Regulatory Cooperation and the Trading System: An Issues Paper*

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February 9, 2015

*Background paper prepared for the Task Force on Regulatory Systems Coherence in the context of the ICTSD/WEF E15 initiative. We are grateful to Sean Doherty and Ricardo Melendez for helpful suggestions on an earlier draft.

1. Introduction

With the establishment of the World Trade Organization (WTO) in 1995, much of the vision of the drafters of the 1948 International Trade Organization (ITO) Charter was realized, albeit some 50 years later.[1] However, since its creation, WTO members have proven unable to negotiate new commitments to liberalize access to markets for goods and services, let alone cooperate on "new" policy issues to address the spillover effects of domestic regulation on international trade and investment, or agree on trade-related policy disciplines to address collective action problems such as safeguarding biodiversity or combatting climate change.

Disagreements among large players, most notably the US and other OECD nations on one side and emerging economies such as Brazil, China and India on the other have impeded progress on the traditional market access agenda (mostly tariffs and agricultural support), precluding efforts to move onto new issues. Many of the latter are regulatory in nature, with the "problem" either being differences across countries in the substance of regulation of a product or production process, or the need for countries to cooperate in the regulation of product markets to address international negative externalities. Instead of deliberation in the WTO, the action – insofar as there is action – on both types of issues is occurring elsewhere. Indeed, even on traditional market access issues the attention has shifted away from the WTO and towards preferential trade agreements (PTAs). But PTAs are now also venues where the trade effects of (differences in) regulatory policies are a focus of attention, often building on bilateral or regional regulatory cooperation that has developed independently of – or in the absence of – trade agreements.

One reason for the use of PTA-centered trade strategies to discuss regulatory issues is that for OECD member countries the traditional market access agenda has become less important. Average tariffs of these countries are very low and quotas have disappeared (outside of agriculture). The policy cooperation agenda spans health and safety norms, certification requirements for services providers, policies pertaining to data security and privacy, and so forth. The rapidly changing composition of trade as a result of technical changes (e.g., the increase in trade in services and associated cross-border data flows) is also making regulatory policies more of a trade concern for high-income countries (although it is equally a matter of

[1] The ITO was supposed to complement the World Bank and the International Monetary Fund in the area of trade-related policy but never entered into force as a result of a decision by the US government not to submit the treaty for approval by the Congress.

concern for many developing nations). As products are more integrated with value added services and connected to each other (the "Internet of things"), national regulation—whether driven by security, privacy, consumer protection, or industrial policy—is moving center stage. Because products are increasingly connected to the Internet/"cloud" and embody a variety of value-added services that involve cross-border data flows, policies that limit or raise the cost of digital trade and data flows are becoming more important.[2]

There is a vast literature regarding the potential rationales and motivations for domestic regulation of producers and products. Regulation has a critical role to play in addressing domestic market failures and to achieve societal objectives. There is also an extensive literature on the pros and cons of international standards and standardization. National standards and regulatory measures may act as barriers to trade, either deliberately or inadvertently. This is so because while standards-setting often reflects a 'genuine' need to regulate to address a market failure of some kind, it can also be influenced by political economy forces, and, consequently, there is a risk for capture of the process. The political economy literature on standards shows that these are often beneficial for economic actors but that they can also be used for protectionist purposes. The same applies to domestic regulation, which can be captured to "raise rivals costs" or used as an instrument to discriminate against foreign suppliers.

The organization of an increasing share of production and trade into global value chains means that end products are impacted by an ever greater number of regulatory jurisdictions. For example, an automobile has thousands of parts that are produced by hundreds of suppliers located in different countries. A Volkswagen might have an engine made in Germany; a wiring harness from Mexico, and an exhaust filter system from South Africa. Differences in standards and in testing procedures imply that components as well as the final product are not interchangeable—a catalytic converter that complies with EU norms may not be accepted in Canada and vice versa. Akhtar and Jones (2013) cite the example of a U.S. light truck manufacturer that wanted to sell a model in Europe – which "required 100 unique parts, an additional $42 million in design and development costs, and incremental testing of 33 vehicle systems …all without any performance differences in terms of safety or emissions." There are many such examples in the trade press and industry literature, e.g. World Economic Forum (2013) notes a case involving a chemical company that imports acetyl, used in aspirin and paracetamol, into the US. The company must, on average, comply with similar regulations from

[2] See, e.g., Bauer et al. 2014 and Kommerskollegium, 2014.

five different agencies that often fail to coordinate and communicate effectively with one another, resulting in delays for one out of three shipments, with each day of delay costing the firm US$60,000. Empirical research has also shown that the costs for firms associated with differences in services regulation across countries are significant (see e.g., Kox and Nordas, 2007).

In many cases regulatory objectives may be very similar across countries, especially economies that have comparable income levels, whether it concerns health and safety of products, food security or minimizing risks and avoiding catastrophic events. If goals are very similar, regulatory cooperation can reduce compliance costs without undercutting the attainment of regulatory objectives. Regulatory cooperation may also be needed to deal with international collective action problems. More generally, cooperation offers the opportunity to increase the effectiveness and efficiency of regulation – it can be an instrument through which outcomes are improved over time through a process of monitoring, evaluation and learning.

The following discussion focuses on dimensions of the interface between domestic regulation and the trading system, the implications for trade of differences in regulatory regimes across markets, and approaches that have been/could be taken to reduce regulatory barriers to trade globally. Each Section ends with some illustrative questions and topics for deliberation with a view to stimulating discussion in the E15 Task Force on Regulatory Systems Coherence and to identify possible subjects for further research.

2. Domestic Regulation, Trade and International Cooperation

Research on the potential gains from improving regulatory performance concludes these can be large: just in the area of border clearance and transport logistics, convergence in regulatory performance towards half-way global best practice could increase real incomes by an average of 5 percent (WEF, 2013); in the case of the EU and US, extending the degree of regulatory convergence achieved in the EU to the transatlantic marketplace could increase average real incomes in the EU by 6 percent (Felbermayr and Larch, 2013); while OECD (2005) concludes that regulatory convergence in services sectors could raise per capita GDP by some 3 percent in the EU and US. But capturing these potential gains is difficult. In part this is because of concerns by specific industries regarding adjustment costs of more foreign competition. In addition, there is often opposition from groups concerned about the attainment of regulatory standards, including regulators themselves. International cooperation to reduce the market segmenting

effects of differences in regulation confronts significant difficulties because of concerns that this will impede the realization of regulatory objectives and the execution of the legal mandates and obligations of regulatory agencies. This has been a prominent feature in the talks between the EU and the US to establish a Transatlantic Trade and Investment Partnership (TTIP). These factors explain why studies assessing the likely real income impact of recent trade integration initiatives suggest these will be far below the potential: the presumption is that there is little scope to address regulatory differences (e.g., ECORYS, 2009; Joint Study, 2008; Francois et al. 2013).

Given that a multiplicity of (different) regulatory policies results in international trade costs often being much greater than for domestic transactions, the challenge is to identify and assess the rationale and efficacy of alternative mechanisms that could be used to narrow the gap between the potential gains from regulatory cooperation and a "business as usual" scenario. This is an area of policy where unilateral, autonomous reforms can generate significant benefits, but given that the source of trade costs and inefficiencies in part reflects *differences* in regulation for the same product, international cooperation is needed.

Trade agreements are not designed with a view to minimize negative regulatory spillovers. They are designed to reduce explicit discrimination against foreign suppliers of goods and services through a process of reciprocal exchange of commitments not to discriminate. In the case of regulatory policies there often is no discrimination: measures are applied to domestic and foreign goods and services equally. The source of the trade costs lies in the differences in regulation across jurisdictions, and the need to comply with the requirements of multiple regulatory bodies in two of more countries. The primary "technology" of trade negotiations – reciprocity – cannot be employed. It is ineffective.

As is well known, other approaches are used, including harmonization, mutual recognition, working towards regulatory equivalence, and other, "softer" forms of interactions – policy dialogue, etc.[3] Cooperation is often characterized along a spectrum of soft to hard (binding, enforceable) and shallow to deep. 'Shallow' integration includes policy dialogue and is often basically an exercise in transparency where parties inform each other on their policies, and may agree on consulting before adopting new regulations. It also is limited to so-called

[3] There is of course an extensive literature on the various options and experiences – see e.g., Vogel (2012). Much of the focus will (have to) be sector-specific—see e.g., Arnold (2005), Bismuth (2010), and Verdier (2011) in the area of services regulation.

negative integration: any agreement consists in applying domestic laws to imported goods and services (à la GATT/WTO). 'Deep' integration includes harmonization, either in the form of 'full' or 'rigid' harmonization, or 'minimum' harmonization; recognition; or regulatory equivalence. Recognition can be unilateral (without consideration) or bilateral/reciprocal, also referred to as 'mutual recognition'.

Some forms of cooperation are more costly than others in terms of required "re-tooling" and some require 'similar' levels of development across participants. Not all countries will be willing to adopt specific types of regulation and a one size fits all rule may well be inappropriate in any event. One could imagine instances of 'shallow' regulatory cooperation that apply to all countries and 'deep' cooperation for those who are willing and/or interested. An implication is that insofar as regulatory matters are dealt with in the WTO this should not be on the basis of a 'single undertaking'. Even the deepest integration process extant, the EU, has set this aside to permit the 'thematic' monetary union, as well as the 'non-thematic' 'enhanced cooperation', where willing partners can choose the area where they want to 'deepen' the integration process between them. Our view is that we should be discussing that some minimum cooperation should be established for all, otherwise we risk seeing yet again the dichotomy between 'integration' and 'involvement'. It does not mean much to be part of the WTO in name, with no actual involvement. History is full of examples of WTO Members living away from the WTO. They should not miss the boat of 'regulatory cooperation' since integration in the years to come will be quintessentially 'regulatory'.

Some countries have already been cooperating on the regulatory front because of commitments they have entered into preferential trade agreements (PTAs). The EU for example, has an institutionalized 'loose' policy dialogue in its 'Partnership Agreements' with its former colonies, and a legally binding mutual reciprocity with some of its OECD partners. Prima facie, the level of 'homogeneity' seems to dictate the 'nature' of commitments entered ('looser' with former colonies, 'stricter' with OECD partners). There are areas where we observe a lot of cooperation (standards), as there are areas where we observe almost no cooperation (labour market policies). Were we to reflect all this in a matrix, we could start thinking in terms of distinguishing between areas of: (i) no cooperation at all; (ii) loose cooperation between different "types" of countries – OECD-developing; developing-developing; intra-OECD; and (iii) intense cooperation (OECD-developing; developing-developing; OECD-OECD).

Key obstacles to achieving the desirable regulatory cooperation include (i) mandate gaps between trade negotiators and domestic regulators; (ii) coordination gaps within government and between government and business; and (iii) informational gaps within and across countries (government agencies; polities). Addressing these gaps requires institutions and processes that foster learning and building trust through regular communication and repeated interaction. This is needed both across agencies within countries – frequently multiple regulators and government bodies are engaged in setting and enforcing product and process regulations – as well across countries. Matters are compounded in federal states, where regulation is applied at the state level (13 provinces and territories in Canada; 29 States in India; 50 in the US).[4]

Regulators often do not consider the trade implications of what they do, but they are the "owners" of many of the policies that affect trade opportunities. They may be limited in their appreciation of the economic effect and costs associated with implementation of their regime, and the possible negative competitiveness impacts of each jurisdiction duplicating tests and certification requirements. The focus of attention is generally on a specific regulatory mandate, with little recognition of measures that may have been applied in other parts of the value chain in other countries that aim to achieve similar outcomes. A necessary condition for regulators to consider the (cross-border) economic implications of their work is that they have incentives to do so, which raises issues related not just to their legal mandates but the design of institutional mechanisms that facilitate learning and a better understanding of the overall impact of regulatory norms on trade and investment incentives.

Regulators frequently have their own mechanisms through which they interact with each other internationally. These are usually independent of trade agreements but may have similar effects: to reduce the market-segmenting effects of the measures that they adopt and enforce. Governments at different levels (central, sub-central, municipal), regulators and multinational companies are all engaged in mechanisms that entail cooperation with counterparts across borders (jurisdictions). The same is true of the private sector. Companies set standards for quality, health and safety for both products and processes that occur in their supply chains and increasingly cooperate in private standards-setting activities that have as a goal achievement of inter-operability and minimum standards across supply chains – sometimes in cooperation with NGOs and governments (e.g., the Global Food Safety Initiative). NGOs do

[4] In the case of the EU there are of course 28 member states that continue to have significant autonomy in the implementation of regulation in many areas.

the same – there is a plethora of different private standards-setting bodies that develop norms and offer certification services to companies that engage in international trade.

Major international regulatory/standards-setting bodies include CEN, CENELEC, the Codex Alimentarius Commission, etc. International regulatory/standards-setting bodies that deal with services include the International Air Transport Association (IATA) (air transport), the International Accounting Standards Board (IASB) (accounting), the UN Economic Commission or Europe (UNECE), the International Telecommunications Union (ITU), the Basle Committee and Financial Stability Board (FSB), the International Organization of Securities Commissions (IOSCO), the International Association of Insurance Supervisors (IAIS) and so forth. These bodies establish international regulatory norms and standards in their respective areas, many of which have been adopted by governments and the relevant national regulatory entities. If so, they become mandatory for suppliers that are active in the sectors concerned and that operate in their respective jurisdictions.

Potential questions for discussion/papers:

- How prevalent/effective is the use of/efforts to use different forms of cooperation – e.g., harmonization (international standardization); use of mechanisms such as regulatory equivalence as opposed to formal mutual recognition agreements?
- What has been learned from past efforts to cooperate internationally? What works (does not work) and why?
- How multilateral is international standards setting for goods and services? Is it adequately open and representative in terms of country-level participation, or dominated by a small group of players?
- What do we know about de facto vs. de jure discrimination in terms of access to standards-setting and implementation of norms?
- Are there issues of concern regarding private standards-setting initiatives and approaches and public (mandatory) regulation from a trade system perspective?
- What is the state of play re: transparency and information on applicable regulatory requirements across jurisdictions and how these relate to international norms where these exist? Is it necessary to improve transparency and if so how? Build on extant efforts such as the OECD Product Market Regulation and World Bank Doing Business databases? Improve the coverage of information on product regulation in trade databases such as WITS?
- What is the state of knowledge regarding regulatory competition issues (races to top/bottom) and the impact of trade (competition) in driving regulatory alignment, whether in desired or undesired directions? To what extent is convergence being driven by market forces?

3. The WTO status quo

Allegations of protectionist abuse of product regulation (standards) have been the basis of numerous trade disputes over the years. These motivated the negotiation and inclusion of specific disciplines on product standards for goods in the GATT/WTO and the building of bridges between the trade and international standard-setting community. The key WTO agreements in this area are the Agreement on Technical Barriers to Trade (TBT) and the Agreement on Sanitary and Phytosanitary (SPS) measures. The TBT agreement addresses technical requirements (mandatory standards) imposed by governments for goods; the SPS agreement deals with health and safety-related norms for agricultural products (foodstuffs, plant and animal health). Both agreements provide 'ports of entry' into the WTO for product standards that have been established in specialized fora elsewhere and incorporated into national law or otherwise made mandatory by governments. Thus, the SPS agreement makes explicit reference to an indicative list of international bodies to promulgate SPS norms such as the Codex Alimentarius Commission. The WTO does not get involved in establishing the content of product-specific technical requirements. The two agreements provide a means for WTO Members to 'in-source' the results of international cooperation on product safety-related norms. In principle, the use of international standards reduces the trade-impeding effects of countries adopting different standards for identical products by lowering trade costs and facilitating access to markets for firms no matter where they are located.

One reason why two standards-specific sets of disciplines for goods exist in the WTO is that the health and safety concerns that arise in the production, trade and consumption of food, plant life and animals are considered to be particularly important – in effect many SPS norms can be characterized as measures that are aimed at catastrophe avoidance: spread of diseases, the probability of serious illness, etc. Such considerations also arise with technical barriers to trade as these may have similar motivations – e.g., a ban on the use of lead paint; radioactive residues, etc. – but they often address other types of issues as well (e.g., radio frequency interference; interoperability, and so forth).

The WTO defines a technical regulation as any measure that applies to an identifiable products or group of products, specifies technical characteristics for these products (e.g., relating to composition and characteristics such as flammability, texture, density, toxicity, etc.) and that is mandatory. Such measures fall under the aegis of Art. III GATT, the national treatment rule. The TBT agreement goes further than national treatment, by requiring that

Members base their product regulation on available science and adopt the least trade restrictive measure that is necessary to achieve their regulatory objective.[5]

The TBT agreement also encourages the use of international standards where these exist as a way reducing transactions costs. International standardizing bodies provide a forum for governments and industry to debate on the need to regulate and cooperate on the design of standards. The international standards that emerge will reflect a common view of how best to address a specific need to regulate through the adoption of a technical measure. Under the TBT agreement there is a presumption that such international standards are least trade restrictive in that the norms are considered to satisfy the necessity test. There is however no guarantee that this is the case, as the process of international standardization may devote as little attention to trade effects as do domestic norm-setting procedures. The presumption is that by having many countries involved in the norm development process, whatever is agreed is regarded as being non-discriminatory in intent, no matter the actual effect on trade.

Production and processing methods (PPMs) are only covered by the TBT agreement if they have a direct bearing on the physical characteristics of a product. Many of the standards that confront firms operating internationally address management processes and production methods. Systems such as ISO 9000 and ISO 14000 are used by companies as a signal of quality, a demonstration of a commitment to social responsibility or as requirements that must be met by suppliers in a trade relationship with buyers or by companies that are part of international value chains and production networks. Standards of this type are not covered by the WTO. The same applies to labels and certification marks insofar as these pertain to the way a product was produced as opposed to its content or physical characteristics.

Conformity assessment procedures for technical product regulations are also subject to WTO disciplines, including the non-discrimination rule. Relevant guides or recommendations issued by international standardizing bodies are to be used if they exist, except if inappropriate for national security reasons or deemed inadequate to safeguard health and safety. In principle, WTO members are to join and use international systems for conformity assessment. The results of conformity assessment procedures undertaken in exporting countries must be accepted if consultations determine these are equivalent to domestic ones. WTO Members are encouraged

[5] For space reasons what follows focuses on the TBT agreement. Similar considerations apply to the SPS agreement.

to negotiate mutual recognition agreements for conformity assessment procedures, and not to discriminate between foreign certification bodies in their access to such agreements.

Much prevailing regulation deals with services. The WTO has fewer disciplines for regulations affecting services than for goods (product regulation). Art. VI.4 GATS calls on the Council for Trade in Services to develop any necessary disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services;[6] and Members may not apply regulatory requirements so as to nullify or impair specific commitments made for sectors/modes (Art. VI.5(a)). The GATS therefore embodies a "least-trade restrictive" norm for technical standards. However, there is no obligation to use of international standards—the GATS leaves it open to WTO members to use whatever standards they wish.

GATS Article VII (Recognition) promotes the establishment of procedures for (mutual) recognition of licenses, educational diplomas and experience granted by a particular member. It permits a Member to recognize standards of one or more Members, but does not require, or even encourage Members recognize equivalent foreign regulations. Art VII:2 requires a Member who enters into a mutual recognition agreement (MRA) to afford adequate opportunity to other interested Members to negotiate their accession to such an agreement or to negotiate comparable ones. Art. VII:3 stipulates that a Member must not grant recognition in a manner which would constitute a means of discrimination between countries. Members must inform the Council for Trade in Services about existing MRAs and of the opening of negotiations on any future ones. Most such notifications pertain to the recognition of educational degrees and professional qualifications obtained abroad.

Finally, the WTO includes disciplines that require minimum levels of regulation – e.g., the TRIPS agreement requires Members to implement minimum standards of protection for intellectual property. However the substance of the rights and requirements/criteria involved are left to other international bodies to determine/discuss.

[6] A Working Party on Domestic Regulation was mandated to develop disciplines called for by Art. VI:4 to ensure that licensing and qualification requirements and related standards are not unnecessary barriers to trade in services. A precursor to this working party, the Working Party on Professional Services agreed in 1998 on a set of principles to ensure transparency of regulations pertaining to licensing of accountants and accountancy services.

Potential questions for discussion/papers:

- To what extent is there a need/role for the WTO to do more on the substance/content of regulation?
- Should more focus be given services and to cross-border data flows/digital economy related regulation? If so, how could this be pursued?
- Should countries be thinking of cooperating on/addressing regulatory issues on the basis of the underlying motivation? E.g., 'health and safety' vs. 'connectivity', 'interoperability', etc.?
- Much regulation focuses on what are called process and production methods (PPMs), including private standards setting. Is this an area of regulation where multilateral disciplines are needed? If so, is there a need to distinguish between types of PPMs?
- Should there be more of an effort to improve transparency and knowledge of the trade effects of regulation? Can/should the WTO become more of a forum where deliberation occurs on regulatory matters?
- Is there potential to build on initiatives that have already occurred in the WTO – e.g., using Committees to address "specific trade concerns"?
- Do PAs offer a useful mechanism to complement international regulatory cooperation that is already taking place – e.g. by offering a means to push forward on new areas (e.g., digital economy), multilateralize small group cooperation or to give access to an enforcement/dispute settlement mechanism?

4. Recent vintage PTAs

As noted, regulatory cooperation is a feature of recent PTAs between OECD members and is on the agenda of the TPP and TTIP negotiations. It is also an element of trade integration agreements that have been in place for a longer time such as the ANZCERTA (the EU is of course sui generis in this domain). Innovative processes and institutions have also been set up in the "shadow" of trade agreements to address regulatory differences – such as the Regulatory Cooperation Council between Canada and the US.

The recent Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU illustrates what is being done. The majority of the substantive chapters of the CETA deal with non-tariff and regulatory policies including TBT and SPS measures; Customs and trade facilitation procedures; mutual recognition of professional qualifications; domestic regulation more generally; and procedures for regulatory cooperation, including protocols on the mutual acceptance of the results of conformity assessment for pharmaceutical products, among others. A chapter on Regulatory Cooperation commits both Parties to further developing their regulatory cooperation to prevent and eliminate unnecessary barriers to trade and investment;

including through pursuing regulatory compatibility and recognition of equivalence. Objectives of regulatory co-operation include building trust, deepening mutual understanding of regulatory governance approaches; promote transparency, predictability and efficacy of regulations; and avoiding unnecessary regulatory differences. A specific aim is to reduce unnecessary differences in sectoral regulation and to enhance the competitiveness of industry by looking for ways to reduce administrative costs and duplicative regulatory requirements and "pursuing compatible regulatory approaches including, if possible and appropriate, through "the recognition of equivalence or the promotion of convergence" (Art. 3(d)(iii) Regulatory Cooperation chapter). Language on and examples of regulatory equivalence embodied in CETA include a requirement that each party accept SPS measures of the exporting Party as equivalent to its own if the exporting Party "objectively demonstrates that its measures achieves the importing Party's appropriate level of protection" (SPS chapter, Art. 7.1 draft CETA text). Principles and guidelines for the determination of equivalence are set out in Annex IV to the SPS chapter, while Annex V lists areas in which Parties have agreed there is equivalence. A specific task of the Joint Management Committee for SPS Measures is to prepare and maintain a document detailing the state of play on recognition of the equivalence of specific SPS measures.[7] The CETA also calls for establishment of a Regulatory Cooperation Forum (RCF) to facilitate and promote the realization of the objectives laid out in the Regulatory Cooperation chapter and calls on the Parties to consult with stakeholders, including the research community, NGOs, business and consumer organizations "on matters relating to the implementation of" the regulatory cooperation chapter (Art. 8 Regulatory Cooperation chapter).

The inclusion of regulatory cooperation in PTAs involving the US and EU raises numerous questions regarding the possible consequences for countries that are either excluded or that have no power to influence the negotiations on the substance of the rules that apply. Agreements that lead to regulatory convergence, mutual recognition and acceptance that regimes are equivalent among PTA members may create incentives for companies to locate in a

[7] A Protocol on the Mutual Recognition of the Compliance and Enforcement Programme regarding Good Manufacturing Practices (GMP) for Pharmaceutical Products makes provisions for determination of the equivalence of regulatory authorities that certify compliance with these practices. Annex II of this Protocol (on Medicinal Products or Drugs) lists a set of medicinal products or drugs where it has been agreed that the GMP requirements and compliance programs of both Parties are equivalent. Some mention of regulatory equivalence also occurs in the chapter on financial services. This permits Canadian institutions to provide portfolio management services to EU professional clients on a cross-border basis (i.e., without having to establish in the EU) once the European Commission has adopted the equivalence decision related to portfolio management (EU prudential requirements still apply).

bloc, or to source from firms located within a bloc, to the detriment of outside firms.. In the domain of regulation, more is required than the standard focus of trade agreements: disciplining the ability of a government to use a policy instrument. Instead, the agenda revolves around convergence of norms and standards and mutual recognition and acceptance that national enforcement systems are effective.

It remains to be seen if and how new vintage PTAs deal with the cost-raising effects of regulatory differences, and if they do, to what extent this will be detrimental to countries that are not members. Classic trade diversion costs generated by preferential removal of tariffs under CETA, the TTP or the TTIP are likely to be limited because average tariffs in most of the countries participating in these initiatives are low—indeed, in the case of the TPP, many already have free trade agreements with each other. That said, there is potential for discriminatory effects. How significant this will be depends on whether firms located in countries that are not members of the PTAs are able to benefit from access to the larger market created by the PTA by demonstrating that their products comply with the relevant regulatory standards. In practice, it may be difficult to exclude third-country firms from benefiting from initiatives that lower the fixed costs of enforcement of regulation in member countries.[8] Non-parties may benefit from PTAs that include regulatory disciplines and foster regulatory cooperation between members if these apply on a nondiscriminatory basis. But discrimination can still easily occur if third countries do not have access to recognized certification systems and therefore have to continue to incur market-specific conformity assessment and inspection costs.

More generally, non-members may lose from the shift to PTAs and away from the WTO simply because they will have no say regarding new rule-making by a subset of the major traders. Whatever the net welfare effects of any given PTA for members and non-members, a shift towards regional deals and agreements among subsets of WTO members that are not applied on a MFN basis and that do not operate under the umbrella of the WTO will imply greater fragmentation of the multilateral trading system.

[8] The literature investigating the effects of regional harmonization of standards has found that this may benefit excluded countries as long as they have the capacity to satisfy the norms and mechanisms that are adopted by a PTA. Research on TTIP incorporates guesstimates of the potential positive spillover effects of deeper transatlantic market integration. See: Francois et al., (2013) and Egger et al. (2014).

Potential questions for discussion/papers:

- What are the (likely) implications and economic effects of PTAs that embody regulatory cooperation? Do third parties have access? Is there discrimination, de facto if not de jure?
- Is there a threat (evidence) that PTAs may undo what is today (has been) an open, multilateral process of international cooperation on the development of standards?
- How much of what is being considered or pursued in the PTA contexts is new as opposed to incorporating mechanisms that were already in place and that are being implemented by regulatory agencies concerned? What is the value added of a PTA?
- What should be learned from past/ongoing high-level efforts (Regulatory Cooperation Commission; Regulatory Cooperation Forum, etc.)
- What kind of cooperation embodied in the PTAs might be multilateralized?

5. Multilateralizing Regulatory Cooperation and Good Practices

Regulatory measures cannot simply be abolished or their impacts on trade reduced by *x* percent as can be done for tariffs. In principle they fulfill a specific social or economic purpose, even if the effect is to restrict trade. Addressing the trade effects of regulation requires first an understanding at the national level of the effects of prevailing policies and the likely impacts of alternative welfare-enhancing reforms. Many reforms will not require actions by other governments (trading partners), but international agreements may help mobilize political attention to an issue and overcome resistance by vested interests. International cooperation may also help governments identify beneficial reforms.

As already mentioned, trade agreements are geared towards the negotiation of enforceable commitments. Binding disciplines reduce uncertainty for traders who know that the dispute settlement mechanism can be used to ensure that governments live up to what they sign on to. A precondition for agreement on binding international rules is a shared recognition that the negative spillovers associated with a policy (set of policies) are significant and that a proposed set of (enforceable) disciplines will result in greater efficiency (lower costs). Such an understanding exists when it comes to tariffs and related border barriers, but much less so when it comes to domestic policies that can generate market segmentation, raise costs, impede innovation or otherwise give rise to negative spillovers. This suggests a necessary condition for international cooperation in the area of regulation is improving the transparency of applied policies; supporting independent analysis of the effects of policies; and establishing mechanisms through which governments can consult and exchange information (Hoekman, 2015).

Insofar as more recent PTAs generate innovative approaches to attenuate the market-segmenting effects of differences in regulatory policies, they can help all countries identify approaches that can usefully be emulated. All WTO members have a strong interest in understanding what PTAs end up doing and achieving. Documenting and analyzing the approaches that are implemented by PTAs to reduce barriers would both help ensure transparency —potentially informing a process of learning about what works and what does not—and identify specific features of cooperation in PTAs that might be multilateralized. This is an important task that WTO members arguably should mandate the WTO secretariat to take up.

Going beyond a stronger transparency function, more small-group cooperation can be pursued under the umbrella of the WTO. There are two alternative mechanisms for members to form clubs on an issue-specific agenda of common interest: conclusion of a Plurilateral Agreement (PA) under Article II.3 of the Marrakesh Agreement that established the WTO and so-called critical mass agreements (CMAs). CMAs involve agreements where negotiated disciplines apply to only a subset of countries, but benefits are implemented on a MFN basis. Examples include initiatives such as the Information Technology Agreement (ITA) and other so-called zero-for-zero agreements, in which a group of countries agree to eliminate tariffs for a specific set of products. There are also CMAs for services, for example, on basic telecommunications and on financial services under the General Agreement on Trade in Services. PAs differ from CMAs in that they may be applied on a discriminatory basis—that is, benefits need not be extended to non-signatories. There are currently two PAs incorporated into the WTO: the Agreement on Civil Aircraft and the Agreement on Government Procurement.

PAs and CMAs differ from PTAs in important respects. WTO rules require that PTAs cover substantially all trade in goods and/or have substantial sectoral coverage of services. Conversely, CMAs and PAs can be issue-specific. PTAs tend to be closed clubs—most PTAs do not include an accession clause. Those PTAs that do allow for accession often restrict it to countries in a specific geographic region. This helps explain the proliferation of PTAs—a new agreement often tends to be negotiated between members of any given PTA and a non-member because it is not possible for a non-member to join an existing regional trade agreement. CMAs and PAs in contrast are open in the sense that any WTO member can join if it wants to and is able to implement the disciplines that are embodied in the agreement.

There are good reasons for doing more via CMAs and PAs (Lawrence, 2006; Hoekman and Mavroidis, 2015). PAs cannot reduce the welfare of any country, including those that decide

not to join, because their content must be approved by the WTO Membership as a whole. PTAs are reviewed by the WTO, but there is no sanctioning of their content; the process is limited to supply of information. PAs are more transparent as they involve regular reporting on activities to the WTO Membership as a whole. They imply less dispersion in rules and approaches—and thus transactions costs and trade diversion—than PTAs. Indeed, they offer a way to multilateralize elements of what may be covered in PTAs. Multiple PTAs dealing with the same subject matter often do so in ways that imply that the rules of the game for firms differ depending on the PTA that applies for a given trade flow. In the case of a PA, there will only be one regime regulating a given subject matter.

There are two constraints that impede the feasibility of pursuing plurilaterals under WTO auspices. The first of these is that there is no straightforward way for WTO members to pursue CMAs that involve deepening of disciplines on policies that are already subject to WTO rules but that they are willing to apply on a MFN basis. The second constraint is that incorporation of a PA into the WTO requires unanimity "exclusively by consensus"[9]which in practice is a major disincentive for countries to pursue this type of cooperation. It is unclear whether WTO members will be willing to consider making it easier to pursue plurilateral cooperation under the umbrella of the organization.

Potential questions for discussion/papers:

- Should the focus of international regulatory cooperation be on differences in regulatory requirements and duplicative compliance requirements as opposed to identifying better regulation or support of domestic regulatory reform?
- Would it be useful to create deliberation mechanisms that allow for participation by and interactions between civil society, regulators, and the business community?
- What could be done to facilitate multilateralization of regulatory cooperation that occurs in PTAs?
- What areas where international regulatory cooperation or standards-setting is already being pursued could benefit from inclusion into a PA or CMA in the WTO?
- What can/should be learned from the many extant efforts and mechanisms that are aimed at cooperation between regulatory agencies in designing international standards and that are independent of trade agreements?

[9] See Art. X.9 of the Agreement Establishing the WTO.

6. Enforcement-related questions

There are two questions of paramount importance when discussing enforcement of international commitments: who has the right to act as complainant, and before which court (forum)? Both questions can of course be contractually agreed. Home and Foreign can include a clause whereby they design both the forum as well as the agents with the right to act as complainant (and defendant). The WTO 'default' solution is embedded in Art. 1 DSU (Dispute Settlement Understanding, that is, the agreement regulating dispute settlement in the WTO). It is WTO Members that can act as complainants and/or defendants. However, in two cases the WTO allows private parties to invoke WTO law before a national forum (not the WTO): Art. X.3 GATT (customs procedures) and the 'Challenge Procedures' embodied in the Agreement on Government Procurement – the GPA.

Right to sue: Assume Home agrees to consult with Foreign on state sponsored standards before their enactment. In this scenario, only Foreign would be entitled to request from Home to observe its obligation, in case it does not. Citizens do not have standing before a court of law to request the same. Regulatory cooperation can, of course, take different forms. It could be that Home agrees to invite private agents to express their views before its national forum, or a forum bi-national forum (assume always a Home-Foreign contract).

Forum: if no forum has been provided for, enforcement will take the form of countermeasures, that is Home will calculate the damage suffered by lack of cooperation in our case (assuming this exercise is feasible, a point to which we might wish to return at a later stage), and then impose them. Foreign in similar case can either react (countermeasures spiral) or take the case to the ICJ (International Court of Justice, the Hague), which has 'default' competence for any public international law issue.

In a nutshell the point is this:

- Trading nations can contractually agree both the right to sue (who has standing) and the forum where complaints will be lodged;
- If no contractual agreement exists, then the 'nature' of the obligation assumed will dictate the agents with the right to sue;
- If no forum has been provided for either, then enforcement will take the form of countermeasures that, by virtue of customary law, have to be proportional to the damage suffered.

An important question concerns identification of the 'institutional' actors, i.e., should we confine the proposed set-up to a government-only forum, or should we make room for private interests as well to be represented? Whatever the concrete legal disciplines that may be agreed, which will depend on the 'form' of cooperation, two elements should be present, no matter what the chosen form of cooperation is: (i) transparency; and (ii) procedural steps to ensure cooperation. We should think thus, of enforcement along these lines. There are some useful precedents that could provide food for thought.

Transparency. Lack of transparency can be fatal for sustaining cooperation. A very telling illustration is the Trondheim-litigation in GPA. Norway had failed to respect its transparency obligations under the Government Procurement Agreement. The United States found out, and prevailed in the subsequent GATT dispute, but had to be content with to a 'Pyrrhic' victory. All that the Panel requested from Norway was a promise never to repeat this behaviour. In practice, therefore, the only discipline aimed to address past lack of transparency is future transparency, at least in this Panel's view. The inclusion of the 'challenge procedures' in the GPA was meant as response to this situation. In practice, what is needed is some sort of 'early warning'-system, a mechanism that will allow trading nations to 'stop the clock' early on before it is too late (e.g. a measure has been adopted without consultation).

Modern democracies cannot 'hide' their regulatory process, so to some extent information regarding future regulatory steps will be disseminated. Then again, there are instances where things are more complicated. What if for example, Home incorporates a market standard by reference into its regulations? And what if the standard has been developed by local matador(s) only and raises (foreign) rivals' costs? Remedies against lack of transparency, realistically, cannot provide deterrent effect. No one would agree to a 'go back and start all over again'-type of remedy in case transparency has been violated. So by backwards induction, we need to think of some sort of 'lock in' mechanisms' that will oblige States to follow regulatory routes that de facto observe transparency. A very drastic manner to do that would be to agree to a rule that no trade-related regulation/legislation can be voted into law in a national parliament, if it has not first been presented for information in the bilateral forum where Home and Foreign participate. Home would be facing an absolute domestic remedy in case it failed to observe this obligation. There are of course variations to this theme. These points apply as well to procedures obligations and commitments that are elements of 'regulatory cooperation'.

The institutional players. Trade agreements are 'government to government' contracts. Only sovereigns have the right to appear before WTO 'courts'; the same is true with PTAs. There are however two elements that cast doubt on the 'correctness' of this description in that private agents already have a (small) stake in the WTO discussion on 'regulatory cooperation':

- When it comes to disseminating information about future acts (laws), undeniably an element of regulatory cooperation, private parties have an opportunity to comment on TBT/SPS issues for example. There is an obligation imposed on the WTO Membership, to allow for a period between provisional enactment and entry into force, during which, the opinions of those affected by the act (law) will be collected. There is no obligation to take them into account, but this could be the result anyway because of other factors ('repeat players', etc.)
- And then there is the discussion we entertained supra about private parties having the 'right to sue' in national fora.

Potential questions for discussion/papers:

- Is it necessary to move beyond State-State dispute settlement?
- What mechanisms could be envisaged to permit greater opportunities for the regulated and stakeholders to raise regulatory issues and invoke dispute settlement procedures?
- Who should have standing to bring cases?
- What alternative instruments could be considered to increase accountability of regulatory entities to pursue cooperation when this has been agreed by governments?
- Is it sensible to recognize compulsory binding force to standards negotiated by a few outside the WTO?

7. Realism Redux

The background to discussions should be the current state of affairs in terms of regulatory cooperation in different fora, and the implications for the trading system. The implementation of whatever proposals come out of this Group will be enhanced if we can 'tie' them to existing institutions, and make the point that we are proposing 'evolution' and not 'revolution'.

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