



STRENGTHENING THE GLOBAL TRADE SYSTEM



Regulatory Spillovers and the Trading System: From Coherence to Cooperation

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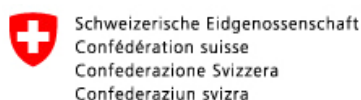
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ABSTRACT

Ever since the creation of the World Trade Organization (WTO), its Members have found it very difficult 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 combating climate change. Disagreements among large players, most notably the United States (US) and other Organisation for Economic Co-operation and Development (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” being that differences across countries in the substance of regulation of a product or production process and/or national conformity assessment processes create negative international spillovers and/or waste (since they represent excess costs for firms).

Instead of deliberation in the WTO, the focus of attention in addressing such spillovers has been shifting to regional and plurilateral fora. Indeed, even on traditional market access issues attention has moved 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 the subject of discussion, 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 spillovers is that the traditional market-access agenda has become less important to OECD members. Average tariffs of these countries are very low and quotas have largely disappeared. The policy spillover 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 (for example, the increase in trade in services and associated cross-border flows of data and services suppliers) is also making regulatory policies more of a trade concern for high-income countries (although it is equally a matter of 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, intellectual property, consumer protection, or industrial policy motivations—is moving centre 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 rapidly becoming more important.

There is a vast literature regarding the potential rationales and motivations for government 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 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 of capture of the process. The political economy literature on product 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 international value chains/networks means that end products are impacted by an ever greater number of regulatory jurisdictions. For example, World Economic Forum (2013) notes a case involving a chemical company that imports acetyl (used in aspirin and paracetamol) into the US. On average, the company had to comply with similar regulations from five different agencies that often did not coordinate and communicate effectively with one another, resulting in delays for one out of three shipments, with each day of delay costing it US\$60,000. Empirical research has also shown that the costs for firms associated with differences in services regulation across countries are significant.

This paper 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 the impact of regulatory barriers to trade globally. Each section has some illustrative questions and potential topics for deliberation in the E15 Task Force on Regulatory Systems Coherence and for possible further research.

CONTENTS

Introduction	1
Domestic Regulation, Trade And International Spillovers	2
The WTO Status Quo	6
Recent Vintage PTAs	8
Multilateralizing Good Practices (Coherence) and Cooperation	9
Enforcement-Related Questions	11
References	12

LIST OF ABBREVIATIONS

ANZCERTA	Australia-New Zealand Closer Economic Relations Trade Agreement
APEC	Asia-Pacific Economic Cooperation
CETA	Comprehensive Economic and Trade Agreement
CMAAs	critical mass agreements
CRTA	Committee on Regional Trade Agreements
DSU	Dispute Settlement Understanding
EU	European Union
FSB	Financial Stability Board
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GMP	Good Manufacturing Practices
GPA	Agreement on Government Procurement
IAIS	International Association of Insurance Supervisors
IASB	International Accounting Standards Board
IATA	International Air Transport Association
IMF	International Monetary Fund
IOSCO	International Organization of Securities Commissions
ISO	International Organization for Standardization
ITA	Information Technology Agreement
ITO	International Trade Organization
ITU	International Telecommunications Union
MFN	most favoured nation
MRA	mutual recognition agreement
OECD	Organisation for Economic Co-operation and Development
PA	plurilateral agreement
PPMs	production and processing methods
PTAs	preferential trade agreements
RCF	Regulatory Cooperation Forum
STCs	specific trade concerns
SPS	Sanitary and Phytosanitary
TBT	Technical Barriers to Trade
TPP	Trans-Pacific Partnership
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UNECE	UN Economic Commission for Europe
US	United States
WTO	World Trade Organization

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 found it very difficult 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 combating climate change.

Disagreements among large players, most notably the United States (US) and other Organisation for Economic Co-operation and Development (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” being that differences across countries in the substance of regulation of a product or production process and/or national conformity assessment processes create negative international spillovers and/or waste (since they represent excess costs for firms). Instead of deliberation in the WTO, the focus of attention in addressing such spillovers has been shifting to regional and plurilateral fora. Indeed, even on traditional market access issues attention has moved 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 the subject of discussion, 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 spillovers is that the traditional market-access agenda has become less important to OECD members. Average tariffs of these countries are very low and quotas have largely disappeared. The policy spillover 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 (for example, the increase in trade in services and associated cross-border flows of data and services suppliers) is also making regulatory policies more of a trade concern for high-income countries (although it is equally a matter of 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, intellectual property, consumer

protection, or industrial policy motivations—is moving centre 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 rapidly becoming more important.²

There is a vast literature regarding the potential rationales and motivations for government 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 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 of capture of the process. The political economy literature on product 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 international value chains/networks means that end products are impacted by an ever greater number of regulatory jurisdictions. An automobile has thousands of parts that are produced by hundreds of suppliers located in different countries. The engine may be made in Germany; a wiring harness in Morocco, and elements of the exhaust filter system in South Africa. Differences in standards and in testing procedures may 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 US 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. For example, World Economic Forum (2013) notes a case involving a chemical company that imports acetyl (used in aspirin and paracetamol) into the US. On average, the company had to comply with similar regulations from five different agencies that often did not coordinate and communicate effectively with one another, resulting in delays for one out of three shipments, with each day of delay costing it US\$60,000. Empirical research has also shown that

1 | The ITO was supposed to complement the World Bank and the International Monetary Fund (IMF) 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.

2 | See, for example, Bauer et al. 2014; Kommerkollegium 2014b.

the costs for firms associated with differences in services regulation across countries are significant (for example, Kox and Nordas 2007).

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 the impact of regulatory barriers to trade globally. Each section ends with some illustrative questions and potential topics for deliberation in the E15 Task Force on Regulation and the Trading System and possible further research.

DOMESTIC REGULATION, TRADE AND INTER- NATIONAL SPILLOVERS

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 offer 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. But regulation may also differ substantially across countries, reflecting different objectives or approaches. In such cases, cooperation may not be feasible or desirable until a certain level of convergence has been achieved.

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 European Union (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 the OECD (2005) concludes that regulatory convergence in services sectors could raise per capita gross domestic product (GDP) by some 3 percent in the EU and US. Capturing these potential gains is difficult. In part, this is because of concerns of 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 (for example, 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 reducing regulatory spillovers 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, what other governments do also matters.

Various approaches have been and are being used by governments to attenuate international regulatory spillovers (see OECD 2013). These include efforts to converge over time on the substance of regulatory norms (harmonization), and to rely instead on competition between rules and accept differences in regulation, while addressing spillover effects through mutual recognition agreements or processes, which seek to identify regulatory equivalence, and other, “softer” forms of interaction—such as increasing “coherence” across regulatory regimes by identifying good practices and common principles that jurisdictions should satisfy (such as transparency, consultations with stakeholders, impact assessments, and so on).³ Efforts to increase coherence across regulatory regimes have been a central element of international initiatives in the context of the OECD and the Asia-Pacific Economic Cooperation (APEC), and figure prominently in the TTIP and Trans-Pacific Partnership (TPP) talks.⁴ The focus here is more on processes than the substance of regulation. Cooperation moves into substantive issues, and can be characterized along a spectrum of soft to

3 | There is an extensive literature on the various options and experiences—see, for example, Vogel (2012) and OECD (2014). Much of the focus will (have to) be sector-specific—see, for example, Arnold (2005), Bismuth (2010), and Verdier (2011) in the area of services regulation.

4 | See Kommerkollegium (2014a) on the TTIP and Bollyky (2012) on the TPP. Bollyky discusses the evolution of regulatory coherence as a matter for international trade negotiation, suggests provisions that would best achieve the goals of regulatory coherence and assesses what is likely to emerge from the TPP talks in this area, and the reasons why this will fall short of the stated ambitions of TPP negotiators. See also OECD (2013).

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 negative integration—any agreement consists in applying domestic laws to imported goods and services (à la the General Agreement on Tariffs and Trade [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.”

All of these alternatives can be embedded into trade agreements, and in practice are pursued as part of economic integration initiatives. Indeed, even the GATT contains sporadic references to harmonization and/or recognition. There is no legal obligation though, imposed on all WTO Members to harmonize/recognize. Negotiating similar instruments does not involve the standard mechanisms that are used to negotiate market access and reduce explicit discrimination against foreign suppliers of goods and services—a reciprocal exchange of commitments not to discriminate. In the case of regulatory policies, there is often 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 or more countries. The primary “technology” of trade negotiations—reciprocity—cannot be employed. It is ineffective.

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 subsets of EU member states can choose areas where they want to deepen the integration process between them. The “enhanced cooperation” mechanism that has now been institutionalized within the EU provides ample evidence that the group already lives in a world of “variable geometry” (Hoekman and Mavroidis 2015).

Some countries have already been cooperating on the regulatory front because of commitments they have entered into in PTAs. The EU, for example, has an institutionalized “loose” policy dialogue in its “Partnership Agreements” with its former colonies, and deeper cooperation with some of its OECD partners. Prima facie, the degree of homogeneity

of the countries involved seems to dictate the nature of commitments made (“looser” with former colonies, “stricter” with OECD partners). There are areas where we observe a lot of cooperation (product standards), and there are areas where we observe almost no cooperation (labour market policies). It is helpful to reflect some of these distinctions in a matrix. Table 1 distinguishes between four degrees of international coordination on regulatory matters—(i) competition, that is, no coordination; (ii) coherence, that is, the adoption of common principles of due process; (iii) looser forms of cooperation such as agreement to consult on new proposed regulations or mechanisms to raise specific concerns; and (iv) deeper forms of cooperation such as mutual recognition agreements, recognition of equivalence, harmonization, or international standardization. This characterization can be applied to four types of country groups (“clubs”)—the world as a whole (universal applicability—for example, all WTO Members); high-income, “advanced” economies (for example, the OECD); subsets of countries (clubs) comprising a mix of high-income and developing economies; and clubs with only developing country members (for example, regional trade agreements).

Competition between regimes is the default or baseline situation, with different jurisdictions independently applying their own set of regulations to products and producers. While competition implies differences across countries, it need not. Over time, as learning occurs and/or firms have incentives to push for emulation of norms prevailing in larger markets, this may give rise to convergence. One standard outcome of transparency in this respect is the “mimicking” of the most appropriate regulatory intervention. Competition is a powerful discovery mechanism and a force that will help to identify more efficient forms of regulation to achieve a given objective. But competition may also have adverse outcomes. The commonly expressed fear of a “race to the bottom” is one possibility, albeit one for which there is generally little evidence. But much more frequent will be excess costs associated with different regulatory regimes that have similar objectives.

Coherence involves efforts among jurisdictions to ensure that the regulatory process conforms to what are generally accepted to be good practices—for example, ensuring that regulation is transparent; that there is the opportunity for stakeholders, including foreign firms and governments, to

4 | Adlung and Soprana (2013: 45).

5 | Mexico reserves the right to grant research and development (R&D) subsidies and incentives exclusively to small service enterprises owned by Mexican nationals, whereas Ukraine’s schedule stipulates that the eligibility for subsidies and other forms of state support, including access to the financial and other material resources of the state, may be limited to small business enterprises.

6 | WTO Document S/WPGR/W/13/Add.1, p. 1.

7 | Steenblik (2007: 18–26).

comment on proposed new regulations; or that the process of regulatory development should be informed by an impact assessment or a cost/benefit analysis. The aim here is not to question or discuss the objectives or the substance of regulation. Instead, the focus is on the process through which regulation is developed and implemented. Coherence is an important element of discussions on regulatory regimes in the recent mega-regionals (TPP, TTIP), is an element of WTO disciplines on Sanitary and Phytosanitary (SPS) measures and Technical Barriers to Trade (TBT), and has been the focus of work programmes in organizations such as the OECD and APEC for many years. Coherence usually addresses the relationship between “means” and “ends,” and, in this sense, is an instrument to “rationalize” policies. In more ambitious terms, it aims to provide some sort of harmony across policies, in the sense that interventions should not be very demanding in one area of public health and not so in another without good reason. The rationalization of domestic policies is the first step towards international coherence.

Consultation is used here to denote initiatives that go beyond agreement between countries to implement good practices (coherence) and that address the substance of regulation and its effects. An example is the scope that has been created in the WTO to raise specific trade concerns arising from (proposed) TBT and SPS measures, or agreement in a PTA context to consult with a partner or partners before implementing a new regulation in a given area.

Cooperation goes beyond consultation. Examples are efforts between regulators to determine instances where regulatory regimes are equivalent, agreements to (mutually) recognize a foreign regulatory process, or efforts to adopt common regulatory standards or conformity assessment processes. Such deeper forms of regulatory cooperation are difficult to achieve for a number of reasons. There may be (i) mandate gaps in that domestic regulators are not permitted to pursue cooperation or have not been given the resources to do so; (ii) coordination gaps in instances where international cooperation requires several regulatory agencies within a country to work together; and (iii) informational gaps

within and across countries—for example, a lack of data on how a regulatory regime “works.” 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—and 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).⁵

Regulators often do not consider the trade implications of what they do—not least because they are not called on to do so. 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 impact of each jurisdiction duplicating tests and certification requirements. 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.

As noted, a key requirement for deeper (more intensive forms) of regulatory coordination is that regulators trust each other’s regime. In practice, there may be a significant capacity constraint that impedes the implementation of whatever level of coordination is agreed between governments. This starts with the most limited form of coordination—coherence. Basic principles such transparency, notification, deliberation, and allowing for comment from stakeholders on proposed new regulation may not be implemented because of resource constraints, a lack of understanding at different

⁵ 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.

TABLE 1:

Alternative Types of Regulatory Coordination Across Country Groups

Note: FSB: Financial Stability Board; CETA: Comprehensive Economic and Trade Agreement.

	Global	High-income	“North-South”	“South-South”
Competition	Baseline situation	Baseline situation	Baseline situation	Baseline situation
Coherence	Some WTO agreements; non-WTO sectoral initiatives	Core area of focus (e.g., OECD)	Element of some PTAs; APEC	Limited to date
Consultation	Some WTO agreements; non-WTO sectoral initiatives	Frequent; networks of sectoral regulators	Element of some PTAs, TPP	Limited to date
Cooperation	Sectoral examples: Codex Alimentarius; FSB	Examples in some PTAs: CETA, TTIP	Limited to date	Limited to date

levels of government as to the agreements reached with partner countries, or what is in principle required by domestic legislation. This may mean that coherence is not attained even when this is the stated goal of the government. There is a very significant technical assistance and capacity-building agenda associated with improving regulatory systems and governance in developing nations.

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 achievement of interoperability and minimum standards across supply chains as a goal—sometimes in cooperation with non-governmental organizations (NGOs) and governments (for example, the Global Food Safety Initiative). NGOs do 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. Thus, the characterization of levels of coordination in Table 1—competition, coherence, consultation, and cooperation—also apply to private standards.

Major international regulatory/standards-setting bodies include the Codex Alimentarius Commission, the International Electrotechnical Commission, the UN Economic Commission for Europe (UNECE), the International Organization for Standardization (ISO), and the like. International regulatory/standards-setting bodies that deal with services include the International Air Transport Association (IATA), the International Accounting Standards Board (IASB), the 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.

Trade agreements can help generate the political oversight needed and support a process of identifying priorities for regulatory cooperation and moving towards greater coherence. An important feature of trade agreements is that there are a large number of interests represented and this can help identify what areas are priorities. Addressing regulatory issues in a trade agreement may help regulators

by mobilizing additional resources and by reducing the extent to which they need to allocate scarce resources to areas where agreement has proven possible that regimes are equivalent. The benefits of regulatory cooperation accrue not just to companies in the form of lower compliance costs; any such reductions in operating costs for a regulatory agency will release resources for other purposes.

The foregoing suggests many possible questions and issues that could be considered by the task force, including the following.

Questions

- i. How prevalent/effective are efforts to use different forms of international regulatory coordination as characterized in Table 1? What works (does not work) and why?
- ii. Is there value in undertaking a mapping exercise of extant instances of regulatory cooperation?
- iii. What can be learned from existing sector-based frameworks for regulatory cooperation such as those that exist for toys, wine, medical devices, civil aircraft, and so on?
- iv. How can trade agreements that cover regulatory matters be crafted in a way that makes them helpful in achieving the objectives of regulators—for example, increasing regulatory compliance?
- v. What are the potential benefits of regulatory cooperation in terms of lowering compliance costs for firms and enforcement costs for regulators?
- vi. How extensive and binding are national statutory barriers to greater cooperation between regulators? Does this vary by sector? Across countries?
- vii. What is the state of play regarding harmonization (international standardization) for regulation of goods and services?
- viii. Are there issues of concern regarding private standards-setting initiatives and approaches and public (mandatory) regulation from a trade system perspective?
- ix. What is the state of play on transparency and information on applicable regulatory requirements across jurisdictions and how do these relate to international norms where these exist? Is it necessary to improve transparency, and if so, how?
- x. 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?

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 TBT and the Agreement on SPS measures, which provide for an elaborate test (when compared to GATT Articles III and XX) to address concerns about “protectionist” behaviour. 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” to 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 such as the spread of diseases, the probability of serious illness, and so on. Such considerations also arise with technical barriers to trade as these may have similar motivations—for example, a ban on the use of lead paint; radioactive residues, and the like—but they often address other types of issues as well (for example, radio frequency interference; interoperability; and so forth).⁶

The WTO defines a technical regulation as (usually) “labeling” and “packaging” requirements that apply to an identifiable product or group of products, and which specify technical characteristics for these products (for example, relating to composition and characteristics such as flammability, texture, density, toxicity, and so forth). Compliance with technical regulations is mandatory, that is, products that do not comply will not be allowed in the market at all. 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 international standards (whenever appropriate), and adopt the least trade restrictive measure that is necessary to achieve their regulatory objective.⁷

The TBT agreement thus 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 also covered by the TBT agreement, irrespective of whether they have been incorporated in the final product or not. In *US-Tuna II (Mexico)*, for example, the WTO Appellate Body confirmed the applicability of the TBT on a US labeling scheme concerning a non-incorporated process of production. In *US-Clove Cigarettes*, the opposite has been the case. 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 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

6 | It is not clear why we have two agreements on product standards in the WTO. One explanation for the inclusion of SPS is that it was regarded as an insurance policy to prevent circumvention of agricultural policy commitments. If so, it is idiosyncratic for this reason alone.

7 | For space reasons, what follows focuses on the TBT agreement. Similar considerations apply to the SPS agreement.

national security reasons or deemed inadequate to safeguard health and safety. In principle, WTO Members are free 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 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 of the General Agreement on Trade in Services (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.⁸ 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 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 to 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—for example, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 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.

We can conclude as follows. The most elaborate regulatory interface under the aegis of the WTO is in the realm of TBT/SPS. WTO Members must establish outlets at the national level to “familiarize” traders with their interventions, and must further provide them with enough time to adjust to the new regulatory reality. At the WTO Committee-level,

Members have adequate opportunities to inquire into the rationale for national measures, the deviation from international standards on occasion, and to even contest the legitimacy of national practices through an informal procedure that is rapidly gaining pace, the so-called specific trade concerns (STCs).

Questions

- i. To what extent is there a need/role for the WTO to do more on coherence, consultation, and cooperation in the area of regulation?
- ii. Should more focus be given to services and to cross-border data flows/digital economy-related regulation? If so, how could this be pursued? Is there a need for a TBT-type agreement for services?
- iii. Should countries be thinking of cooperating on/addressing regulatory issues on the basis of the underlying motivation? For example, health and safety vs. connectivity, interoperability, and so forth?
- iv. Can an approach based on the “least trade restrictive” concept found in the TBT agreement—see UNECE (2014), for example—be applied to other areas of regulation? If so, what does this mean and how can it be assessed in practice?
- v. Much regulation focuses on so-called PPMs. This is also true for 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?
- vi. Should there be greater 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 in areas not subject to multilateral disciplines?
- vii. Is there potential to build on initiatives that have already occurred in the WTO—for example using Committees to address STCs?

8

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.

RECENT VINTAGE PTAS

As noted, regulatory coherence, consultation, and cooperation are features 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 Australia–New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). 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 EU is, of course, *sui generis* in this domain.

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 the 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.⁹ 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 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 the 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.¹⁰

9 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 (that is, 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).

10 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 the TTIP incorporates guesstimates of the potential positive spillover effects of deeper transatlantic market integration. See Francois et al. (2013) and Egger et al. (2015).

Non-parties may benefit from PTAs that include regulatory disciplines and foster regulatory cooperation between Members if these apply on a non-discriminatory 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. Their worry is legitimate—why would the transatlantic partners write their regulatory agenda with the interests of non-participants in mind? It is their own domestic political economy that can be expected to drive the agenda. 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 most favoured nation (MFN) basis and that do not operate under the umbrella of the WTO will imply greater fragmentation of the multilateral trading system.

Questions

- i. What are the (likely) implications and economic effects of PTAs that embody regulatory coherence, consultation, and cooperation?
- ii. If cooperation is an element of PTAs, do third parties have access? Is there discrimination, de facto if not de jure?
- iii. Is there a threat (evidence) that PTAs may undo what is today (has been) an open, multilateral process of cooperation on the development of international standards?
- iv. 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?
- v. What should be learned from past/ongoing high-level efforts (Regulatory Cooperation Commission, Regulatory Cooperation Forum, and the like)?
- vi. What kind of regulatory coherence, consultation, and cooperation embodied in PTAs should/could be multilateralized?

MULTILATERALIZING GOOD PRACTICES (COHERENCE) AND COOPERATION

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 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, and more in general for monitoring and analysis of impacts by international organizations such as the OECD and World Bank. As things stand, all we formally know about PTAs at the WTO level is up to the moment a notified PTA is discussed before the Committee on Regional Trade Agreements (CRTA). Once the train has left the station, the quantity of information decreases dramatically.

Going beyond greater transparency, 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 GATS. 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 attempting to do 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 PAs 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,”¹¹ 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 and how this could be facilitated.

Questions

- i. Are the APEC-OECD checklist for assessing regulatory coherence an adequate and a good basis for incorporation into the WTO as a core element of a multilateral agreement that applies to all WTO Members? Is the model that was established in the Agreement of Trade Facilitation one that could be emulated?
- ii. Would it be useful to create deliberation mechanisms that allow for participation by and interactions between civil society, regulators, and the business community? If so, should this be done in the WTO or elsewhere?
- iii. What could be done to promote greater coherence through aid for trade? Is there a need for greater focus on transparency (compilation of information; making this more easily available)? Or should there be more effort to deliver and sustain trade-related technical assistance and capacity building? What scope exists for more public-private partnerships in this area?
- iv. What could be done to facilitate multilateralization of regulatory cooperation that occurs in PTAs?
- v. Do “clubs” in the WTO offer a useful mechanism to push forward on new areas (for example, digital economy; data transfers; privacy regulation)?
- vi. 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?
- vii. 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? Could a set of good practices for regulatory cooperation become a form of sector-based international standard setting? If so, is there a role for the WTO here?

11 | See Art. X.9 of the Agreement Establishing the WTO.

ENFORCEMENT-RELATED QUESTIONS

There are two questions of paramount importance when discussing enforcement of international commitments, whether this takes the form of coherence, consultation, and/or cooperation 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 of the Dispute Settlement Understanding (DSU), 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 (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 Home to observe its obligation, in case it does not. Citizens do not have standing before a court of law to request the same. It could be that Home agrees to invite private agents to express their views before its national forum, or a 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 implementation in our case (assuming this exercise is feasible), and then impose them. Foreign in a similar case can either react (countermeasures spiral) or take the case to the International Court of Justice (ICJ, the Hague), which has “default” competence for any public international law issue.

In a nutshell, the point is this,

- Trading nations can contractually agree on 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, that is, 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 coordination, two elements should be present—(i) transparency; and (ii) procedural steps to ensure cooperation. 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 the GPA. Norway had failed to respect its transparency obligations under the agreement. The US found out, and prevailed in the subsequent GATT dispute, but had to be content with a Pyrrhic victory. All that the Panel requested from Norway was a promise never to repeat this behaviour. In practice, therefore, the only discipline 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” before it is too late (for example, 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 a 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 face an absolute domestic remedy if 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 of 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) are to be collected. There is no obligation to take them into account, but this could be the result because of other factors (repeat players, and so forth).

- And then there is the discussion we entertained above about private parties having the right to sue in national fora.

Questions

- i. Is it necessary to move beyond a state-state dispute settlement?
- ii. What mechanisms could be envisaged to permit greater opportunities for the regulated and stakeholders to raise regulatory issues and invoke dispute settlement procedures?
- iii. Who should have standing to bring cases?
- iv. What alternative instruments could be considered to increase accountability of regulatory entities to pursue cooperation when this has been agreed by governments?

REFERENCES

Akhtar, S. and Jones, V. 2013. "Proposed Transatlantic Trade and Investment Partnership (TTIP): In Brief." Washington, DC: Congressional Research Service, 23 July.

Arnold, P. 2005. "Disciplining Domestic Regulation: The World Trade Organization and the Market for Professional Services." *Accounting, Organizations and Society*, 30, pp. 299–330.

Bauer, M., Lee-Makiyama, H., van der Marel, E. and Verschelde, B. 2014. "The Costs of Data Localisation: A Friendly Fire on Economic Recovery." ECIPE Paper No. 3/2014.

Bismuth, R. 2010. "Financial Sector Regulation and Financial Services Liberalization at the Crossroads: The Relevance of International Financial Standards in WTO Law." *Journal of World Trade*, 44 (2), pp. 489–514.

Bollyky, T. 2012. "Regulatory Coherence in the Trans-Pacific Partnership Talks." In C. L. Lim, Deborah Elms, Patrick Low (eds.), *The Trans-Pacific Partnership: A Quest for a 21st Century Trade Agreement*, Cambridge University Press, pp. 171–86.

Economic Commission for Europe. 2014. "Methodological Arrangements to Avoid Technical Barriers to Trade." UN, ECE/TRADE/C/WP.6/2014/11, Geneva.

ECORYS. 2009. "Non-Tariff Measures in EU-US Trade and Investment: An Economic Analysis." Report for the European Commission, Rotterdam.

Egger, P., Francois, J., Manchin, M. and Nelson, D. 2015. "Non-Tariff Barriers, Integration, and the Trans-Atlantic Economy." *Economic Policy*, forthcoming.

Felbermayr, G. and Larch, M. 2013. "TTIP: Potential, Problems and Perspectives." CESifo Forum, 2/2013 (June).

Francois, J. et al. 2013. *Reducing Transatlantic Barriers to Trade and Investment*. London: CEPR.

Hoekman, B. 2015. "Trade Agreements and International Regulatory Cooperation in a Supply Chain World." EUI, RSCAS Working Paper 2015/04.

Hoekman, B. and Mavroidis, P. C. 2015. "Embracing Diversity: Plurilateral Agreements and the Trading System." *World Trade Review*, 14 (1), pp. 101–16.

Joint Study. 2008. "Assessing the Costs and Benefits of a Closer EU-Canada Economic Partnership." European Commission and Government of Canada, http://trade.ec.europa.eu/doclib/docs/2008/october/tradoc_141032.pdf.

Kommerskollegium. 2014a. "Regulatory Cooperation and Technical Barriers to Trade within Transatlantic Trade and Investment Partnership," Stockholm: Swedish Board of Trade.

Kommerskollegium, 2014b. *No Transfer, No Trade—the Importance of Cross-Border Data Transfers for Companies Based in Sweden*. Stockholm: National Board of Trade.

Kox, H. and Nordas, H. 2007. "Services Trade and Domestic Regulation." MPRA Paper No. 2116, <http://mpra.ub.uni-muenchen.de/2116/>.

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

Lester, S. and Barbee, I. 2013. "The Challenge of Cooperation: Regulatory Trade Barriers in the Transatlantic Trade and Investment Partnership." *Journal of International Economic Law*, 16 (4), pp. 847–67.

OECD. 2005. *Benefits of Liberalising Product Markets and Reducing Barriers to International Trade and Investment: The Case of the US and the EU*. Paris: OECD.

OECD. 2013. *International Regulatory Co-operation: Addressing Global Challenges*. Paris: OECD.

OECD. 2014. "Draft Study on MRAs: Stocktaking and Case Studies," GOV/RPC(2014)12.

Verdier, P. 2011. "Mutual Recognition in International Finance." *Harvard International Law Journal*, 52, pp. 56–108.

Vogel, D. 2012. *The Politics of Precaution: Regulating Health, Safety, and Environmental Risks in Europe and the United States*. Princeton: Princeton University Press.

World Economic Forum. 2013. *Enabling Trade: Valuing Growth Opportunities*. http://www3.weforum.org/docs/WEF_SCT_EnablingTrade_Report_2013.pdf.

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