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A Role for the World Trade Organization on Regulatory Coherence

Thomas J. Bollyky

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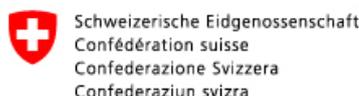
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Thomas J. Bollyky is Senior Fellow for Global Health, Economics, and Development at the Council on Foreign Relations.

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ABSTRACT

The way the world trades has changed since the World Trade Organization (WTO) was established. Fewer goods and services originate from any one supplier or country. Components and intermediate services are increasingly sourced and assembled from specialist suppliers around the world. Regulation also plays a more significant role in this era of international trade. The adequacy of regulatory oversight has become more important as complex, unbundled global supply chains have become harder for businesses and customers to monitor. To date, the WTO has had a limited role in promoting regulatory coherence. Businesses and some governments are turning elsewhere for relief. Many multinational corporations rely on private standards, third-party certifications, and their own quality management systems to oversee their global supply chains. Since negotiating agreements that require approval of the full WTO membership is difficult, this paper focuses on the prospects of concluding commitments on regulatory coherence that involve only a subset of WTO Member countries. It summarizes the key features of the types of agreements by which a subset of WTO Members may undertake additional commitments and trade liberalization—critical mass agreements (CMAs) and plurilateral agreements (PAs). It assesses the potential utility of CMAs and PAs over preferential trade agreements (PTAs) for improving regulatory coherence. It also suggests the regulatory matters on which CMAs and PAs should focus, and the design elements these agreements should incorporate to be most successful.

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LIST OF ABBREVIATIONS

CMA	critical mass agreement
FDA	US Food and Drug Administration
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
MFN	most favored nation
PA	plurilateral agreement
PTA	preferential trade agreement
WTO	World Trade Organization

INTRODUCTION

The way the world trades has changed since the advent of the World Trade Organization (WTO). Fewer goods and services originate from any one supplier or country, but rather are more likely to consist of components and intermediate services sourced and assembled from specialist suppliers around the world. These global supply chains have brought significant benefits to consumers and businesses—cheaper goods, better economies of scale, and just-in-time production more responsive to customer needs and tastes. Global supply chains have also enabled many developing countries without a deep industrial base to participate and compete in the world economy, lifting millions from poverty.

Regulation also plays a more significant role in international trade. Domestic regulations are essential tools with which to promote public health and safety, safeguard the rights of citizens and the environment, and maintain the proper functioning of markets. The adequacy of regulatory oversight has become more important as complex, unbundled global supply chains have become harder for businesses and customers to monitor. Conversely, uncoordinated regulations are a greater hindrance to trade in global supply chains. Divergent or unclear rules and duplicative conformity assessment procedures increase costs, particularly in global production models where parts and intermediate services crisscross national borders multiple times (Bollyky 2012). As more products are integrated with cross-border data flows, the importance of coherent regulation in international commerce will only grow.

The role of the WTO in promoting regulatory coherence has been limited. Effective WTO disciplines exist on discriminatory regulatory measures, but not yet on the redundant, divergent, and unclear yet non-discriminatory rules and conformity assessments procedures that increasingly hinder trade (Saiger and Sykes 2009). WTO trade agreements have also not, for the most part, improved collaboration among regulatory agencies. WTO committees on technical barriers to trade and sanitary and phytosanitary measures have promoted good regulatory practices and helped defuse regulatory conflicts, but businesses and some governments are turning elsewhere for greater progress on regulatory matters. Many multinational corporations rely on private standards, third-party certifications, and their own quality management systems to oversee their global supply chains (Bollyky 2009). Higher-income governments are pursuing preferential trade agreements (PTAs) to foster regulatory cooperation, harmonization, and mutual recognition of regulations, standards, and conformity assessment procedures among participating nations.

Private standard-setting organizations and PTAs may facilitate trade among their participants, but can present

barriers to other governments and producers and diminish long-term support for the multilateral trading system. This paper explores the possibility of adopting new WTO disciplines to encourage regulatory coherence. Given the difficulty of negotiating agreements that require approval of the full WTO membership, this paper focuses on the prospects of concluding commitments on regulatory coherence that involve only a subset of WTO Member countries.

This paper will proceed as follows. First, it summarizes the key features of the types of agreements by which a subset of WTO Members may undertake additional commitments and trade liberalization—critical mass agreements (CMAs) and plurilateral agreements (PAs). Second, this paper assesses the potential utility of CMAs and PAs over PTAs for improving regulatory coherence. Third, it suggests the regulatory matters on which CMAs and PAs should focus, and the design elements these agreements should incorporate to be most successful.

WTO AGREEMENTS INVOLVING A SUBSET OF MEMBERS

CRITICAL MASS AGREEMENTS

A CMA is an agreement in which negotiated disciplines apply only to a subset of WTO Members, but its benefits are implemented on a most-favored nation (MFN) basis and, thus, apply to all WTO Members. Examples of CMAs exist on both goods and services. The 1997 Information Technology Agreement is a zero-for-zero CMA, in which a group of countries agreed to eliminate tariffs for a specific set of products. CMAs for services include the 1997 Financial Services Agreement and the 1997 Basic Telecommunications Services Agreement. There is one CMA that covers the regulation of services. The Reference Paper in the 1997 Agreement on Basic Telecommunications Services calls on signatory states to enact appropriate measures on some anti-competitive practices, provides guidelines on licensing, and gives procedural assurances to new market entrants.

The significant advantage of CMAs is that these agreements do not require unanimous approval of the full WTO membership for adoption. The disadvantages of CMAs are two-fold. First, CMAs permit non-member states to enjoy the benefits of the agreement on an MFN basis without undertaking its commitments. This free-rider problem may not matter

much to states that conclude CMA commitments to adopt international standards and on good regulatory practices such as due process, greater transparency, and conducting impact assessments before the adoption of new measures. It is likely to be a greater concern for Member states in CMAs that depend on the adequacy of another state's regulatory oversight, such as mutual recognition agreements, or that include commitments to recognize foreign equivalence, share inspection reports, and adopt common conformity assessment procedures.

Second, CMAs may not be used to deepen or extend commitments covered under MFN provisions of WTO agreements other than those on services (Hoekman and Mavroidis 2015). Under Article XVIII of the General Agreement on Trade in Services (GATS), WTO Members can schedule additional services commitments subject to the market access and national treatment commitments, including on regulatory measures such as licensing, qualifications, or standards. There are no corresponding provisions in other WTO agreements that include MFN commitments on regulatory matters. Accordingly, it does not appear that CMAs may be used to adopt deeper commitments on regulatory matters such as food safety, animal and plant health, or technical regulations for goods such as packaging, labelling, production and processing methods, and conformity assessment procedures. Some regulations on digital content and cross-border data flows might not be subject to deeper commitments under CMAs either (Meltzer 2014). These restrictions significantly diminish the utility of CMAs, as many global supply chains will implicate one or more of these regulatory areas.

PLURILATERAL AGREEMENTS

Plurilateral agreements are agreements in which negotiated disciplines only apply to a subset of WTO countries; neither the benefits nor the commitments undertaken in the PA extend to non-signatories. Unlike CMAs, PAs do not permit free riding by non-signatory states. Another advantage of PAs over CMAs is that clear legal authority exists to extend and deepen WTO commitments on regulatory matters in areas other than services.

The major disadvantage of PAs, however, is that incorporation of discriminatory agreements (not subject to MFN) into the WTO must occur “exclusively by consensus” of the full membership (General Agreement on Tariffs and Trade [GATT] Article X: 9). Accordingly, WTO Members can demand concessions and weaken the agreement even if those countries never intend to join. Many non-members might also fear being forced to join PAs at a later date, as was required under the single undertaking in the Uruguay Round that produced the WTO. These reasons likely explain why no PAs have been concluded since the advent of the WTO. The two existing PAs—the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement—date back to the 1970s and the Tokyo Round of multilateral trade negotiations.

COMPARING CRITICAL MASS AGREEMENTS, PLURILATERAL AGREEMENTS, AND PREFERENTIAL TRADE AGREEMENTS ON REGULATORY COHERENCE

The advantages of CMAs and PAs over PTAs for concluding regulatory coherence commitments are significant, especially for non-participating states. These advantages include the following aspects.

- a. CMAs and PAs can be issue-specific, while PTAs must cover substantially all trade in goods and sectoral coverage of services to qualify under the WTO exception for PTAs (GATT Article XXIV). This advantage is somewhat attenuated as this WTO exception is fairly permissive and compliance is not closely monitored.
- b. CMAs and PAs offer the possibility of subjecting commitments to WTO dispute resolution, which is better established and more proven than dispute resolution options under most PTAs.
- c. As part of the WTO, CMAs and PAs are more likely to be transparent and to include regular reporting on regulatory cooperation activities to the full membership.
- d. CMAs and PAs are less likely to lead to trade diversion than PTAs. The benefits of CMAs are extended to non-participating WTO Members on an MFN basis. PAs must be approved by full WTO membership and are less likely to be adverse to non-signatory states than PTAs.
- e. WTO rules provide a clear accession path to Members that wish to join a CMA or a PA at a later date, when able to implement the disciplines in the agreement. Most PTAs do not include an accession clause, although some do, such as the Trans-Pacific Strategic Economic Partnership (the basis for the ongoing 12-country Trans-Pacific Partnership talks).
- f. Successfully concluding a CMA or a PA on regulatory coherence would reassert the ability of the WTO to address major, emerging challenges in international

commerce and help reaffirm the importance of the multilateral trading system.

The practical disadvantages of CMAs and PAs are likewise significant, particularly for governments that would be able to negotiate regulatory cooperation and coherence commitments in PTAs. There is no clear path for these governments to use these agreements to deepen or extend commitments in many of the sectors where the interests of trade and regulatory officials are most likely to overlap.

Progress on regulatory coherence depends on the cooperation of trade negotiators and regulators. The complexity and scale of the global supply chains means regulators in the sectors dominated by these production models are increasingly unable to fulfil their mandate without the help of their foreign counterparts. The volume of US Food and Drug Administration (FDA)-regulated imports, for example, quadrupled (from six to 24 million shipments) over the past decade and now involves more than 300,000 facilities in 150 countries. Yet, global adoption of the adequate and consistent rules that regulators increasingly need will occur only if it is in the economic interests of exporters and their governments. Conversely, trade initiatives that focus on economic goals of regulatory coherence alone have not succeeded in reducing inefficient and duplicative but otherwise non-discriminatory regulations in these sectors.

The areas where the interests of regulatory and trade officials most overlap are food, drugs, chemicals, and consumer goods. These goods are often produced in global supply chains and their success depends on the consistency, adequacy, and predictability of regulatory oversight across national boundaries. However, MFN commitments exist on food, drug, chemicals, and consumer goods in WTO agreements, which means that these sectors are unsuitable for CMAs. PAs require approval of full WTO membership, which is difficult to obtain and may well lead to non-signatories holding out and demanding concessions in agreement or other areas. The advantages of PAs for non-member countries and the WTO seem unlikely to motivate the higher-income countries to forgo the flexibility and ease of pursuing deeper regulatory commitments in PTAs.

The regulatory barriers to trade and investment in services are significant, but the limited progress in opening services markets through the WTO suggests limited appetite among governments and businesses for an ambitious CMA in this area (Hoekman and Mattoo 2011). The GATS does not impose constraints on domestic regulation beyond its non-discrimination and transparency provisions. Governments have been reluctant to expand these commitments multilaterally, perhaps because it would reduce their flexibility to limit services competition and the movement of service providers.

Another reason for the lack of progress may be that many services regulators are less dependent on international

cooperation than goods regulators to fulfil their institutional mandates. Most services regulatory reforms have been adopted unilaterally (Hoekman and Mattoo 2011). The need for international cooperation is greater on financial and transport services, which are more likely to be affected by inadequate or divergent regulations in other states, but progress is more likely to occur among governments with similarly sophisticated regulators and shared goals. This cooperation is more likely to occur in PTAs, where benefits of financial and transport services commitments need not be extended on an MFN basis.

Similarly, the other benefits of CMAs and PAs, such as having access to WTO dispute resolution and reinforcing institutional relevance of the WTO, are unlikely to resonate with many regulatory authorities. These officials have traditionally resented WTO review of regulatory choices and may not support further extension of its reach into regulatory matters.

A ROLE FOR WTO AGREEMENTS ON REGULATORY COHERENCE

Given the strict limits on the use of CMAs, this type of agreement is unlikely to yield much progress on regulatory coherence, especially in the sectors most likely to need it. Unless WTO rules are amended, practical prospects for PAs are also limited, but can be successful if focused on the types of regulatory cooperation and standard setting that will generate the least opposition from the full WTO membership.

WTO Members are likely to oppose a PA if it is perceived to create market barriers to non-signatory states, especially those with less developed regulatory systems. This may exclude commitments in PAs on recognizing regulatory equivalence, adopting common conformity assessment procedures, and mutual recognition agreements, as these commitments may divert investment and goods and services production to signatory countries. Members are also likely to oppose a PA if the agreement is perceived to intrude further on the substance of non-discriminatory regulatory decision-making in sensitive areas such as health, safety, and the environment. For the same reason, dispute resolution and external cost-benefit analyses/impact assessment of proposed regulations are likely to be controversial.

Members of the WTO are most likely to be able to agree on PAs that focus on good regulatory practices, transparency

and consultation, and information sharing on regulatory performance. Processes for assessing and considering the adoption of international standards generated by competent standard-setting organizations and institutions also seem promising and useful. These regulatory coherence commitments are modest, but useful, and help build support among WTO Members for deeper disciplines in the future.

Governments pursuing such PAs should design these agreements to attract broad support. Again, the trade and regulatory benefits of such cooperation will be highest in sectors dominated by complex, transnational production chains. Establishing a clear path to accession with capacity-building commitments for non-members with less developed regulatory oversight will diminish opposition to PAs and advance trade and regulatory objectives over the long term. The design of the accession pathway, however, must also take into account the need to maintain the confidence of the participating regulatory authorities, which may not want to be prematurely forced to rely on the data of regulators with still nascent capacity. Creating an observer status for non-signatory states (as exists under the International Conference on Harmonization) will ensure these governments have full information and can raise concerns.

Negotiating WTO principles on the use of PAs generally would also help alleviate Members' concerns. These principles should include assurances that non-signatories will not be compelled to adopt PAs at a later date. It should provide that Members may join these agreements later with the same conditions that applied to the original signatories. Principles could also include provisions that WTO Members opposing a PA commit to explain substantive reasons for their opposition and refrain from "tactical" opposition (Lawrence 2006).

CONCLUSION

CMAs and PAs offer significant advantages over PTAs for the WTO as an institution and for non-participants, but fewer advantages to the governments currently pursuing PTAs with regulatory coherence commitments. Yet, there may still be a role for WTO agreements on regulatory coherence. PAs that focus on good regulatory practices, information sharing, and consideration and adoption of existing international standards may be able to succeed. If so, these agreements may be useful to build longer-term support for deeper commitments and a greater role for the WTO on improving regulatory coherence in international trade and investment.

REFERENCES

Bollyky, Thomas J. 2012. "Better Regulation for Freer Trade." Council on Foreign Relations Expert Brief.

Saiger, Robert W. and Sykes, Alan O. 2009. "International Trade and Domestic Regulation." Stanford Law School, Working Paper No. 387, p. 43.

Bollyky, Thomas J. 2009. "Global Health Interventions for US Food and Drug Safety." Washington, DC: Center for Strategic and International Studies, p. 8.

Hoekman, Bernard M. and Mavroidis, Petros C. 2015. "Embracing Diversity: Plurilateral Agreements and the Trading System." *World Trade Review*, Vol. 14, Issue 1, pp. 101–16.

Meltzer, Joshua Paul. 2014. "The Internet, Cross-Border Data Flows and International Trade." *Asia and the Pacific Policy Studies*, Vol. 2, Issue 1, pp. 90–102.

Hoekman, Bernard M. and Mattoo, Aaditya. 2011. "Services Trade Liberalization and Regulatory Reform: Re-invigorating International Cooperation." World Bank Policy Research Working Paper 5517.

Lawrence, Robert. 2006. "Rulemaking Amidst Growing Diversity: A Club of Clubs Approach to WTO Reform and New Issue Selection." *Journal of International Economic Law*, Vol. 9, Issue 4, pp. 823–35.

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