



TRADE AND DEVELOPMENT SYMPOSIUM

Perspectives on the Multilateral Trading System

A Collection of Short Essays

WTOplus issues in the Multilateral Trading System

By Andrew L. Stoler



International Centre for Trade
and Sustainable Development



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Federal Department of Economic Affairs FDEA
State Secretariat for Economic Affairs SECO

1. Introduction

At their mid-November meeting in Hawaii, the Leaders of the sub-APEC Trans-Pacific Partnership (TPP) trade negotiations outlined the progress made in the talks and provided considerable detail on how they expected to address the mostly “behind the border” regulatory barriers that are the focus of these talks. On the agenda for this agreement are investment and competition rules, regulatory coherence, creating opportunities for small- and medium-sized enterprises, business facilitation and market access initiatives for green technologies.

In African regional economic cooperation agreements, it has been common practice to include competition policy obligations, including through the creation of competition authorities with region-wide enforcement responsibilities. Regional trade agreements (RTAs) in place or under negotiation in East Asia include many so-called “WTO-Plus”¹ provisions. At the same time, discussion of these questions in the WTO is *verboten*.

Wonder not why business interest in the Doha Round is almost non-existent. Global business in 2011 is for the most part not preoccupied with traditional border measures but with the kinds of things the TPP Leaders are discussing. Unless a way is found to open a constructive dialogue on these questions in the multilateral trading system, the WTO will be doomed to be a 20th Century organization increasingly irrelevant to today’s policy-makers and business leaders.

This short paper suggests ways in which those responsible for WTO policy-making can avoid creeping irrelevance and initiate a constructive discussion of 21st Century “WTO-Plus” issues in Geneva.

2. The Problem for the WTO

Most of today’s Members of the WTO are involved in regional trade negotiations and agreements that go beyond the scope of WTO agreements in terms of their coverage. Although the TPP is a more ambitious undertaking than many other RTAs, it is common to find chapters on investment, competition policy, trade facilitation, electronic commerce in these agreements whether the parties are developed or developing countries. Meanwhile, since mid-2004, WTO Members have decided that these topics are off the agenda for the Organization - as though these issues have no relationship to trade in the globalised world of 2011.

Over the past several decades, progress in multilateral and unilateral trade liberalisation has meant that - with some obvious exceptions - tariffs have been eliminated or reduced to levels that are often functionally insignificant (e.g., exchange rate movements can have a much more significant effect on competitiveness). Globally oriented businesses have organised their supply chains around production in countries where transaction costs at the border are low. Reflecting this new reality, economists studying utilization rates (for goods trade) in RTAs

often conclude that the costs of complying with rules of origin documentary requirements often outweigh the preferential tariff benefits. But it would be incorrect to conclude that for this reason, the RTA is useless.

While economists do not have the quantitative tools to accurately measure the effects, it is the elimination of behind the border barriers to trade that drives business interest in most modern regional trade agreements. Much more important than border tariffs are actions to suppress anti-competitive behaviour in the market, the elimination of discrimination in services trade, stable investment environments, and rule of law-promoting actions. Behind the border barriers are often insurmountable problems for small and medium-sized enterprises (SMEs) looking towards export markets.

For all of the progress achieved through the Uruguay Round’s expansion of the WTO agenda to cover intellectual property and services, the scope of WTO’s multilateral rule-making and liberalisation still falls very far short of what has been happening in regional trade agreements in recent years. WTO Members need to recognise this and the danger it presents to the Organization and the system it oversees. Either the WTO catches up with the times or it will become increasingly irrelevant to players in the real world of global trade and investment.

3. Potential Responses to the Problem

There are several questions that should be addressed at the start of any effort to discuss WTO-Plus trade agreement provisions in the WTO. These are: (1) what should be the institutional framework(s) for the exercise?; (2) what should be the shared objective of the effort?; (3) what definition should be given to the scope of the discussion?; and, (4) should there be any limitations placed on participation in the exercise?

3.1 Possible Institutional Frameworks

Plan A: One possibility would be to agree to create a new forum in the WTO that could be the focal point for discussion of these questions. We might imagine something like a “**Working Party on Coherent Approaches to 21st Century Issues**”. Participation in the working party should be open to all WTO Members on a voluntary basis and, for the purpose of this exercise, participation should also be open to both global and regional organizations and groupings with experience in dealing with WTO-Plus issues. The discussion would be enriched by the participation of the OECD, regional development banks, regional UN economic commissions and the secretariats of APEC, ASEAN and regional economic cooperation agreements in Africa and Latin America. Recognizing that the business community is the natural constituency for action on these behind the border measures, some form of participation by relevant international business groupings should also be facilitated. The creation of the Working Party would be without prejudice to discussion of these topics, as appropriate, in existing WTO bodies, including the GATS and TRIPS Councils, the Committee on

1 In this paper, “WTO Plus” refers both to trade-related issues now outside the scope of the WTO - such as foreign direct investment issues - and questions within the scope of WTO - such as trade in services - but where trade agreements outside of the WTO have adopted an approach superior to that used in the WTO (for example, the NAFTA-type negative list approach to services trade liberalisation).

Trade and Development and the Committee on Regional Trade Arrangements (CRTA). In fact, these specialised committees and councils should be encouraged to develop inputs to the discussion in the Working Party.

Plan B: A fall-back option to the focussed Working Party arrangement could be to agree that the agreed work plan of the **Committee on Regional Trade Arrangements** would be modified to include detailed discussion of WTO-Plus provisions - including those addressed to issues currently outside the scope of the WTO - on a horizontal basis. The modification of the agreed work plan should be accompanied by an understanding that, notwithstanding the view some delegations take of the Enabling Clause, all trade agreement provisions falling within the scope of the exercise, including those in South-South agreements, would be open for discussion in the CRTA. This would be desirable to maintain a certain unified quality to the discussion. Like the Working Party approach, a CRTA-based discussion should also invite contributions from appropriate WTO Councils and Committees.

Plan C: In the event WTO Members failed to reach consensus on one of the approaches suggested above, many - but not all - of the WTO-Plus trade provisions found in modern RTAs could be discussed in **existing WTO Committees and Councils**. The problem is that such a "Plan C" would not provide a home for consideration of very important provisions relating to investment, competition policy, government procurement and certain other questions (labour standards, e-commerce, etc.). Another downside is that the discussion would be forced inside what are normally very rigid agendas and rules that guide the work of the committees and councils and this would add to the risk that the work could be counter-productive.

Plan D: Should it prove impossible to launch a productive discussion of WTO-Plus questions under any of the previously-discussed institutional formats, WTO Members interested in pursuing a review in the context of the multilateral trading system could take the discussion "off-campus" in a **plurilateral grouping** organised outside of the formal institutional structure of the WTO itself. This could be the G-20 (the post-GFC G-20, not the Brazilian-led agriculture-oriented G-20) with participation open to other interested parties. Alternatively, it could be based on the external CG-18-type format that a number of key WTO Members pursued in the mid-1990's "Invisibles Group"². Of course, taking the discussion "off-campus" would be very unpopular in some quarters, but we must recognize that a failure by Members to initiate a constructive discussion on the basis of a forward-looking agenda inside WTO would make such an outcome more likely.

Establishing a dialogue on WTO-Plus issues in Geneva on the basis of Plans A and B would add to the credibility of the Organization by demonstrating that WTO Members are supportive of a multilateral discussion designed to enhance coherence between trade agreements negotiated regionally and bilaterally and that Members

are capable of responding to the challenges of today. Plans C and D would get the discussion going but would reflect badly on the WTO as an institution where its broader membership would be seen as not being supportive of bringing the institutional discussion into the 21st Century.

3.2 Shared Objectives of the Exercise

Broadly speaking, the objective of the proposed exercise in the WTO should be to try to ensure some coherence and complementarity in the WTO-Plus trade agreement provisions being developed and implemented in RTAs, as well as working to see these provisions support the multilateral system. To the extent that WTO Members could develop a shared appreciation of what these provisions should look like (perhaps through an APEC-like best practices exercise), we would make a contribution toward avoiding the trade aggravation caused by differing and overlapping rules like Professor Bhagwati's rules of origin "spaghetti bowl". Even better, if a multilateral discussion led to harmonized approaches, then the exercise would facilitate the eventual multilateralization of key parts of regional trade agreements.

If we could reach agreement that these would be the objectives of the exercise, why should any WTO Member raise an objection?

3.3 Scope of the Discussion

It should be agreed at the start that the scope of the discussion should be open-ended, with any WTO-Plus provision found in any existing trade agreement or RTA under negotiation being fair game for examination. For starters, this means the issues up for discussion would include: investment, competition policy, government procurement, top-down/negative list services liberalisation, trade and environment, trade and labour standards, e-commerce, post-TRIPs intellectual property protection, mutual recognition agreements in goods and services trade, and dispute settlement approaches different from those found in the WTO's own DSU.

How would the discussion in this exercise be organized? Ideally, this would be through a horizontal examination of particular issues and trade agreements provisions where the point of the exercise would not be to criticise what any particular Member has done in an agreement but rather to try to identify best practices and formulations that might eventually best lend them to adoption at the multilateral level. How the discussion might be organised is illustrated below (in simplified form) for the case of a hypothetical RTA chapter on investment.

3.4 Participation

Assuming that it would be possible for WTO Members to agree to launch the proposed exercise on coherence of WTO-Plus measures, who should participate in the discussion? On the understanding that this is not a negotiating exercise, nor one that even has the potential

² The "Invisibles Group" was an informal grouping of developed and developing countries that met periodically to discuss WTO trade issues and global trade developments between 1995 and 1998. Representation was at capitals-based senior official level. The Group was especially active in the lead up to the 1996 Singapore Ministerial Conference.

to lead to eventual negotiations, participation in the proposed WTO “Working Party on Coherent Approaches to 21st Century Issues” should be open to (*inter alia*):

- WTO Members
- Countries in the process of negotiating accession to the WTO
- Other WTO observers
- Relevant International Organizations including:
 - Regional development banks;
 - Regional UN Economic Commissions; and,
 - Secretariats of regional groupings like APEC, ASEAN, NAFTA, etc.
- Representatives of Civil Society, such as:
 - International Chamber of Commerce;
 - International Bar Association;
 - APEC Business Advisory Council; and,
 - OECD BIAC and TUAC.

4. Conclusion

If it is to remain an institution that business and governments find relevant for the 21st Century, the WTO cannot ignore what is going on today in WTO-Plus negotiations conducted outside of the multilateral trading system. Developed and developing countries - including in purely South-South agreements - have gone far beyond the scope of the current coverage and approach of WTO agreements in the bilateral and regional trade agreements they have or are negotiating. As the central forum for global trade issues and rule making, the World Trade Organization cannot ignore these developments outside its scope any longer.

This is not about negotiations or forcing WTO Members to agree to WTO-Plus provisions either in Geneva or their bilateral agreements. Rather, it should be about building a shared understanding of what the issues are; how the business community and civil society feel about these issues; and, what would be the best practice and most coherent way of dealing with these questions on a global scale in the future. The global financial crisis has illustrated the need to explore policy coherence on international economic issues and initiatives to keep markets open in an increasingly integrated environment.

If we cannot agree to a multilateral discussion of the issues with an objective of bridging differences and developing best practices, we run the risk of a trade agreements “spaghetti bowl” far more complicated than Professor Bhagwati’s rules of origin problem. We know that some WTO Members are more prepared than others to include provisions in their trade agreements on investment, competition and other 21st Century questions and we know that others will require continuing technical assistance in complex areas like these. This is not about negotiations and it is not about negotiating new WTO provisions in these areas.

But we cannot afford to let the pre-eminent multilateral system flounder over a lack of attention to these questions and how they impact on trade. WTO Members owe it to themselves and the decades of investment they have put into GATT and WTO to ensure that the past efforts were not wasted. The way forward is to acknowledge that these new trade issues and agreements provisions are real and that we cannot afford to ignore them in the drive to improve and strengthen the multilateral trading system.

Andrew Stoler, Executive Director
Institute for International Trade

Selected Issues Relative to Investment

| Aspect of Issue | Examples of Points to Compare / Contrast / Evaluate |
|--|---|
| Definition of “Investment” for purposes of the RTA | <ul style="list-style-type: none"> • Is it desirable to have a broad or narrow definition of what is meant by “investment”? • Do we need to ensure that there is some circumscription to investors’ rights (e.g., excluding the “right” to pollute)? • Should all kinds of “investment” be given the same treatment in an agreement? |
| Applicability of National Treatment | <ul style="list-style-type: none"> • Should national treatment apply at the pre-establishment phase as well as post-establishment? • Is national treatment generalised or only applied to specified sectors/ activities? |
| Fair and Equitable Treatment | <ul style="list-style-type: none"> • Is this principle generalised or have the parties to an agreement circumscribed it to ensure it does not result in regulatory chill? |
| Dispute Resolution | <ul style="list-style-type: none"> • Does the agreement provide for investor-state dispute settlement? If so, does it specify ICSID or some other body / approach? • If the RTA has an MFN clause, is it qualified in some way in relation to its applicability to ISDS? |