expanded version of the ITA, which includes not only tariff reduction and elimination but also service liberalization commitments.

successfully, it is necessary to shift the focus onto increasing the number of participants.

4) Electronic Commerce

Electronic commerce, or e-commerce, is another potentially promising area for plurilateral initiatives. Discussions on a moratorium on custom duties on electronic transmissions took place more than a decade ago along with those on the question of whether e-commerce should be dealt with under the GATS or the GATT (regarding which, Japan took an initiative in advocating for the application of the latter).

Subsequently, the United States has incorporated provisions for a moratorium on custom duties and tariffs on e-commerce into its FTAs with such countries as South Korea and Australia. Japan has also introduced its first set of such e-commerce provisions—including those for a moratorium on custom duties and tariffs, MFN and national treatment (NT), and market access—in its economic partnership agreement (EPA) with Switzerland.

It is considered that there is a fairly good chance for Japan and the United States to pursue jointly and achieve a plurilateral agreement on rules for business software and other related matters, drawing on the e-commerce provisions in the Japan-Switzerland EPA and similar provisions in other existing FTAs. In doing so, they can quite possibly involve such countries as Switzerland, Australia, and South Korea, i.e., those countries that have agreed to e-commerce provisions in their FTA or EPA either with Japan or the United States.

The framework of consultations for a proposed economic integration agreement between Japan and the EU (Japan-EU EIA) will be a possible venue for the two to discuss e-commerce. However, it will be quite possible to bring the EU into the plurilateral framework if Japan and the United States collaborate in that direction.

In fact, e-commerce provisions under existing FTAs are far from satisfactory, and discussions should be deepened toward introducing additional provisions. A possible approach in this regard would be to pursue further development of rules for e-commerce through various opportunities such as initiatives for the Japan-EU EIA and FTAs with developed countries, while at the same time

exploring the possibility of bringing them all under a plurilateral framework.

5) Trade and Investment

Following the failure of the MAI initiative at the OECD, the relationship between trade and investment was included in the initial agenda for the Doha Round negotiations but was subsequently dropped at the WTO Ministerial Conference in Cancun in 2003. This turn of events has been greatly affecting overseas investment not only by Japanese companies but also those from the United States, Europe, and many other countries. Lack of satisfactory international rules on investment is critically detrimental to international business activity, particularly in countries that grant national treatment only after the establishment of a local subsidiary while continuing to demand technology transfers.

Bilateral investment treaties (BITs) are definitely important but not enough. Discussing plurilateral rules on investment is necessary not only for investing countries—i.e., Japan and other developed economies—but also for developing countries where foreign direct investment (FDI) is essential to economic growth. Indeed, all countries and regions around the world need this discussion because it is anticipated that south-to-south and south-to-north investment will expand in the coming years. It is also expected that developing economies' attitude toward initiatives for creating international rules on investment will change in due time. Going forward, it will be necessary to deepen discussions on procedures for settling investment-related disputes, including investor-state dispute settlement (ISDS) provisions.

6) Trade and Competition

Interaction between trade and competition policy was put on the agenda for the Doha Round in response to the strong request by the European Commission (which was supported by Japan). However, like the issue of trade and investment, it was dropped at the WTO Ministerial Conference in Cancun.

The loss of venue for discussing competition-restrictive trade measures and their treatment under the WTO has been making it extremely difficult to discuss export restrictions imposed by certain countries and companies at a time when natural resources markets are becoming increasingly oligopolistic (e.g., export restrictions of natural resources, mergers between natural resources giants).

The competition authorities of some economies are already engaged in a policy dialogue. However, it is also necessary to launch international discussions on competition-restrictive situations and measures from the viewpoints of both trade and competition.

7) Standards and Conformance, and TBT

At the launch of the Doha Round, Japan attempted but failed to put technical barriers to trade (TBT) on the agenda due to a lack of sufficient support from other WTO members. Today, however, while the Doha Round remains gripped by deadlock, non-tariff issues and behind the border measures are drawing much attention. Establishing a set of effective rules for such issues is critical in view of the need to create an environment that can respond properly to the globalization of business.

Discussions in this area are expected to make progress at the APEC forum and in the course of negotiations for interregional FTAs. The OECD also has a repository of relevant knowledge and expertise accumulated over the years. Since this area is extremely broad in scope and involves various treaties and agreements, it will be necessary to clarify the scope of issues to be discussed. However, despite such odds, this area deserves active efforts and commitments in view of the need to create business-friendly rules and build global value chains.

Issues are wide ranging, including the definition of international standards, best regulatory practices, mutual recognition agreements (MRAs), and certification rules. This is an area in which soft law has traditionally played an important role, and the WTO relies significantly on external institutions.⁵⁰ The fact that cooperation between the WTO and external specialized agencies is highly valued can be seen as an indication that the former lacks sufficient knowledge and expertise in this area.

It is considered quite possible to enhance TBT provisions through a plurilateral initiative. Given the highly specialized and technical nature of TBT issues, an in-depth discussion is warranted. But this is an area where Japan can pursue

⁵⁰ Footer (p.267).

plurilateral initiatives with the United States, the EU, or APEC partners. At the same time, however, it must be remembered that developed and developing economies are still divided over rulemaking for TBT as well as for standards and conformance. Thus, starting with like-minded countries would be a reasonable approach to a plurilateral initiative.

8) Rules of Origin

Efforts to harmonize non-preferential rules of origin have made little headway due to difficulties imposed by their multi-purpose and often protectionist nature (rules of origin are used for statistical purposes, enforcement of anti-dumping and countervailing duties, quota management, etc.). As for preferential rules, different countries have different rules, creating a situation often referred to as the “spaghetti bowl” phenomenon. The chaotic presence of many different rules and their arbitrary nature are, no doubt, hindering global trade. A joint research conducted by the WTO and the IDE-JETRO also found trade restrictive measures based on the country of origin problematic, pointing to the need to pursue the “made in the world” initiative.⁵¹ Discussions aimed at improving rules of origin are being made under the framework of the Trans-Pacific Partnership (TPP). Indeed, various plurilateral forums should be utilized to propose and take steps to improve rules of origin, particularly those of preferential terms.

3 Summary

In terms of the possible legal form of agreements, the areas discussed above can be broadly classified into the following three groups: 1) those in which the incorporation of rules into WTO agreements is assumed (tariffs, services, government procurement); 2) those in which immediate incorporation into WTO agreements is not assumed (investment, competition); and 3) those in which specific policies have not been set and will depend on future developments (e-commerce, standards and conformance/TBT, rules of origin). (Note: Detailed discussion on the legal form of plurilateral agreements is omitted.)

However, as seen in the case studies on the ITA and the ACTA, discussions on the legal form of agreements are inseparable from the type of forum, participants, and the intended contents of the agreements. In this sense, conclusion can be

⁵¹ “Trade Patterns and Global Value Chains in East Asia: From trade in goods to trade in tasks,” WTO/IDE-JETRO, 2011.

drawn only by examining all these factors on an area-by-area basis.

The areas discussed in Section 2 above are intended to be examples and have been selected from those closely related to trade and the WTO. Thus, there are many more potential areas for plurilateral agreements, if not limited to those related to the WTO.

For instance, in the area of trade and the environment, there may be more items—other than the liberalization of environmental goods and services—that should be dealt with under a plurilateral framework, depending on future developments in the relationship between multilateral environmental agreements (MEAs) and the WTO. Trade facilitation may be another possible area for plurilateral initiatives, that is, if the ongoing efforts under the WTO should happen to fail. Indeed, further globalization and changing needs of industries will certainly generate various new demands and requirements. Furthermore, it may become necessary to discuss some of those issues together as a combined package.

At the moment, FTAs and RTAs are serving as the almost sole channel for promoting trade liberalization and rulemaking because of the stalemate in the WTO negotiations under the Doha Round. The continuation of this trend could result in the fragmentation and inefficiency of the global trade regime.⁵²

Obviously, businesses relying on global supply chains want to see liberalization and rulemaking in the broadest possible scope. For instance, one option worthwhile considering is to pursue, in collaboration with major economies, a plurilateral agreement on international business facilitation, a package of rules for standards and conformance, e-commerce, country of origin, trade facilitation, and so forth. Or rather, it should be said that this sort of proactive proposals are crucially needed for the further enhancement of global supply chains and the development of the international trade system.

It goes without saying that such initiatives must be intended to support the

⁵² The United States and the EU differ in their trade regimes and legal systems. Seeking to harmonize various systems in a bits-and-pieces manner under this situation would definitely cause inefficiency and give rise to new problems. The spaghetti bowl of rules must be avoided by all means.

multilateral trade regime under the WTO and are designed to provide a basis for multilateral rulemaking in the future. Thus, they must be consistent with WTO rules.

The sense of speed permeating the WTO and its round of trade negotiations is just not acceptable, given the pace at which globalization is taking place and business environments are changing. While firmly supporting the WTO as the bedrock of the global trade system, governments around the world should consider utilizing issue-based plurilateral agreements more proactively in parallel with pursuing FTAs so that they can respond more quickly to new problems faced by their industries and challenges in global trade.

VI Conclusion

1 Governance of the Global Trade System and Plurilateral Agreements

Today, as the stagnation and problems plaguing the WTO have become all too clear, it is imperative to prepare and establish a mechanism for making full use of issue-based plurilateral agreements along with FTAs. The WTO, which operates on the principles of a single undertaking and decision-making by consensus, is groaning under its own weight, with its membership growing in size and diversity and a large number of issues listed on agenda.

Plurilateral agreements need to present solutions and provide much-needed impetus to the WTO, thereby enabling it to cope properly with global issues in reality. Issue-based plurilateral initiatives are a critical tool to support the free trade regime and the WTO that are vital for Japan.

2 Inter-institutional Competition among the WTO, FTAs, and Issue-based Plurilateral Agreements

The WTO, FTAs, and issue-based plurilateral agreements need to be considered collectively from the viewpoints of trade liberalization and rulemaking. Promoting issue-based plurilateral agreements helps understand the problems embedded in the WTO and find a direction for reform.

Setting a framework for an issue-based plurilateral agreement involves the selection of both issues and members, hence, requiring a more strategic approach than would be the case in pursuing multilateral agreements or FTAs.

In the face of progressive globalization and continuous changes in the economic environment, governments will be required to have a good command of all of these various tools, applying the right one to the right need to deliver the best possible solution. It is hoped that this paper will provide useful insights to the government in pursuing issue-based plurilateral agreements and implementing trade policies in the future.

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