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The WTO and the rise of plurilateralism — what lessons can we learn from the European Union's experience with differentiated integration?

Article (Accepted version) (Refereed)

The WTO and the rise of Plurilateralism

What lessons can we learn from the European Union's experience with differentiated integration?

Robert Basedow*

Abstract: The *de facto* failure of the Doha Round has shaken the confidence in multilateral trade negotiations and governance. Policy-makers increasingly turn to plurilateralism – in the form of Plurilateral and Critical Mass Agreements – as a new strategy for global trade governance. The World Trade Organisation may develop into a 'club of clubs'. The rise of plurilateralism creates opportunities and risks. Plurilateralism may reinvigorate world trade and modernise the WTO. But it may also fragment the global trade regime and disenfranchise countries. The article advances two arguments. First, the turn to plurilateralism is timely and promises to be welfare-enhancing as trade liberalisation evolves from negative integration through tariff cuts to positive integration through rule convergence. Plurilateralism is often better suited to govern rule convergence. The article builds on the theory of club goods to underpin this claim. Second, the turn to plurilateralism nonetheless requires a carefully crafted governance approach to succeed. The article thus evaluates the rich experience of the European Union with so-called 'differentiated integration' to inform the policy debate in the WTO. It highlights that inter alia transparency, trust and institutional embedding are key to ensure that the WTO and her members benefit from the rise of plurilateralism.

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1. Introduction[**]

In December 2015, the Doha Round *de facto* collapsed after 15 years of cumbersome negotiations. While the Doha Round has not formally been buried yet, the confidence of many policy-makers in multilateral trade negotiations and governance is shaken. Many policy-makers doubt that multilateral trade negotiations – bringing together and requiring the consent of all 164 members of the World Trade Organisation (WTO) – can produce any meaningful new trade commitments and address the evolving realities of the world economy. Multilateral trade negotiations and governance are widely perceived as inefficient and ineffective.

Many policy-makers have shifted their attention toward plurilateral trade governance as a promising alternative to multilateralism. The 11th Ministerial Conference (MC11) in Buenos Aires in December 2017 produced three declarations by sub-stets WTO members, which are seen to prepare the ground for plurilateral initiatives on new trade rules for Micro, Small and Medium-sized Enterprises (MSMEs), e-commerce and investment facilitation. The rise of plurilateralism implies the transformation of the WTO into a 'club of clubs' of differentiated trade integration.[1] Plurilateral Agreements (PAs) and Critical Mass Agreements (CMAs) enable likeminded countries to deepen and to broaden WTO rules and commitments for specific trade issues, while hesitant WTO members do not need to participate in these initiatives in order to allow PAs and CMAs to come into force. Plurilateralism promises to be more efficient and effective in adjusting the WTO to the evolving challenges of global trade than multilateralism, which requires all 164 WTO members to participate in and to agree to new rules and commitments. The WTO as a 'club of clubs' may lift the global trade regime out of its current paralysis.

Plurilateralism has important advantages. Nonetheless, there are also noteworthy downsides to it. Governance through plurilateral clubs risks legally and economically fragmenting the global trade regime. Multiple PAs and CMAs with varying membership create diverging commitments and norms, which may undermine the coherence of international trade law and make the trade regime more difficult to navigate for stakeholders. What is more, the turn toward plurilateralism risks side-lining developing and least developed countries. Developing and least developed countries may struggle to make their voices heard in negotiations and to participate and to commit to ambitious PAs and CMAs. The transition of the WTO toward a 'club of clubs' of differentiated trade integration may limit the potential of trade to boost development and to eradicate poverty.

The discussion highlights that the WTO faces an important governance challenge in the coming years. *How can policy-makers take advantage of the efficiency and effectiveness of governing through plurilateral clubs while limiting the negative effects of plurilateralism on the WTO and the global trade regime?* This paper seeks to give some tentative answers to this question. It ties in with other articles of this special issue, which assess future governance challenges in the WTO regime.[2] This

[**] The author is grateful for comments from Bernard Hoekman, Petros Mavroidis, Joost Pauwelyn and the participants of the MC11 Think Conference in Buenos Aires in December 2017.

[1] Bernard Hoekman and Petros C Mavroidis, 'Embracing Diversity: Plurilateral Agreements and the Trading System', 1 World Trade Review 14 (2015), at 101; Peter Sutherland et al, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: World Trade Organization, 2004); Warwick Commission, *The Multilateral Trade Regime: Which Way Forward?* (Coventry: University of Warwick, 2007).

[2] Susan Ariel and Patrick Leblond, 'Another digital divide: the rise of digital realms and its implications for the WTO and the global economy', MC11 Thing Conference working paper (2017), at; Rachel Brewster, 'Exit from Trade: Cooperation and fairness', MC11 Thing Conference working paper (2017), at; Dylan Geraets, 'Ensuring continued support for the rules-based multilateral trading system: the need for a public-private approach', MC11 Thing Conference working paper (2017), at; Ohiocheoya Omiunu, 'The role of non-traditional actors (NTAs) in

article reviews the literature on 'differentiated integration' in the European Union (EU) to that end. Trade policy-makers have only little experience with governing through 'clubs' apart from bilateral preferential trade agreements (PTAs). The EU, however, has experimented with various forms of 'differentiated integration' for several decades. The paper reviews research on the costs and benefits of 'differentiated integration' to identify key lessons from the EU experience of relevance for the WTO.

The paper is structured as follows. The first section provides a theoretical background. It discusses why multilateralism was generally thought to be optimal for trade governance. It then cautions that the evolving nature of trade policy makes plurilateralism an equally compelling and in some cases even welfare-maximising governance approach today. The second section introduces the reader in more detail to the different types of plurilateralism (PAs; CMAs; PTAs) permitted under WTO law and the WTO's experience in this domain. The third section turns toward the EU experience with 'differentiated integration'. It briefly discusses the different types of 'differentiated integration' in the EU, their costs and benefits and the EU's strategy to limit undesired and to maximise desired effects of 'differentiated integration'. The article transposes several principles guiding the EU's approach to 'differentiated integration' to the WTO context and formulates policy recommendations.

2. Making the theoretical case for plurilateralism

2.1 The theoretical foundations of multilateralism

The term 'multilateralism' implies in a trade context that all WTO members jointly formulate and agree on common rules and negotiate on trade liberalisation commitments.[3] All WTO members then apply these rules and offer market access in line with their national schedules to all other WTO members. In other words, WTO members must not discriminate vis-à-vis other WTO members. A notable exception to multilateralism are PTAs, which allow – within limits – for discriminatory trade liberalisation between a subset of WTO members.

Multilateralism has been the ideal of global trade governance for economic and political considerations.[4] First, the architects of the post-war world economy thought that trade discrimination had amplified economic imbalances and political tensions in the interwar period. Multilateralism should prevent trade from intensifying international tensions. Second, multilateralism should ensure that trade could take place within a coherent and transparent set of rules, which provides for a level playing field for traders and consumers. Finally, multilateral trade liberalisation is supposed to ensure the optimal allocation of resources, to maximise output and ultimately welfare. Discriminatory trade liberalisation – on a bilateral, regional or plurilateral basis – should result in a distortion of trade flows, misallocation of the world's scarce resources and foregone welfare.

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the design of international economic agreements in the 21st century', MC11 Thing Conference working paper (2017), at.

[3] Bernard Hoekman and Petros Mavroidis, *World Trade Organization*, 2 edition (Routledge, 2015).

[4] Jagdish Bhagwati, *Termites in the Trading System* (Oxford: Oxford University Press, 2008); Bernard Hoekman and Michael Kostecki, *The political economy of the world trading system*, 3d ed. (Oxford: Oxford University Press, 2009); John Ravenhill, *Global political economy*, 2nd ed. (Oxford: Oxford University Press, 2008); John Gerard Ruggie, 'International regimes, transactions, and change: embedded liberalism in the postwar economic order', 02 International Organization 36 (1982), at 379.

2.2 The growing complexity of trade policy and new policy trade-offs

Policy-makers have been embracing multilateralism as the ideal of global trade governance for good reasons. The recent reorientation of the policy debate toward plurilateralism is typically justified on practical grounds of efficiency and effectiveness rather than economic theory and wholehearted conviction.[5] Policy-makers and academics argue that – while welfare-maximising in theory – multilateralism simply does not work anymore. Plurilateralism, which is understood as agreeing on rules and new market access commitments in a sizeable sub-group of WTO members, is seen as a practical yet not ideal approach to global trade governance.

There is, I argue, a much stronger theoretical case for plurilateralism to be made. Plurilateralism should not be considered as a mere practical second-best approach to trade governance in the light of failing multilateralism. Rather plurilateralism should in many instances be seen as an optimal and welfare-maximising approach to trade governance nowadays. Why is that? In short, the growing complexity of modern trade policy creates new trade-offs between trade gains and intrusive adjustments to regulations and public policy. Pluriateral arrangements are in many cases better suited to locate mutually agreeable legitimate and welfare-maximising agreements than multilateralism. I draw on the theory of club goods to underpin my argument.[6]

One may recall here that traditional trade policy focused on the removal of classic 'on-the-border' trade barriers such as tariffs and quotas. Trade policy and negotiations proceeded through so-called 'negative' integration. Policy-makers faced a trade-off between trade gains from the removal of trade restrictions and potentially adverse employment effects. Since the rise of the neo-liberal paradigm in the late 1970s and 1980s, however, many states fully endorsed the classic economic perspective that trade liberalisation is generally beneficial for society and maximises welfare. The trade-off between trade gains and employment partly vanished from the minds of policy-makers. Extracting market access commitments from negotiating partners has become the key preoccupation of many policy-makers.

During the last years, however, trade policy has fundamentally evolved and new – challenging – policy trade-offs have emerged. Modern trade policy proceeds through 'positive' rather than 'negative' integration in the form of regulatory cooperation. Differences in regulations trigger three types of trade costs.[7] First, traders may need to get informed about local regulatory requirements. Second, they may have to adjust goods and services to local regulatory requirements. And third, they may have to pay for compliance assessment procedures by local authorities. Modern trade policy seeks to promote – within the limits of democratically defined public policy and regulatory objectives – communication and cooperation between national regulators in order to promote regulatory convergence and harmonisation. States seek to agree on joint regulations and enforcement mechanisms to reap the economic gains of trade liberalisation while pursuing their public policy and regulatory objectives. Modern trade policy as 'positive' integration is thus a 'constructive' process and

[5] Kenneth Heydon, 'Plurilateral Agreements and Global Trade Governance: A Lesson from the OECD', 5 Journal of World Trade 48 (2014), at 1039; See Hoekman and Mavroidis, above n 3; Brendan Vickers, *The Relationship between Plurilateral Approaches and the Trade Round* (Geneva: E15 Initiative, 2014).
[6] Alberto Alesina and Enrico Spolaore, *The size of nations* (Cambride MA: MIT Press, 2005); Alessandra Casella, 'Free trade and Evolving Standards', in *Free trade and harmonization* (Cambride MA: MIT Press, 1996).
[7] OECD, *International Regulatory Co-operation and Trade - Understanding the Trade Costs of Regulatory Divergence and the Remedies* (Paris: OECD Publishing, 2017).

considerably more intrusive than traditional trade policy. It requires states to find a finely tuned balance between trade and broader public policy objectives.

2.3 Modern trade liberalisation – Network effect or club good

Trade liberalisation through international regulatory cooperation may either be subject to network effects or satisfy the qualities of club goods. The gains from adhering to international regulations – such as basic product standards for instance – may increase as a growing number of jurisdictions adjusts to the norm.[8] Such network effects make trade liberalisation through regulatory cooperation non-discriminatory and indeed keep multilateralism desirable and self-sustaining for this type of regulation. In many cases, however, regulatory cooperation should exhibit club good dynamics making Plurilateralism a more promising governance approach. Club goods are non-rival yet excludable.[9] Agents may cooperate and jointly produce such goods. Joint production significantly reduces per capita production costs, while all participating agents can consume the good. Such club goods, however, need to be tailored to the preferences of the club i.e. the entirety of the agents. The club good is unlikely to fully satisfy the preferences of any one agent. Agents should remain in a club as long as the gains of consuming a club good at low costs exceed the losses from consuming a good not fully tailored to agents' preferences. If the club becomes bigger, per capita production costs shrink. At the same time, however, the club good must be tailored to the ever more heterogeneous preferences of its members. Club good theory thereby predicts that clubs have an optimal welfare-maximising size. If clubs are smaller than the optimal size, agents may join. If they are bigger than the optimal size, agents are likely to leave the club. The optimal size hinges on the cost savings realised from joint production and the heterogeneity of agent preferences.

How does the theory of club goods relate to trade liberalisation through international regulatory cooperation? Trade liberalisation through regulatory cooperation is in many regards similar to the production of club goods. It faces policy-makers with a challenging trade-off between trade and other public policies. States need to carefully weigh costs and benefits of regulatory cooperation. Participating in regulatory cooperation and adhering to internationally agreed regulations might lead to increased trade and investment activities, promote GDP growth and create jobs.[10] At the same time, states face costs when engaging in regulatory cooperation. They need to give up regulations tailored to their national preferences and objectives. Instead they enforce internationally agreed regulations, which reflect the aggregate preferences and policy objectives of all participating states. It follows that states should only engage in international regulatory cooperation, if the economic gains outweigh the costs of adjusting regulations and public policies. If the costs outweigh the gains, states should stop cooperating. As the number of states participating in international regulatory cooperation increases, the greater might be the distance between the national preferences and policy objectives and the internationally agreed regulations. In other words, the costs of participating in regulatory cooperation might grow. If the economic gains from greater membership do not grow to the same extent, states may leave cooperation arrangements and prefer foregoing economic gains in order to maintain national regulations. The analysis implies that there is an optimal size for international regulatory

[8] The diffusion of technical standards such as USB cables or QWERTY keyboards illustrates the example. The more users adjust to a standard, the greater are the potential gains for other users to adjust.
[9] See Alesina and Spolaore, above n 8; See Casella, above n 8.
[10] The reduction in trade costs attained through regulatory cooperation is not necessarily limited to cooperating states though. If a sizeable group of countries cooperates to adjust regulations, firms from non-cooperating countries may also benefit from the reduction in trade costs. In that sense, regulatory cooperation can be non-discriminatory and may under certain conditions produce public rather than club goods.

cooperation arrangements. The optimal size should be reached where the regulatory cost of adjustments and economic gains from trade liberalisation functions intersect. A cooperation arrangement at optimal size should be welfare maximising as it strikes an optimal balance between costs and benefits. It is unlikely that the optimal size of regulatory clubs neatly correlates with full WTO membership.

3. The WTO experience with differentiated integration

3.1 Types of differentiated integration in the GATT/WTO regime

Differentiated integration is not a fundamentally new phenomenon in the GATT/WTO regime. On the one hand, the WTO Agreement and its annexes provide for a limited degree of differentiated integration inter alia through so-called 'special and differentiated treatment' and national GATT and GATS schedules. 'Special and differentiated treatment' provisions grant developing and least developed countries inter alia longer implementation periods and special safeguards. National GATT and GATS, moreover, allow countries to commit to different levels of economic integration within the WTO regime. WTO law, on the other hand, provides for the conclusion of three different types of plurilateral agreements to accommodate differentiated integration. Plurilateral agreements allow for more significant degrees of differentiation and therefore stand in the focus of this article.

PAs: First, WTO members may negotiate under Article II.3 WTO plurilateral agreements. Like-minded countries may get together and enter into new rules and/or market access commitments. PAs may provide for co-called WTO-plus and WTO-extra commitments. WTO-plus PAs deepen existing WTO market access commitments and rules. WTO-extra PAs extend the scope of WTO market access commitments and rules to new areas. Signatory countries may apply PAs on a discriminatory basis. The MFN principle does not cover plurilateral agreements. In other words, non-signatory WTO members cannot demand the same treatment as signatory members under the PA. Yet, most PAs aim for new rules rather than additional market access commitments. Rules are often non-discriminatory by nature. PAs – unlike PTAs – are typically issue- or sector-specific agreements. PAs do not cover the entirety of trade activities between the signatory countries but focus on a rather narrow issue such as environmental goods or e-commerce. It is noteworthy here that PAs require consensus among all WTO members to be appended to WTO law and to become legally binding. Once likeminded WTO members have come to an agreement, they need to submit the text to the WTO's General Council for *ex ante* scrutiny. If non-signatories come to the conclusion that a planned agreement goes against their national preferences, they may veto the PA. The *ex ante* consensus rule ensures that PAs are Pareto-efficient. Yet, it may significantly complicate and delay the conclusion of PAs. Finally, it needs to be emphasised that PAs are generally open to all WTO members.

CMAs: Second, WTO members may negotiate so-called 'critical mass agreements'. Like PAs, they enable a subset of likeminded WTO members to agree on new rules and commitments going beyond their multilateral schedules and commitments. Like PAs, they are seen as legal instruments to deal with specific sectors and issues rather than horizontal matters. CMAs differ in one important aspect from PAs though. They apply on a MFN basis. In other words, a subset of WTO members enters into and is bound by CMAs. Any commitments under CMAs are, however, extended to all WTO members. CMAs are a viable governance approach, if the participating WTO members represent a sizeable share of world trade, production and consumption in a concerned domain. Such a 'critical mass' ensures that the gains from trade liberalisation are significant and compensate signatories for losses due to free-riding of other WTO members.

PTAs: Finally, WTO members make prolific use of Regional Trade Agreements (RTAs) in accordance with Articles XXIV GATT and III GATS. RTA is the WTO term for preferential trade agreements (PTAs). PTAs may be considered as plurilateral agreements as they increasingly involve not only two but several countries (e.g. North American Free Trade Agreement, European Free Trade Area). PTAs – undoubtedly an important issue – are not the subject of this study. They pose a number of distinct challenges and questions discussed at length in the literature.[11]

3.2 Past experiences and new developments of differentiated integration in the WTO

The WTO regime has gained some – yet limited – experience with PAs and CMAs. In the 1960s and 1970s, a number of likeminded WTO members negotiated so-called codes for specific trade issues. Most codes were applied on a MFN basis and qualified as CMAs.[12] Most codes were integrated into the WTO Agreement as part of the Uruguay Round (1986-1994) and thereby become multilateral commitments; or expired at some point.[13] As of today, three PAs are in force – the Agreement on Government Procurement, the Agreement on Trade in Civil Aircraft and the Information Technology Agreement.

The last years saw several plurilateral initiatives within and outside the WTO regime. Two important initiatives recently collapsed. The Anti-Counterfeiting Trade Agreement (ACTA) was a plurilateral initiative outside of the WTO of some 30 countries including the USA, the EU and other OECD economies to establish a legal framework to fight trade in counterfeited goods and trade-related infringements of intellectual property rights. While the negotiations were concluded, the EU failed to ensure ratification of ACTA in 2012. The second major plurilateral initiative – which seems to have failed – was the Environmental Goods Agreement (EGA). Some 50 WTO members negotiated the EGA in the WTO between 2014 and 2016. The EGA was designed as a CMA. After two years of negotiations – and shortly before the conclusion – major negotiating parties tabled new demands, which led to the collapse of the negotiations.

Some 50 WTO members currently negotiate on the so-called Trade in Services Agreement (TiSA). The aim of TISA is to harmonise regulations and standards for major service sectors and thereby to facilitate trade. It follows in the footsteps of the GATS. The involved countries negotiate TiSA outside the WTO and have shown little interest in involving other WTO members or the Secretariat. Trade policy-makers and academics moreover discuss a number of sectors and issues, which may become object of plurilateral initiatives such as financial services, digital trade and alike. It remains to be seen which ideas become reality in the coming years.

[11] Richard Baldwin, 'Multilateralizing Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade', 11 World Economy 29 (2006), at 1451; See Bhagwati, above n 6; Kenneth Heydon and Stephen Woolcock, *The rise of bilateralism: comparing American, European and Asian approaches to preferential trade agreements* (Tokyo: United Nations University Press, 2009); Paul Krugman, 'Is Bilateralism Bad?', in Elhanan Helpman and E Razin (eds), *International Trade and Trade Policy* (Cambride MA: MIT Press, 1991) 9–23.
[12] See Hoekman and Kostecki, above n 6, at 512.
[13] Ibid., at 512–513.

3.3 Positive and negative effects of Plurilateralism

3.3.1 Benefits of Plurilateralism

Economic gains: Plurilateralism comes with a number of costs and benefits. A key advantage of PAs and CMAs is of economic nature. PAs and CMAs may promote growth through two channels. PAs and CMAs providing for tariff reductions liberalise economic relations between countries and thereby allow them to tab on their respective comparative advantages and resources. PAs and CMAs – much like multilateral or bilateral agreements – thus provide for a more efficient allocation and use of countries' production capacities and resources.

Streamlining governance and modernising trade rules: In addition to the 'classic' economic benefits tied to trade integration, PAs and CMAs are promising governance tools to update rules. WTO law reflects the economic, political and legal realities of the 1980s. For the moment being WTO dispute settlement body has sought to apply and elaborate WTO law in line with new challenges. This practice, however, triggers questions over legitimacy, accountability and effectiveness. Plurilateralism is a promising strategy to elaborate new modern rules for salient trade issues.

Keeping the WTO alive: In the light of cumbersome multilateral trade negotiations, many countries have turned toward bilateral trade agreements in the last 15 years. The turn toward bilateral agreements endangers the WTO as a focal point of global trade governance. It increasingly shifts rule-making and policy debates from the WTO to bilateral fora. PAs and CMAs are firmly rooted in the legal, political and institutional setting of the WTO. They may keep the WTO alive as legal and political hub for the global trade regime.

3.1.2 Costs of Plurilateralism

Limiting interest in multilateral efforts: While Plurilateralism may be seen as promising new approach to trade governance by overcoming the difficulties of multilateral trade negotiations, one may also criticise it for further limiting interest in such efforts. As countries resort to bilateral and plurilateral agreements to attain their trade policy objectives, the relative costs for working toward a multilateral agreement rise. This effect also raises questions over fairness in global trade governance. The Doha Development Round was meant to produce more development-friendly trade rules in exchange for developing and least developed countries' acceptance of WTO rules inter alia on intellectual property rights or services trade during the Uruguay Round. The current turn from multilateralism to plurilateralism undoes this gentleman's agreement between the developed and developing world.

Side-lining developing countries: A further important drawback of plurilateralism is the risk of side-lining opposition – notably from developing and least developed countries. Critiques of plurilateralism warn that PAs and CMAs enable rich developed countries to agree among themselves on sectorial rules tailored to their national interests. While developing and least developed countries may *de jure* not be bound by these rules, they may *de facto* have to accept and follow these rules in case they want to take part in relevant global value chains and join a PA in the future. Plurilateralism is thus seen to potentially undermine the legitimacy and accountability of the WTO.

Negative development effects: A related challenge is the potentially detrimental development impact of Plurilateralism. Trade has been one of the strongest motors of international development over the last decades. Competitive access to global markets was decisive. The rise of plurilateralism may

complicate access to global markets. Future PAs and CMAs will to a large extent focus on complex regulatory matters. Developing and least developed countries often lack the administrative capacity to enforce complex international regulations. PAs and CMAs risk impeding economic integration for developing countries if not accompanied by capacity building.

Political and legal fragmentation: As Hoekman and Mavroidis[14] observe, PAs were a common feature of the GATT regime after the Tokyo Round. During the Uruguay Round, policy-makers however decided to limit the use of PAs and to largely transpose existing PAs into the WTO Agreement. Policy-makers worried that overlapping and contradictory provisions and interpretations might hinder rather than help world trade; and shift the political momentum out of multilateral discussions. This concern remains valid today. Yet, the much greater heterogeneity of WTO membership has created the impression that 'differentiation' is necessary.

4. The EU's experience with differentiated integration – What lessons for the WTO?

4.1 The EU's governance crisis and the rise of differentiated integration

The current debates on the causes, advantages and disadvantages of plurilateralism within the WTO mirror – to a striking degree – the long-standing debates on 'differentiated integration' within the EU. The EU's turn toward differentiated integration reflected a profound governance crisis. In the 1970s and 1980s, European policy-makers and academics started lamenting the inability of the EU to take decisive policy action, to reinvigorate the European economy and to advance integration. While newspapers coined the term '*eurosclerosis'* to describe Europe's paralysis, political scientists developed the concept of the '*joint decision trap*' to explain inertia.[15] Three factors created this 'joint decision trap' in the EU. First, in many policy domains the interwoven decision-making structures of the EU required the Member States to unanimously agree on new policy measures. Second, the number and heterogeneity of Member States triggered prohibitively high transaction costs to strike the necessary bilateral substantive package deals.[16] In line with the Coase theorem, Scharpf (1988) argued that these high transaction costs prevented agreement on Pareto-efficient outcomes. Instead EU decision-making systemically produced stalemate and/or sub-optimal lowest common denominator measures. Finally, the EU was caught in this paralysis due to the Member States' self-interest. The Member States were unwilling to streamline decision-making and thereby to sacrifice sovereignty. Scharpf concluded that the EU was indeed arrested in a state of "*frustration without disintegration and resilience without progress*" [17].

[14] 'WTO "à la carte" or "menu du jour"? Assessing the case of more plurilateral agreements', 2 European Journal of International Law 26 (2015), at 319.
[15] Fritz Scharpf, 'The joint decison trap revisited', 4 Journal of Common Market Studies 44 (2006), at 845; Fritz Scharpf, *Regieren in Europa - Effektiv und demokratisch?* (Frankfurt: Campus, 1999); Fritz Scharpf, 'The joint decision trap: Lessons from German federalism and European integration', 3 Public Administration 66 (1988), at 239; George Tsebelis, *Veto players : how political institutions work* (New York: Russell Sage Foundation, 2002); George Tsebelis and Xenophon Yataganas, 'Veto players and decision-making in the EU after Nice: Policy stability and bureaucratic/judicial discretion', 2 Journal of Common Market Studies 40 (2002), at 283.
[16] In today's EU of 28 Member States and negotiations on *a* salient policy issues, 28 x (28 – 1) x a^2 package deals have to be simultaneously agreed in order to enact a new policy measure. Needless to say that EU decision-making easily runs into stalemate if thousands and tens of thousands of bilateral deals have to be struck even for minor policy initiatives.
[17] See Scharpf, above n 17, at 256.

The conceptualisation of the 'joint decision trap' in the early 1980s produced a wealth of policy recommendations on how to reform EU governance to promote efficient, effective and democratically legitimate decision-making.[18] The leitmotiv flowing from this strand of research is to intensify the use of 'differentiated integration'. Differentiated integration should enable likeminded Member States to further integrate and to take decisive reform action, while sceptical Member States would not be forced to participate and in turn to block such efforts. Differentiated integration should thereby boost efficiency, effectiveness and the democratic legitimacy of EU governance and integration. Scharpf underlined that the turn toward differentiated integration was particularly important and timely, as European Integration had evolved from negative toward positive integration.[19] While the Commission and the Court of Justice of the EU (CJEU) could promote negative integration to some extent – even against Member State opposition – the European Institutions could not advance positive integration through joint rule-making without Member State support.

Differentiated integration in the EU has become a political reality since the 1990s.[20] As Bickerton et al. observe the EU has seen an unprecedented intensification of integration since the entry into force of the Maastricht and Amsterdam Treaties.[21] Integration, however, rarely proceeds through existing supranational legal structures or institutions. Instead changing subsets of Member States enter into intergovernmental treaties and create *de novo* intergovernmental agencies and networks – such as the European Stability Mechanism (ESM) – to deal with salient policy issues. The EU today is a highly complex regime of clubs within clubs rather than a homogenous entity with clear boundaries.

4.2 Types of differentiated integration

Scholars of European Integration analyse 'differentiated integration' in the European Union along three dimensions:

1. **Horizontal differentiation:** Horizontal integration refers to geographical differentiation within the overarching integration process or in other words the creation of 'clubs within the club'.[22] EU Member States may opt-in and out of common policy initiatives. The United Kingdom and Ireland for instance do not take part in the Schengen Area despite being EU Member States. In a similar vein, third countries may take part in common policy initiatives despite not being EU Member States. Ukraine, Georgia and Turkey for instance take part to varying degrees in the legal economic regime of the Single Market. Some scholars thus

[18] Gerda Falkner (ed), *The EU's Decision Traps Comparing Policies* (Oxford: Oxford University Press, 2011); See Scharpf, above n 17.
[19] See Scharpf, above n 17.
[20] Katharina Holzinger and Katharina Schimmelfennig, 'Differentiated Integration in the European Union: Many concepts, sparse theory, few data', 2 Journal of European Public Policy 19 (2012), at 292.
[21] Christopher Bickerton, Dermot Hodson and Uwe Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era', 4 Journal of Common Market Studies 53 (2015), at 703; Sandra Lavenex, 'The external face of differentiated integration: third country participation in EU sectoral bodies', 6 Journal of European Public Policy 22 (2015), at 836; Frank Schimmelfennig, Dirk Leuffen and Berthold Rittberger, 'The European Union as a system of differentiated integration: interdependence, politicization and differentiation', 6 Journal of European Public Policy 22 (2015), at 764; Alexander Stub, 'A Categorization of Differentiated Integration', 2 Journal of European Public Policy 34 (1996), at 283.
[22] See Schimmelfennig, Leuffen, and Rittberger, above n 23, The European Union as a system of differentiated integration.

distinguish between internal and external horizontal differentiation.[23] Horizontal differentiation is comparable to PAs and CMAs in that a subset of countries advances and agrees on additional integration measures, which exceed the generally agreed level of cooperation and integration in the 'main club'.

2. **Temporary differentiation:** Temporary differentiation refers to different finalities of differentiated integration arrangements.[24] So-called multispeed integration implies that all Member States strive to reach the same level of integration but may take more or less time to assume commitments. So-called '*Europe à la carte'* or *'variable geometry'* stipulates that Member States may opt-in or out of certain European policy initiatives. There is no legal commitment to participate in such initiatives at any time. Temporary differentiation may also occur within the WTO depending on whether PAs and CMAs are understood as building blocks toward a multilateral agreement or not.

3. **Vertical differentiation:** Vertical differentiation is rarely considered when reflecting upon differentiated integration in the EU. It refers to the diverging centralisation of decision-making, administration and enforcement of common policies in the EU.[25] While certain common policies are highly integrated with supranational decision-making, administration and enforcement capacities, other common policies are little integrated. Decision-making proceeds through intergovernmental consensus and joint measures are implemented and enforced through national or local administrations. The notion of 'vertical differentiation' can be transposed to some extent to the WTO regime. Especially with regard to PAs and CMAs, the question arises to what extent these agreements may draw on the WTO Secretariat and Dispute Settlement Body for the operation, monitoring and enforcement of group-specific commitments.

4.3 Instruments and strategies of differentiated integration

The EU has gained extensive experience with horizontal, vertical and temporary differentiation since the 1990s. It has developed a plethora of instruments to deal with these types of differentiated integration.

4.3.1 Hard law instruments

Opt-outs: The EU draws on a variety of hard law instruments for horizontal, vertical and temporary differentiated integration. The most basic hard law instruments at use in the EU are opt-out protocols. They put on record the full or partial non-participation of Member States in a common policy and

[23] Sieglinde Gstöhl, 'Models of external differentiation in the EU's neighbourhood: an expanding economic community?', 6 Journal of European Public Policy 22 (2015), at 854; See Lavenex, above n 23, The external face of differentiated integration.
[24] See Stub, above n 23.
[25] Andrew Moravcsik, *The choice for Europe: Social purpose and state power from Messina to Maastricht* (Ithaca: Cornell Univeristy Press, 1998); Mark A Pollack, *The engines of European integration: delegation, agency, and agenda setting in the EU* (Oxford: Oxford University Press, 2003); See Schimmelfennig, Leuffen, and Rittberger, above n 23, The European Union as a system of differentiated integration.

treaty obligation.[26] Opt-outs are thus used if a comprehensive 'multilateral' agreement among the Member States has been reached but individual Member States continue to oppose them. Opt-outs are subject to a consensus requirement among Member States.

Enhanced Cooperation: The so-called Enhanced Cooperation is by and large equivalent to PAs in the WTO regime.[27] It enables likeminded countries to deepen integration and to agree on new common policy measures in areas of mixed competence. It cannot be used to extend the reach of EU activity into new legal and political domains. The method of Enhanced Cooperation was invented to overcome the joint decision trap and is enshrined in European primary law. It is meant to prevent paralysis in situations where small groups of Member States do not want cooperate and would otherwise block initiatives. Commitments produced through Enhanced Cooperation become part of the EU's legal order and are managed by the European Institutions even though non-participating Member States are not bound by them. As for PAs and CMAs under WTO law, European primary law lists a number of conditions for the launch of Enhanced Cooperation initiatives. First, at least nine Member States must support such an initiative. It must be evident that no ordinary EU-wide initiative is underway. Second, the Commission may then formally propose the initiative to the Council. Third, the European Parliament must give its assent to the initiative. And finally, the Council must formally endorse the initiative by unanimity.

Intergovernmental Treaties: Member States have recently started using intergovernmental treaties to engage in differentiated integration.[28] These treaties are 'classic' treaties in the sense of public international law. They are not part of the EU's legal order, which inter alia implies that European Institutions do not play a role in the operation, monitoring and enforcement of relevant commitments. Rather than pursuing cooperation and integration through the EU's existing legal structures and political institutions, the Member States create in parallel *de novo* agencies and structures to attain their objectives.

A note on external differentiation instruments: For the sake of completeness, it needs to be mentioned that intergovernmental treaties have played a central and long-standing role with regard to external differentiation.[29] Many third countries take part to different degrees in the Single Market and underlying *acquis communautaire*. Iceland, Norway, Liechtenstein and Switzerland are highly integrated into the EU's legal, economic and political order through classic international agreements. Turkey, Ukraine, Georgia, Moldova and many other countries also participate to varying degrees and on the basis of trade agreements in the EU's Single Market. So while classic intergovernmental treaties may be considered a *novum* in regard to internal differentiation, they have been the central instrument in external differentiation.

4.3.2 Soft law instruments

The EU has developed a variety of soft law instruments to promote differentiated integration. Soft law instruments allow for more flexible cooperation and side-step often high decision-making hurdles at

[26] Rebecca Adler-Nissen, *Opting out of the European Union: diplomacy, sovereignty and European integration* (Cambridge: Cambridge University Press, 2014).
[27] Daniela Kroll and Dirk Leuffen, 'Enhanced cooperation in practice. An analysis of differentiated integration in EU secondary law', 3 Journal of European Public Policy 22 (2015), at 353.
[28] See Bickerton, Hodson, and Puetter, above n 23.
[29] See Gstöhl, above n 25, Models of external differentiation in the EU's neighbourhood; See Lavenex, above n 23, The external face of differentiated integration.

the EU and Member State level. Soft law instruments play an increasingly important role in internal cooperation and differentiation as well as external differentiation.

Open Method of Coordination: The Open Method of Coordination (OMC) is not *per se* an instrument for differentiated integration.[30] Yet, it is primarily used to foster cooperation in social policy (i.e. a policy domain where certain Member States have gained opt-outs) and is by its very nature of differential impact. The OMC in essence provides for peer discussions and reviews. The Member States share information about their approaches and experiences on policy challenges. The Commission may table recommendations to the Member States. The effectiveness of the OMC is controversial.

Regulatory cooperation: Regulatory cooperation is an often-overlooked but effective instrument to deepen integration among likeminded countries.[31] This blind spot arguably results from the informal and fluid nature as well as the absence of national governments in such cooperation efforts. Within the EU, many Member States engage in regulatory cooperation at the intergovernmental and interregional level. National regulators for instance exchange information to facilitate the development of efficient and effective norms and to enhance monitoring and enforcement activities. Regulatory networks and cooperation are also of great importance in external differentiation. Many non-EU countries for instance participate in the work of the EU's standardisation organisations such as CEN, ENELEC or ETSI. These organisations develop standards of quasi-binding nature for the Single Market.[32] Non-EU countries such as Ukraine, Russia or Belarus participate in EU standard-setting and import relevant norms into their jurisdictions. Such cooperation amounts to external differentiated integration into the EU's legal and economic order.[33]

4.3.3 Differentiation strategies

The preceding discussion suggests that differentiated integration proceeds through two strategies: top-down and bottom-up differentiation. In other words, the Member States sometimes manage to reach general agreement but allow a small isolated group of opposing Member States to opt-out either on a permanent or temporary basis. In the WTO context, this approach would amount to striking a multilateral agreement but allowing hesitant WTO members to abstain from controversial commitments for instance through a negative list enumerating national carve-outs and reservations.

More frequently though differentiated integration follows the reverse logic. The Member States fail to reach broad agreement. Hence, they start cooperating and integrating with likeminded Member States. Hesitant Member States may – if they wish so – join such enhanced cooperation later. In the WTO context, PAs and CMAs – and more generally positive lists of market access commitments – reflect this bottom-up strategy of differentiated integration.

Table 2: Overview of key instruments and features

[30] Jonathan Zetlin, 'Conclusion - the Open Method of Coordination in Action: Theoretical Promise', in Jonathan Zeitlin, Philippe Pochet and Lars Magnusson (eds), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Brussels: Peter Lang, 2005).
[31] Robert Basedow and Céline Kauffmann, 'International Trade and Good Regulatory Practices: Assessing The Trade Impacts of Regulation', OECD Regulatory Policy Working Papers 4 (2016), at; Nikolai Malyshev and Céline Kauffmann, *International Regulatory Co-operation: The Menu of Approaches* (Geneva: E15 Initiative, 2015); OECD, *OECD Regulatory Policy Outlook 2015* (Paris: OECD Publishing, 2015).
[32] Morten Kallestrup, 'Stakeholder participation in European Standardization: A mapping and an assesment of three categories', 4 Legal issues of economic integration 44 (2017), at 381.
[33] See Lavenex, above n 23, The external face of differentiated integration.

Differentiation instrument	Hard/soft law	Differentiation strategy	Decision-making mode in EU	Formally embedded in EU institutions and law	WTO equivalent
Opt-outs	Hard law	Top-down	Unanimity among Member States	Yes	Negative list approach
Enhanced cooperation	Hard law	Bottom-up	At least nine Member States & Qualified majority in Council of Ministers	Yes	PA & CMA
Intergovernmental treaties	Hard law	Bottom-up	Unanimity; no formal say of non-contracting states	No	PA & CMA
Open Method of Coordination	Soft law	n/a	n/a	Yes	TBT & SPS
Regulatory cooperation	Soft law	Bottom-up	n/a	No	TBT & SPS

4.4 Assessing the EU's experience with differentiated integration

Differentiated Integration has been a feature of European Integration for at least three decades. About half of the EU's policies are subject to some form of differentiated integration.[34] Scholars of European Integration, however, only recently started systematically researching the phenomenon. Our understanding of differentiated integration therefore remains remarkably limited.[35] Three questions are in bad need of research: 1) Why and when does differentiated integration occur? 2) Why does differentiated integration take different forms across policy domains? 3) How does differentiated integration affect the EU and individual Member States?

4.4.1 Why does differentiated integration occur?

The literature on differentiated integration in essence points to two conditions for differentiated integration to happen in the EU. First, differentiated integration may result from heterogeneous Member State preferences and capacities. A small minority of Member States may block integration or accession candidates may be unable to immediately commit to all Union law obligations.[36] Allowing acceding Member States to only gradually enter Union law commitments is seen to facilitate the

[34] Benjamin Leruth and Christopher Lord, 'Differentiated integration in the European Union: a concept, a process, a system or a theory?', 6 Journal of European Public Policy 22 (2015), at 754.
[35] See Holzinger and Schimmelfennig, above n 22; See Schimmelfennig, Leuffen, and Rittberger, above n 23, The European Union as a system of differentiated integration.
[36] Thomas Duttle et al, 'Opting out from European Union legislation: the differentiation of secondary law', 3 Journal of European Public Policy 24 (2017), at 406; See Scharpf, above n 16; See Scharpf, above n 16; Frank Schimmelfennig and Thomas Winzen, 'Eastern enlargement and differentiated integration: towards normalization', 2 Journal of European Public Policy 24 (2017), at 239; Thomas Winzen and Frank Schimmelfennig, 'Explaining differentiation in European Union teaties', 4 European Union Politics 17 (2016), at 616.

accession process through gradual capacity building and policy learning. It, moreover, limits negative externalities on old Member States for instance in the form of increased competition on labour markets. Allowing hesitant Member States, on the other hand, to stay on the side-lines of integration is seen as a last resort solution to enable likeminded countries to go ahead. Differentiation is thus in essence an instrument to accommodate heterogeneity in state preferences and capacity.

Second, research suggests that differentiated integration occurs, if externalities for hesitant Member States are negligible or positive.[37] If differentiated integration is seen to eventually trigger negative externalities for non-members, these non-members typically seek to prevent and to veto such initiatives in the EU. Similar dynamics must be expected in the WTO context. While CMAs are unlikely to meet significant resistance (all CMA benefits are extended to non-members), PAs may face headwinds if non-members expect immediate or future negative fallouts.

4.4.2 Why does differentiated integration take different forms?

No in-depth research exists shedding light on why and how differentiated integration arrangements vary in their legal and political form. Yet, new institutionalism offers promising tentative explanations.[38] Rational choice institutionalism suggests that institutions are designed in view of their functional purpose. The choice of differentiated integration mechanism should thus reflect cost-benefit calculations of the Member States. Historical institutionalism, in turn, stresses the importance of pre-existing legal and political structures for institutional development. From a historical institutionalist perspective, the choice of differentiated integration mechanism might reflect legacies and path dependence rather than rational functional cost-benefit calculations.

4.4.3 How does differentiated integration affect the EU and Member States?

For the purpose of this study, the question of key interest is how differentiated integration has affected the EU as whole as well as individual Member States. Should we consider differentiated integration in the EU as a positive or negative occurrence? Has it helped to overcome decision-making paralysis and re-invigorated European Integration? And what lessons can we draw from the EU experience for the WTO? The level of 'noise' in the form the Euro and migration crisis, Member State accessions and alike makes it difficult to disentangle the effects of differentiated integration on European Integration from other influences.

Effects on 'outsiders': Little attention has been paid to the effects of differentiated integration on the EU and individual Member States. The scarce research, however, suggests that differentiation did not politically or economically harm 'outsiders'. One of the few scholars having worked on the effects of differentiated integration on 'outsiders' is Adler-Nissen.[39] She analyses the United Kingdom and

[37] See Kroll and Leuffen, above n 27.
[38] Tim Büthe, 'Historical Institutionalism and Institutional Development in the EU - The Development of Suprnational Authority over Government Subsidies (State Aid)', in Thomas Rixen, Lora Anne Viola and Michael Zürn (eds), *Historical Institutionalism and International Relations: Explaining Institutional Development in World Politics* (Oxford: Oxford University Press, 2016) 37–66; Paul Pierson, *Politics in time: history, institutions, and social analysis* (Princeton: Princeton University Press, 2004); Kenneth Shepsle, 'Rational choice institutionalism', in RAW Rhodes, Sarah Binder and Bert Rockman (eds), *The Oxford handbook of political institutions* (Oxford: Oxford University Press, 2008) 23–38; Barry Weingast, 'Rational-choice institutionalism', in Ira Katznelson and Helen Milner (eds), *Political science: state of the discipline* (New York: W.W. Norton & Company, 2002) 660–692.
[39] above n 26.

Denmark's political standing in the Council of Ministers in policy domains subject to national opt-outs. She presents four findings of relevance for the management of plurilateralism in the WTO:

- First, the institutional setting of differentiation is important. If outsiders (are allowed to) participate in policy debates, they stay remarkably engaged and even influential in policy-making. While the United Kingdom and Denmark play an active role in debates on Justice and Home Affairs in the EU, they are institutionally and thereby politically excluded from discussions in the Eurogroup and other committees of the European Monetary Union. All three areas, however, are subject to similar national opt-outs.
- Second, the design of opt-outs affects the participation and influence of outsiders. The United Kingdom and the Denmark have in some domains opt-outs, which allow for selective opt-ins. Both countries play a markedly greater role in domains where they can legally opt-in.
- Third, the role British and Danish diplomats play in domains subject to opt-outs hinges on their self-conception. While British diplomats self-confidently take part in discussions in these domains and indeed have often decisively shaped discussions and outcomes, Danish diplomats are more reserved in their interventions and exert little influence on policy-making.
- Finally, British and Danish diplomats are not seen as 'bad Europeans' and stigmatised. Instead the working culture of the Council of Ministers seeks to build compromises amenable for all – even outsiders.

With regard to the WTO regime, Adler-Nissen's findings have important implications. They suggest that open participation in debates – not in decision-making – on the operation of PAs and CMAs may make plurilateralism significantly more inclusive and equitable. What is more, it may enable outsiders to shape the operation of these agreements making their later accession more likely. In short, the EU experience underlines that plurilateralism should be transparent and inclusive so as to keep interested 'outsiders' as far as possible involved. This may require that WTO committees for the operation of PAs and CMAs allow and indeed encourage the participation of 'outsiders'.

Other studies assess the effects of differentiated integration as part of the pre-/post-accession process for new Member States.[40] The Member States, which joined the EU in 2004 and 2007, struggled to fully commit to all legal obligations under European law and to fully participate in all common policies of the EU. The EU resorted to differentiation to accommodate the new Member States and to enable them to gradually assume legal and political commitments.[41] Schimmelfennig and Winzen (2017) assess how this differentiation has evolved over time. They find that differentiation has markedly decreased. The Member States, which joined in 2004 and 2007, have over time assumed most standard legal and political commitments. Pull and push factors fuelled this process of 'normalisation'. The EU provided comprehensive technical assistance, encouraged policy learning but also maintained elements of conditionality to encourage new Member States to normalise and limit differentiation. In short, differentiation in combination with support for 'outsiders' seemed to have been a successful strategy to promote economic and political integration. While heterogeneity in the WTO is much higher than in the EU, the finding suggest that plurilateralism in combination with technical assistance and capacity building for interested 'outsiders' may be a promising strategy to foster integration and development.

Effects on the core EU: An important concern of policy-makers and academics with regard to differentiated integration has always been the political and legal fragmentation of the EU. Legal research on the effects of differentiated integration on European law is of conceptual rather than

[40] See Schimmelfennig and Winzen, above n 36.
[41] See Winzen and Schimmelfennig, above n 36.

empirical nature.[42] It contains little information on economic and political consequences of differentiation on the EU. The silence on the dangers of fragmentation in the literature implies that European lawyers do not consider it is a major problem. What is more, most differentiated integration initiatives take place within the legal and political framework of the EU and allow for dispute resolution through the Court of Justice of the EU (CJEU). The institutional embedment and central adjudication of differentiated integration should ensure a certain degree of legal and political coherence. A helpful insight from EU-related research is that firmly anchoring plurilateralism in the institutional framework of the WTO including its DSB may prevent regime fragmentation.

Kölliker[43] suggests that the impact of differentiated integration on the core EU depends on the policy content of such initiatives. Differentiated integration initiatives, which provide network or club goods to participating Member States tend to advance European Integration and to strengthen the EU. Differentiated integration initiatives – such as the Schengen Area or EMU – offer exclusive benefits to participating Member States. They trigger centripetal forces and incentivise non-participating Member States to gradually join initiatives. Other initiatives, however, produce common pool resources. They encourage free riding and trigger centrifugal forces, which weaken the EU and undermine European Integration. Kölliker illustrates his argument at the example of attempts to intensify cooperation in tax policy among likeminded Member States. Cooperation in tax policy increased the gains from non-cooperation for non-participating Member States. Firms and citizens started shifting their fiscal activities to non-cooperating Member States in order to save taxes. It is important to note that Kölliker does not provide comprehensive empirical evidence regarding the effects of differentiated integration on the EU and European Integration. His focus lies on theory-building. His argument is, nonetheless, of interest to the WTO. Ambitious PAs providing sizeable benefits to signatories may trigger growing interest in trade integration among outsiders and reinvigorate the WTO.

Governance challenges of differentiation: Research seems to suggest that differentiation imposes little negative externalities on 'outsiders' and the EU as a whole. Recent calls to intensify the use of differentiated integration within the EU implicitly support this reading. It is, nonetheless, noteworthy that the EU has recently taken the position that certain forms of (external) differentiation are overly burdensome in terms of governance. They arguably bind too many administrative resources and complicate the operation of the EU.

The EU has made it clear for instance that it is determined to overhaul the framework of its relations with Switzerland.[44] Switzerland – like Norway, Iceland and Liechtenstein – was meant to integrate in the EU's Single Market through membership in the European Economic Area (EEA) in 1994. Switzerland, however, was unable to ratify the relevant agreement due to the outcome of a domestic referendum. In consequence, the EU and Switzerland negotiated a dense web of bilateral sectorial agreements. The approximately 20 main agreements – in combination with hundreds of secondary agreements – provide for mutual market access, the free movement of people, far-ranging mutual recognition of laws and political cooperation. In recent years, the European Institutions have been lamenting that the bilateral framework with Switzerland is overly burdensome and impracticable. The EU thus pushes for streamlining the EU-Swiss framework.

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[42] Curtin Curtin, 'The COnstitutional Structure of the Union: A Europe of Bits and Pieces', 1 Common Market Law Review 30 (1993), at 17; Neil Walker, 'Sovereignty and differentiated integration in the European Union', 4 European Law Journal 4 (1998), at 355.

[43] *Flexibility and European Unification: The Logic of Differentiated Integration* (Lanham: Rowan and Littlefield, 2006); 'Bringing Together or Driving Apart the Union? Towards a Theory of Differentiated Integration', 4 West European Politics 24 (2001), at 125.

[44] See Gstöhl, above n 23, Models of external differentiation in the EU's neighbourhood.

4.5 EU policy recommendations for differentiated integration

Research is scarce. It is impossible yet to draw reliable conclusions on the effects of differentiated integration on 'outsiders' and the EU. Findings suggest though that differentiation has had no significant negative effects. The EU's careful institutional and governance strategy to differentiated integration probably played an important role in that regard. Differentiation arguably allowed the EU to accommodate heterogeneity in state preferences and capacity. The EU, however, actively sought to limit differentiation through transparency, inclusive institutions, open policy debates, technical assistance and alike. These preliminary insights have led to policy recommendations on 'differentiated integration' enshrined in hard and soft EU law.[45]

4.5.1 Initiating differentiated integration

- **Last resort:** Differentiated integration initiatives should constitute a last resort option for policy-making.[46]

- **Minimum membership:** Differentiated integration should involve a minimum number of Member States to avoid the fragmentation of the legal and political system of the EU.[47]

- **Authorisation:** Differentiated integration should be subject to equitable authorisation procedures.

4.5.2 Design and content of differentiated integration

- **Multispeed integration:** Differentiated integration should in principle be designed in line with the idea of multispeed integration.[48] Differentiated integration must not be construed – politically and legally – to permanently exclude certain Member States and thereby to cement a two-tier membership structure within the EU.

- **Openness of differentiated integration:** Differentiated integration initiatives should be operated in an open and transparent manner.[49]

- **Conformity with the *Acquis Communautaire* and EU policy objectives:** Differentiated integration must be compliant with the EU's legal framework and political objectives.

4.5.3 Institutional setup of differentiated integration

- **Institutional embedment:** Differentiated integration in the EU should be embedded in the EU's political and legal institutions to ensure legal coherence and political openness and to avoid the fragmentation of the EU and its membership.

[45] See Scharpf, above n 16; See Schimmelfennig, Leuffen, and Rittberger, above n 21, The European Union as a system of differentiated integration; See Stub, above n 21.
[46] See Stub, above n 21.
[47] Ibid.
[48] Ibid.
[49] See Adler-Nissen, above n 26.

- **Financing:** While it is politically desirable to anchor differentiated integration with the European Institutions, it is important to find a viable financing scheme to avoid resistance among non-participating countries against differentiated integration initiatives.

4.6 Transposing EU policy guidance to the WTO regime

The guiding principles for differentiated integration in the EU seem largely applicable to the WTO regime and the governance of plurilateralism. It seems desirable that WTO members resort to PAs and CMAs as a solution of last resort to avoid an over-fragmentation of the multilateral trade regime. Yet, multilateralism has led nowhere for years now, which implies that the time may be ripe for PAs and CMAs. A minimum membership for plurilateral initiatives in the WTO seems equally reasonable. PAs and CMAs require in principle a minimum of two members. Setting a higher minimum membership of for instance one third of WTO members would promote more equitable PA and CMA outcome. A higher minimum membership would require some degree of heterogeneity in members and thus more balanced commitments. It would moreover prevent an over-fragmentation of the WTO regime. The authorisation of PAs by qualified majority vote – such as in the EU – seems reasonable. While consensus/unanimity as foreseen in Article X.9 WTO may ensure Pareto-efficient outcomes, it may equally hinder the use of PAs to reinvigorate the WTO. Experiences from the Doha Round show that members establish issue-linkages between unrelated questions and thereby stall progress. A qualified majority threshold in combination with a minimum membership may maintain the capacity of PAs to reinvigorate the WTO while balancing members' preferences. Overly stringent authorisation requirements though may push plurilateral initiatives out of the WTO regime, which may do more harm in the long run to 'outsiders' and the WTO than a PA.

The EU's requirement that differentiated integration needs to be open in nature and in compliance with existing Union law is also key for the WTO regime. In the EU, it has shown beneficial to allow non-members of differentiated integration to take part in deliberations on the operation of these agreements. It enables outsiders to learn about the effects of differentiated integration, to remain informed over new developments, and to share their concerns and positions with regard to such initiatives. It keeps the boundaries between members and non-members of differentiated integration low and supports the principle that all Member States may – if they wish so – join a differentiated integration initiative. The WTO Agreement in principle provides for transparency and openness in the creation and operation of plurilateralism. Yet, recent projects such as TiSA developed outside the WTO structures and triggered mistrust among outsiders.

Finally, the EU's aim to embed differentiated integration into its existing institutional framework is also crucial in the WTO context. If the EU and WTO reinvent themselves as 'clubs of clubs' or clearinghouses for differentiated integration arrangements, it is important to have central focal points and institutions which monitor the multilateral-friendliness, coordinate overlapping initiatives and ultimately resolve disputes between participating but also non-participating countries. Having the European Institutions, the WTO Secretariat and Dispute Settlement Body as central supervising institutions ensures a minimum degree of legal and political coherence in differentiated integration regimes. Like in the EU context, the institutional embedding of plurilateralism in the WTO requires finding a compromise on the allocation of costs to prevent resistance from 'outsiders'.

5. Conclusion and outlook

The key message of the article is that trade policy-makers should take a careful look at the EU's experience with 'differentiated integration'. The WTO and the EU are both transforming into 'club of clubs'. The EU, however, has been on this development trajectory much longer and gained more experience with the governance, opportunities and risks involved in 'differentiated integration'. Trade policy-makers should take advantage of the EU's greater experience and experimentation with 'differentiated integration' to develop a carefully crafted approach to plurilateralism in the WTO. Another important insight from this article is that theoretical and empirical research on the effects of differentiated integration on overarching regimes, insiders and outsiders remains remarkably scarce. EU and WTO scholarship should study this phenomenon in more detail to provide policy guidance in an increasingly interconnected world economy.