



International Centre for Trade  
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# The Role of Regulatory Cooperation in the Future of the WTO

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Think Piece



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## Abbreviations and Acronyms

APEC	Asia-Pacific Economic Cooperation
CETA	Comprehensive Economic and Trade Agreement
EGA	Environmental Goods Agreement
EU	European Union
FDA	US Food and Drug Administration
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GVC	global value chain
HACCP	Hazards Analysis and Critical Control Points
MFN	most favoured nation
NGO	non-governmental organisation
PA	plurilateral agreement
PTA	preferential trade agreement
RCF	Regulatory Cooperation Forum
SPS	sanitary and phytosanitary
TBT	technical barriers to trade
US	United States
WTO	World Trade Organization

## **| Abstract**

The emergence of global value chains (GVCs) and global public goods presents an opportunity for the World Trade Organization (WTO) to play a larger role in international regulatory cooperation. This paper identifies the circumstances and modalities where the WTO is most likely to be successful. First, it assesses the circumstances in which international regulatory cooperation is best suited to be multilateralised through the WTO. Second, it considers the means by which regulatory cooperation should be pursued at the multilateral level. In particular, it recommends a hub and spoke model for promoting regulatory cooperation and maintaining the transparency and democratic accountability of that mechanism.



# 1. Introduction

Trade officials are interested in regulatory cooperation, because there are few good alternatives for reducing restraints on international commerce that arise from duplicative or divergent, but non-discriminatory, rules and standards. In most cases, non-discriminatory regulatory differences will not run afoul of the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (TBT) or its Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures. The duplicative or divergent regulations are not necessarily protectionist or even domestically irrational, and they may well be science based. Regulations also cannot simply be negotiated away. They are essential tools for promoting public health and safety, safeguarding the environment and rights of citizens, and ensuring the proper functioning of markets. The TBT and SPS Agreements include provisions to encourage non-discriminatory mutual recognition and equivalence, but those provisions are limited to best efforts and do not provide a framework for regulatory authorities to adopt regulatory cooperation arrangements (TBT 1999; SPS 1999).

This paper seeks to accomplish two tasks. First, this paper assesses the circumstances in which international regulatory cooperation is best suited to be multilateralised through the WTO. That assessment will consider both the topic areas and the forms for regulatory cooperation most conducive to pursuit at the WTO. Second, this paper considers the means by which regulatory cooperation should be pursued at the multilateral level. This section evaluates the hub and spoke model for promoting regulatory cooperation and ways to maintain the transparency and democratic accountability of that mechanism.

# 2. Regulatory Cooperation and the WTO

The assessment of when regulatory cooperation should be pursued at the WTO is best answered in three steps. The first step is determining when international cooperation is necessary for regulators. The second step is determining the circumstances in which the success of cooperation among regulators depends on its pursuit in a trade context. The third step is identifying when regulatory cooperation must occur in a trade context with a large number of diverse trading partners and a strong institutional framework, such as exists at the WTO.

## 2.1. International Regulatory Cooperation in General

International cooperation is needed when a national regulatory authority cannot do its job without the help of its counterparts. This circumstance arises in sectors dominated by global value chains (GVCs), in which different firms in different countries undertake different stages of producing a good or service. Imports that the United States (US) Food and Drug Administration (FDA) regulates, for example, grew nearly sixfold (from 6 million to 35 million shipments) over a 12-year period and now involve more than 300,000 facilities across at least 150 countries (FDA 2012). There are legal and practical limits on inspecting such a multitude of producers and suppliers. Border and port surveillance can supplement, but not replace, oversight, control, and surveillance by local regulators and industry.

International regulatory cooperation is also needed for sectors involving global public goods, defined as “goods whose impacts are indivisibly spread around the entire globe” (Nordaus 2005). Global public goods include global warming, nuclear proliferation, financial contagion, and pollution. Regulating these goods cannot occur through market forces alone or without international coordination. Cooperation

with counterparts enables regulators to gather information and share best regulatory practices and tools, build their knowledge base, and coordinate on the effective regulation of global public goods (De Búrca, Gráinne, and Sabel 2014; Sabel and Victor 2015).

The common characteristic of GVCs and global public goods is regulatory interdependence. Without that baseline interdependence — the shared need for regulators to work together to fulfil their institutional mandate — international cooperation initiatives will proceed slowly, if at all. In these circumstances, international cooperation creates additional work for regulators outside of their domestic mandate and usually underfunded by appropriators. In contrast, international cooperation thrives in circumstances where the effective regulatory oversight in one country depends on the adequacy and consistency of regulatory oversight in other countries (Bollyky 2012; 2015).

It is difficult to spur international regulatory cooperation through top-down mandates. Consistent, efficient regulatory oversight depends as much on how rules are interpreted and enforced on a day-to-day basis as the rules themselves. Even with the support of a country's leadership, it is difficult to mandate and maintain meaningful, iterative, and cooperative behaviour. Here too, the FDA provides a good example. In 1997, Congress amended the US Food, Drug, and Cosmetic Act to make the following requirement one of the three core mandates of the agency: “participat[ion] through appropriate processes with representatives of other countries to reduce the burden of regulation, harmonise regulatory requirements, and achieve appropriate reciprocal arrangements” (FDAMA 1997). Yet, the FDA devoted relatively little attention to international cooperation and harmonisation for the next decade (Bollyky 2009). FDA engagement on international cooperation has increased in recent years because of the rising demands that globalisation is placing on the agency's efforts to fulfil its core mission. Again, meaningful sustained international cooperation is more likely to proceed when it is a necessity to achieve transnational priorities.

It is also difficult to achieve the same benefits of international cooperation through unilateral reforms. Regulations are dynamic, with rules and their enforcement changing in response to emerging political and market demands, past performance, and new scientific developments.<sup>1</sup> Unilateral adoption of good regulatory practices, such as notice and comment requirements and cost-benefit assessments, for example, can only do so much to improve the quality and consistency of international regulatory oversight. Nations must also regularly engage with one another on adopting and maintaining consonant, adequate measures and conformity assessment procedures (Bollyky 2012). Structured international regulatory cooperation can provide predictability, accountability for backsliding, iterative engagement on deepening integration, and increased efficiencies from greater scale (Irwin 2015). It is plausible that adoption of good regulatory practices may make it easier for international regulatory cooperation to occur, but there is little empirical evidence indicating this is the case.

There are various forms of cooperation that have advanced the adequacy and consistency of international regulatory oversight across GVCs and over global public goods. These strategies range from modest measures, such as transparency and information sharing (Steger 2011), to more robust work-sharing arrangements, like mutual recognition of inspection reports (FDCA 2010) to determinations of regulatory equivalence and peer-review mechanisms for conformity assessments (FDA 2016).

Regulatory cooperation is sometimes considered to be a continuum, which begins with information

<sup>1</sup> This is particularly true for experimentalist regulatory regimes that rely on continuous monitoring and assessment of performance in ways designed to induce learning and revision of standards. See Sabel & Simon (2011) citing the Hazards Analysis and Critical Control Points (HACCP), and equivalence assessments as international examples.

sharing and advances over time to deeper forms of cooperation, as regulators build greater trust with each other. However, the forms of regulatory cooperation are better conceptualised as a tool kit, with different types of cooperation being better suited to different regulatory challenges. The type of cooperation that should be pursued depends on the regulatory objective, the novelty of the issue, and the relationship and sophistication of the regulatory agencies. Deeper forms of international cooperation are possible on novel regulatory issues, where cooperation may be more needed and regulatory agencies are less entrenched in their particular practices (NAS 2013). Some forms of deeper regulatory engagement, such as equivalence, work-sharing arrangements, and mutual recognition of conformity assessment, are also easier among trusted, sophisticated, regulatory counterparts.<sup>2</sup> Regulatory objectives that require cooperation among agencies with divergent levels of sophistication and on topics where regulatory practices are better established are more likely to proceed through transparency, information sharing, joint reviews, and the adoption of international standards and best practices (NAS 2013; Bollyky, Cockburn, and Berndt 2010).

## 2.2. International Regulatory Cooperation and Trade

The next step in the analysis is determining when the success of international regulatory cooperation depends on its pursuit in trade talks. Moving regulatory cooperation into a trade context does not alter the core requirements for that cooperation to occur. In the trade context too, meaningful regulatory cooperation will move forward only with the support and active participation of regulatory officials that comes from their genuine need to work together. But,

<sup>2</sup> See Hoekman and Sabel (forthcoming) discussing the example of the International Civil Aviation Organization and bilateral arrangements on assessing equivalence of aircraft safety certifications.

this baseline requirement does not mean trade has nothing to add.

Trade talks can provide the context and impetus for regulators to initiate and maintain ongoing, iterative cooperation with their counterparts. Trade negotiations provide the structure, resources, and high-level political commitment that many international regulatory dialogues lack. Most regulatory agencies do not have the resources, staff, and mandates to pursue international negotiations on cooperation and capacity building. Finally, trade negotiations can help align transnational regulatory objectives with market access incentives, which is the context in which international regulatory cooperation proceeds fastest and most meaningfully. For example, a series of consumer product safety scandals in the US created a brand crisis for Chinese exports in 2007.<sup>3</sup> This led to the launch of bilateral negotiations on memoranda of understanding between teams of regulatory and trade officials from each side.<sup>4</sup>

<sup>3</sup> Press Release, FDA. FDA Advises Consumers to Avoid Toothpaste from China Containing Harmful Chemical (June 1, 2007), available at <http://www.fda.gov/bbs/topics/NEWS/2007/NEW01646.html>; Press Release, FDA. FDA Advises Manufacturers to Test Glycerin for Possible Contamination (May 4, 2007), available at <http://www.fda.gov/bbs/topics/NEWS/2007/NEW01628.html>; FDA. FDA's Ongoing Pet Food Investigation (April 16, 2007), available at [http://www.fda.gov/consumer/updates/pet\\_food\\_recall\\_FDA.pdf](http://www.fda.gov/consumer/updates/pet_food_recall_FDA.pdf); FDA. Charges Filed in Contaminated Pet Food Scheme (Feb. 19, 2008), available at [http://www.fda.gov/consumer/updates/pet\\_food021908.html](http://www.fda.gov/consumer/updates/pet_food021908.html); Gardiner Harris. "U.S. Identifies Tainted Heparin in 11 Countries," New York Times, (April 22, 2008).

<sup>4</sup> Agreement Between the Department of Health and Human Services of the United States of America and the State Food and Drug Administration of the People's Republic of China on the Safety of Drugs and Medical Devices, available at <http://globalhealth.gov/news/agreements/ia121107a.html>. Agreement between the Department of Health and Human Services of the United States of America and the General Administration of Quality Supervision, Inspection, and Quarantine of the People's Republic of China on the Safety of Food and Feed.

Those negotiations took less than a year and concluded in China adopting more US-consistent regulatory standards, including extending regulatory oversight for active pharmaceutical ingredients produced solely for export (Becker 2008). These binding memoranda also created mechanisms for ongoing bilateral regulatory engagement (Bollyky 2009).

### 2.3. International Regulatory Cooperation at the WTO

The last step of the analysis is identifying when regulatory cooperation is most suited to the WTO. This situation will occur only when the WTO offers advantages for participating governments over other means of achieving international regulatory cooperation, such as regulator-to-regulator initiatives or preferential trade agreements.

The benefits the WTO offers are likely to be greatest in sectors where there is a regulatory need and an economic interest in a large and diverse group of nations working together in a structured manner. One context might be sectors dominated by GVCs, where production and trade in goods and services are affected by many regulatory jurisdictions. The countries involved in GVCs are often diverse, including nations at different stages of economic development and some with relatively nascent regulatory agencies.<sup>5</sup> Bilateral and regional agreements that do not span all of these economies cannot effectively advance trade integration and regulatory efficiency. One promising area for international regulatory cooperation at the WTO is digital trade in goods and services. The regulatory paradigms of digital goods and services are less entrenched in many countries, and the adequacy and effective oversight of privacy, security, consumer protection, and contract enforcement depends on international cooperation

and consistency (Manyika et al. 2016; Meltzer 2015).

The other context that is potentially suited for regulatory cooperation at the WTO is sectors involving global public goods, shared social preferences, and a need for efficient and effective regulatory oversight as part of global economic integration. One example is the Environmental Goods Agreement (EGA). This plurilateral agreement (PA) is to be concluded between China, the European Union (EU), the US, and 14 other WTO members accounting for nearly 90 percent of the world's trade in environmental goods. The core of the agreement is the objective to reduce tariffs on a list of 54 environmental goods identified by the Asia-Pacific Economic Cooperation (APEC) forum (APEC 2012). Other potential examples include global food and drug safety (NAS 2012) and other trade-related measures to mitigate harmful emissions and adapt to the changing environment of climate change, such as climate-smart agriculture (FAO 2015).

Given the diversity of the WTO member states and their differing levels of regulatory capacity, the types of regulatory cooperation that are likely to occur at the WTO involve transparency, information sharing, joint reviews, and the promotion of international standards and best practices (NAS 2013; Bollyky, Cockburn, and Berndt 2010). The design of these arrangements and the manner in which they should incorporate bilateral and regional regulatory cooperation practices are the subjects of the next section.

<sup>5</sup> See Baldwin (2012), demonstrating range and diversity of countries in GVCs and their degree of engagement.

### 3. Multilateralising Progress on Regulatory Cooperation

It is important to multilateralise the progress on international regulatory cooperation occurring in these preferential trade agreements (PTAs) and regional economic communities and bring it into the WTO (Bollyky and Mavroidis 2017). Over the past 20 years, there has been a proliferation of PTAs that include commitments on regulatory cooperation that go beyond those in the WTO. In 1990, there were approximately 70 active PTAs; today, there are more than 500 (Limão 2016). The explosive growth of PTAs began with the end of the Uruguay Round and the increased relative importance of non-tariff measures as potential restraints on trade (Mavroidis and Sapir 2015). Roughly 60 PTAs have terms that go beyond the WTO TBT commitments; 50 have SPS commitments that exceed those in WTO agreements (WTO 2011). Countries with greater participation in GVCs are more likely to enter into these “deep integration” PTAs and more likely to reap the benefits of doing so (Orefice and Rocha 2011).

Recent PTAs, for example, include useful provisions on: transparency on adoption of new TBT-related measures, including in some cases a right to comment on proposed rules, to enhance data and information sharing among regulators; procedures to facilitate compliance with certification requirements; and institutional mechanisms to promote cooperation between trade and regulatory officials.<sup>6</sup>

The Comprehensive Economic and Trade Agreement (CETA), a recently concluded deal between Canada and the EU, creates a Regulatory Cooperation Forum (RCF) that permits consultation of stakeholders, including the

research community, non-governmental organisations (NGOs), and business and consumer organisations “on matters relating to the implementation of” the agreement’s regulatory cooperation chapter (CETA, Ch 21). The EU-Canada Regulatory Cooperation Council creates a similar mechanism.<sup>7</sup>

The challenge with regulatory cooperation in PTAs is that many developing countries, especially lower-income states, are not included in the agreements with the most ambitious commitments. Multilateralising regulatory cooperation involves these nations in regulatory cooperation and avoids the need to introduce multiple parallel discussions among regulatory and trading partner counterparts that would otherwise be necessary, especially in a trading system increasingly dominated by GVCs.

Finally, pursuing international regulatory cooperation on a multilateral basis within the WTO also offers the opportunity to leverage the process for regulatory convergence, albeit rudimentary, that is already in place there. The WTO General Agreement on Trade in Services (GATS), for example, provides a potentially useful model for a rolling process of rule-making in a still novel area. The contribution of the GATS was to expand the coverage of services in the multilateral trading system, but in a way that afforded flexibility to countries undertaking new commitments.

#### 3.1. Options for Multilateralising Regulatory Cooperation at the WTO

Multilateralising that progress occurring in PTAs would reduce business costs, expand regulatory cooperation, and leverage the potential fulfilment of shared social preferences (when they are broadly

<sup>6</sup> See Baldwin, Evenett, and Low (2009) discussing TBT provisions in PTAs that might be multilateralised at the WTO level.

<sup>7</sup> See Hoekman (2014) discussing the potential advantages of adapting these provisions in the CETA and the EU-Canada RCC to function as supply chain councils that advance regulatory cooperation.

shared) to unlock the welfare benefits of trade liberalisation in both the WTO and PTAs.<sup>8</sup> One idea for doing so would be establishing a mechanism for automatic negotiations to occur at the WTO any time a fixed number of countries belonging to the three distinct WTO groups (developed, developing, and least-developed countries) enter into comparable arrangements on regulatory cooperation in separate agreements (Bollyky and Mavroidis 2017). Another idea would be to tie those automatic negotiations to the adoption of regulatory cooperation in a PTA covering a high percentage (such as 85 percent or more) of global trade in a goods or services sector.<sup>9</sup>

To make this multilateralisation approach work, the WTO must return to a Tokyo Round model of PTAs. The advantages of WTO PTAs provide greater transparency and input, and an explicit path to accession for non-party WTO members in the future. They are also less likely than PTAs to impose negative externalities on third-party countries (Hoekman and Mavroidis 2015a; 2015b).

However, changes in the corporate governance of the WTO are necessary before meaningful agreements can be concluded on advancing deeper regulatory

cooperation (Bollyky, 2015). Many of the sectors in which regulatory cooperation are most likely to be sought (such as food and drug safety, or chemicals) are covered under WTO agreements implemented on a most-favoured nation (MFN) basis. This means that critical mass agreements may not be used to deepen those commitments (Hoekman and Mavroidis 2015a). This means that PTAs are the only option for regulatory cooperation, and those agreements can be incorporated into the WTO only “exclusively by consensus” of the full membership (General Agreement on Tariffs and Trade [GATT] Article X: 9). As a result, 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 PTAs at a later date, as occurred with the single undertaking in the Uruguay Round. There are good reasons no PTAs have been concluded since the launch of the WTO.

The clearest path forward would be to amend Article X:9 of the WTO Agreement to no longer require approval of PTAs by the full membership. In order to secure the necessary support for that amendment, WTO members should also agree to binding principles limiting the use of PTAs. These principles should include assurances that non-signatories will not be compelled to adopt PTAs at a later date. The principles should also provide that members can join PTAs later with the same conditions that applied to the original signatories and require implementation support for least-developed member countries (Lawrence 2006). Requiring the creation of an observer status for non-participating WTO members would also ensure full transparency and enable those members to raise concerns.

The design of PTAs to advance regulatory cooperation might involve a baseline set of rules and goals and a venue for engaging on regulatory transparency and information sharing. The agreement should establish broad priorities and mechanisms for monitoring progress, but otherwise remain broad, allowing member countries the flexibility to collaborate on emerging challenges. This approach should operate in a hub and spoke model and include voluntary, topic-

<sup>8</sup> See Baldwin, Evenett and Low (2009) noting that EU has a similar “clubs within the club” approach with its Closer Cooperations, or Enhanced Cooperations. See also Horn, Mavroidis, and Sapir (2010) on the value of the EU forum to promote nonbinding regulatory cooperation with its former colonies in Africa, the Caribbean, and the Pacific as a vehicle to sensitise future regulators to each others’ concerns.

<sup>9</sup> The WTO has been taking some steps toward building bridges with PTAs, even though there is still lack of communication between preferential partners and the WTO after the end of the multilateral review as per the WTO transparency mechanism. Recently, for example, the WTO sponsored a study aimed at emulating at the multilateral level the best practices occurring across preferential partners (see Archarya 2016). This initiative, and others like it, remains sporadic and ad hoc. We are proposing a concrete osmosis mechanism, which will help multilateralise whatever can be acceptable to all, while sensitising preferential partners to the merits of a multilateral approach, whenever feasible.

specific, regulator-led working groups for interested members to negotiate deeper forms of regulatory cooperation.<sup>10</sup> The hub, perhaps a committee of participating member states with observer member states present, should prepare common technical regulations and standards, recommend adoption of international standards, and promote the sharing of surveillance data and inspection reports through the development of confidentiality arrangements. The substance of these recommendations and proposals should be generated through the ad hoc, regulator-led working groups.

These “spoke” working groups should be open to consultation with non-state actors and experts. Firms participate in and manage GVCs, engage in private and non-governmental international standard-setting initiatives, and support corporate social responsibility and capacity building programmes. Civil society, non-governmental institutions, and academic institutions have expertise and the deep understanding of local circumstances to contribute agenda setting and ongoing problem solving.

The recommendations and proposals of the “hub” committee should also be made public, allow expert consultation, and be subject to notice and comment.<sup>11</sup> This transparency will reduce the risk of regulatory capture, manage sensitivities around regulatory independence, and promote accountability for progress.<sup>12</sup> The WTO should also consider expanding its TBT and the SPS committees to embrace the participation of relevant members of civil society and the business community, which would help advance regulatory cooperation in those committees as well. In recent months, economic nationalists have suggested that goals of sovereignty and better cooperation on trade and regulation are mutually inconsistent. In a global economy increasingly

dominated by GVCs, however, the opposite is true. Pursuing regulatory cooperation as a strategy for trade liberalisation (and vice versa) offers a more promising way for policymakers and negotiators to advance both economic objectives and social preferences on worker safety, a cleaner environment, and healthier, more sustainable products. It is the present alternative — trade officials and regulators operating unilaterally and in parallel — that leaves the fulfilment of those social preferences more at risk and international commercial goals unmet.

Nevertheless, it is more important than ever to assuage concerns over sovereignty and local accountability of national regulatory authorities at the WTO. Regulatory cooperation measures agreed at the WTO should not have binding domestic legal effects. Where new legislation is required to implement measures, opportunity for parliamentary scrutiny must be assured. Participating member states should instead opt for transparency and predictability in their decision-making. This could include committing to decide on whether to adopt these joint recommendations produced in this hub and spoke model PA within a fixed period and to provide a written, detailed explanation when deciding not to do so. Given the relative novelty of regulatory cooperation and sensitivities around policy independence, subjecting the agreement to WTO dispute resolution would only discourage participation and inclusion of strong provisions in this area.

<sup>10</sup> See Stewart (2016) making a similar suggestion.

<sup>11</sup> Bollyky (2012) makes similar recommendations with respect to what would have been a “21<sup>st</sup> century approach” to regulatory coherence in the Trans-Pacific Partnership.

<sup>12</sup> The form regulatory cooperation itself may also reduce the risk of lobby-pressure. Equivalence regimes, for example, diminish the interest of domestic lobbies to press for the adoption of laws that condition access to products mimicking the domestic production process (Baldwin 2001).

## 4. Conclusion

The emergence of GVCs and global public goods in the world economy provides the WTO an opportunity to play a larger role in international regulatory cooperation. This short paper identifies the circumstances and modalities where the WTO is most likely to be successful in its efforts. It also identifies a strategy for multilateralising the important regulatory cooperation occurring in smaller groupings of like-minded countries and changes to facilitate the use of PAs where agreement across all WTO members is not yet possible. Making these corporate governance changes will not be easy, but they are feasible and would enhance the continued relevance of the WTO in the decades to come.

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Jointly implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), the RTA Exchange works in the interest of the sharing of ideas, experiences to date and best practices to harvest innovation from RTAs and leverage lessons learned towards progress at the multilateral level. Conceived in the context of the E15 Initiative, the RTA Exchange creates a space where stakeholders can access the collective international knowledge on RTAs and engage in dialogue on RTA-related policy issues.

