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From the Board

Preferentials and Plurilaterals: Between a Rock and a Hard Place for the WTO

The new year of 2015 invites us to survey the global trading landscape, twenty years on from January 1995, and the entry into force of the Marrakesh Agreement Establishing the World Trade Organization (WTO). It seems hard to believe now, but thirteen of WTO's last twenty years have been dedicated to the WTO Doha Round of multilateral trade negotiations.¹ Only in this last year has a remnant of Doha been delivered in the form of the WTO Trade Facilitation Agreement. While this is an interesting and innovative agreement, it is nevertheless 'Doha-lite'. In contrast, one is reminded of the original and much more ambitious WTO Doha regulatory agenda including, among other things, competition and investment policies – all left behind at the Cancun Ministerial in 2003. Since then, even the separately tracked General Agreement on Trade in Services (GATS) Round for services liberalization and rules enhancements has been gradually sidelined, another victim of the failure of the core Doha agriculture and goods negotiations.

These three subject areas are raised here because all contain a large measure of domestic regulatory content, the realm of internal non-tariff barriers that is not about discrimination or internal quantitative restrictions, but rather the more complex interface between the regulatory systems of different territories and the question of how to bring them to a functional convergence. This is a fancy way of asking: how can WTO Members smooth the barriers that one regulatory approach presents to another? And while no one has found the secret ingredients to make this happen easily, there is little doubt that leading developed territories in the WTO are actively exploring them, both inside and outside of the WTO. 'Regulatory cooperation' is now the thing, and while the original Doha agenda had plenty of it in the mix, our way of looking at it has also evolved markedly since those days. Then, the notion was oriented to 'subject areas' framed in the context of 'liberalization' commitments. Now, the context and the search have moved to designing regulatory processes that can generate legal results over time. Many of these processes work with softer institutional touches that frame and

¹ WTO Doha Ministerial Declaration (November 2001).

generate expectations and encouragements via working groups, committees and consultations, with a mix of public and private actors.

This style of low institutionalism characterizes the new regulatory regionalism, both ‘mega’ and otherwise, and either because regulatory changes in domestic laws tend to be made on a most-favoured nation (MFN) basis, or because the processes themselves are so ‘soft’ in legal character, many conclude accordingly that there is little or no threat to the core WTO principles of MFN, i.e., that the new regional (preferential) trade agreements (RTAs) are not really preferential.² In many respects, this may well be the case. We know, for one example, that territories are far more open on a unilateral basis to admission of investment (commercial presence) than GATS schedules indicate, and that GATS origin rules for regional economic integration agreements do not allow service-provider preferences on the basis of nationality.³ For intellectual property rights, the WTO TRIPS Agreement has an MFN provision that does not contain any regional agreement exception. IP obligations incurred in a regional trade agreement are understood to be extended necessarily to all other WTO Members.

However, before one concludes that the new regulatory regionalism is purely WTO benign and therefore complementary, consider two aspects of these institutional processes that should be of concern to those who want to see the WTO itself move on to a more modern regulatory agenda. First, the processes themselves (soft or otherwise) are purely preferential to the members of the RTA. When the European Union (EU) and Korea develop a non-tariff measure mediation instrument, they are the only two parties who are going to use it, irrespective of whether or not the outcome is applied on an MFN basis.⁴ Second, when a process does lead to a result with a legal effect, that result might not always be extended by MFN to WTO Members. The EU Canada Agreement (CETA) contains a process to encourage and then direct the formation of bilateral service-provider recognition agreements. It is an interesting mix of carrot and stick and, if it works, the resulting agreements may or may not be notified to the GATS Council as according to GATS Article VII.⁵ A similar preferential outcome for geographic indications (GIs) can be found in the EU agreement with Korea where

² For example, R. Baldwin, *21st Century Regionalism: Filling the Gap between 21st Century Trade and 20th Century Trade Rules* (WTO Staff Working Paper, ERSD-2011-08, 2011, available at, www.wto.org/english/res_e/reser_e/wpaps_e.htm. (accessed 15 Jan. 2015).

³ GATS V.6. A ‘juridical’ person with ‘substantial business operations’ is all that can be required for preferential origin.

⁴ Mediation Mechanism for Non-Tariff Measures, EU Korea Agreement, Annex 14-A, L 127/1336-37.

⁵ EU Canada Agreement, Annex XY, ‘Guidelines for Agreements on the Mutual Recognition of Professional Qualifications’, Art. 3(c). ‘May or may not notify’ as CETA is silent on the question. The EU-Korea Agreement says that any results are to be notified according to GATS Art.VII.

there is a process set for the bilateral recognition and enforcement on behalf of each party's provided list of GIs.⁶

Given these examples (there are others), one has to ask: how can the WTO, with its large and diverse membership, develop such regulatory frameworks – or get into the regulatory game, so to speak? This question gains potential urgency with the realization that RTA regulatory processes can evolve over time, and the gap between treating non-tariff barriers in RTAs as compared to the WTO will grow. The underpinning WTO Agreements, while remaining the core framework and also incorporated into RTAs, will be gradually rendered – in part – out of date. We also know that there is no developed consensus in the WTO that Members want any more multilateral regulatory agreements, and certainly no consensus that any concluded obligations regarding domestic regulations should be at all subject to the WTO Dispute Settlement Understanding (DSU).⁷

It has been suggested that creating new WTO Annex 4 plurilateral agreements in the WTO might be part of the answer.⁸ This in contrast with 'critical mass agreements' in the WTO which, while also formed by a smaller group of Members, extend the benefits of the agreements to all.⁹ Plurilateral agreements and regional trade agreements are both preferential, but a plurilateral agreement in the WTO *is* a part of the WTO, and can arguably better provide for system transparency, modes of accession for non-signatories, and not insignificantly, remain within the integrated fabric of the WTO dispute settlement system.¹⁰

One such plurilateral possibility to consider is the services negotiations (TISA) going on now among a group of about fifty WTO Members.¹¹ For this to be concluded in the WTO as either a plurilateral agreement or a critical mass agreement would seem to be quite daunting. A critical mass agreement containing significant scheduled market access commitments would pose a large free rider problem. To the extent that an agreement might introduce new approaches to regulation, then a plurilateral agreement may well be appropriate. However, the 'exclusive consensus' rule for approval by the Ministerial Conference would also have to be met. Considering that the negotiations thus far have occurred outside

⁶ EU Korea Agreement, Art. 10.18(1-5). The TRIPS MFN provision is broad, but it is doubtful whether the RTA parties see themselves making a unilateral recognition of all other WTO Members' GI lists.

⁷ This was a repeatedly noted issue in the Doha competition policy discussions.

⁸ B. Hoekman & P. Mavroidis, *Embracing Diversity: Plurilateral Agreements and the Trading System*, 14 *World Trade Rev.* 101–116 (2015). They suggest plurilateral agreements as the vehicle for new policy areas. *Ibid.* at 103.

⁹ The 1997 WTO Agreement on Basic Telecommunications, for one example.

¹⁰ Annex 4 Agreements are authorized by the WTO Agreement, Article II.3. They, 'do not create either obligations or rights for Members that have not accepted them.' A plurilateral agreement can be added to Annex 4 by the Ministerial Conference, 'exclusively by consensus'. WTO Agreement, Art. X.9.

¹¹ This number counts the EU's twenty-eight Members in addition to the others in negotiations.

the WTO framework, the outlook for a consensus adoption for an Annex 4 agreement is also not encouraging.¹²

However, the remaining alternative of a notified regional economic integration agreement (GATS V) may be even less appetizing if one considers such a large group of WTO Members in a preferential and closed-services agreement, totally outside the WTO's institutional disciplines. Future case interpretations of any of the agreement's regulatory enhancements would lie outside the WTO DSU. Even worse, it threatens to render the entire idea of 'WTO rulemaking' inutile. That prospect has to be more frightening to some non-participants than their exclusion from some of the mega-regional negotiations going on now.¹³

The area of service negotiations is raised as perhaps the most difficult to incorporate into a plurilateral or critical mass agreement. Other areas of group negotiations, including environmental goods and services, technology products, and proposals for a WTO non-tariff barrier-facilitation mechanism may not present some of the same pitfalls.¹⁴

Twenty years on, the WTO arguably finds itself in a very difficult spot. Members are not going to stop their experiments with domestic regulatory processes in regional trade agreements, especially as the WTO's own regional exception rules as they might apply to such systems remain completely unclarified by the Members. Opening the plurilateral route may be an unpleasant second-best for many, but at least it offers the possibility for the WTO to enhance its own regulatory approaches while incorporating fair and open accession avenues within – and not outside of – a real WTO agreement.

JHM, January 2015

¹² See on this point, P. Sauvé, *A Plurilateral Agenda for Services? Assessing the Case for a Trade in Services Agreement (TISA)* (NCCR Trade Regulation, Working Paper No. 2014/29, 2013).

¹³ The WTO as the forum for multilateral negotiations for matters dealt with under the annexed agreements is a stated function of the WTO. WTO Agreement Art. III.2.

¹⁴ The latter is proposed to have a multilateral application as a Ministerial Decision. See WTO, TN/MA/W/106/Rev.1, 3 Feb. 2010.