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Plurilateral Trade Negotiations: Supplanting or Supplementing the Multilateral Trading System?

By Meredith Kolsky Lewis



ASIL Insights, international law behind the headlines, informing the press, policy makers, and the public.

Introduction

Over the past decade or more, much ink has been spilled over whether the proliferation of free trade agreements (FTAs)^[1] serves as a stepping stone or stumbling block along the path towards further multilateral trade liberalization. However, most of that debate has centered on the impact of agreements that are: 1) primarily bilateral; 2) if not bilateral, primarily within one region; and 3) largely similar in coverage to the World Trade Organization (WTO) agreements. Recently a new trend has emerged, in which agreements are being negotiated that comprise: 1) more than two or three countries; 2) membership that is not strictly regional; and 3) subject matter that goes beyond that found in the WTO agreements. These plurilateral trade negotiations raise a number of novel considerations for the multilateral trading system. This *Insight* will highlight a selection of the recent plurilateral trade negotiations, and assess some implications of the proposed agreements for the multilateral trading system.

A New Generation of Trade Agreements

At the same time that the WTO's Doha Round of trade negotiations has spluttered to an indefinite halt, subsets of the WTO membership have been busily contemplating, negotiating, and even completing agreements outside the WTO framework. Some such agreements have been the types of bilateral or regional FTAs that have been proliferating for the past decade or longer. Two such agreements at a nascent stage of negotiation are worth noting, due to the trade volumes that would be affected by a successful conclusion. The first is the Regional Comprehensive Economic Partnership (RCEP), which is being negotiated by the ten members of the Association of Southeast Asian Nations (ASEAN) (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam) plus Australia, China, India, Japan, New Zealand, and South Korea.

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The second is the Transatlantic Trade and Investment Partnership (TTIP), which would link the United States and European Union.[2] While the size of the RCEP and TTIP make those agreements notable, other agreements under negotiation are more fundamentally different because they feature multiple and geographically diverse parties, as well as commitments that go beyond the WTO Agreements in both coverage and scope. A few of these plurilateral negotiations are highlighted below.

Trans-Pacific Partnership

The Trans-Pacific Partnership (TPP) is an FTA currently being negotiated by eleven countries (Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam), with Japan scheduled to join the negotiations this month. The TPP has been called a "Twenty-first century trade agreement" by the United States Trade Representative[3] and others.[4] The TPP is viewed as a novel agreement both because of the geographic diversity of its members and due to its ambitious coverage. The proposed agreement has its roots in the Trans-Pacific Strategic Economic Partnership (also called the P-4 Trade Agreement) comprising Brunei, Chile, New Zealand, and Singapore. The P-4 members wished to form a high-standards trade agreement that would serve as the model for an ultimate Free Trade Agreement of the Asia Pacific (FTAAP), and committed to full market access for goods, with no exclusions.

The TPP negotiations began with the P-4 vision in mind, with the participants agreeing to no per se exclusions. However, the TPP parties are negotiating over a variety of non-tariff-related commitments that are not part of the P-4, such as disciplines on regulatory coherence, state-owned enterprises, and heightened intellectual property protections. In addition, its binding dispute settlement mechanism will apply to labor and environmental commitments. After seventeen negotiating rounds, many uncertainties remain. Notwithstanding the original vision of high standards and no exclusions, agricultural interest groups in the United States are lobbying for dairy and sugar exclusions; Canada wishes to protect its dairy and poultry supply management systems; and Japan likely will seek to exclude rice. At the same time, other participants are reluctant to agree to TRIPS-plus intellectual property disciplines (that is, provisions providing greater intellectual property protections than in the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS))[5] among other provisions, particularly if the treaty will include market access exclusions or impediments (such as in the form of restrictive rules of origin).

Trade in Services Agreement

Frustrated with the lack of progress towards further liberalizing trade in services within the WTO framework, twenty-one WTO members[6] (and forty-seven economies, as the European Union is counted as one participant) are preparing to negotiate a new services agreement with ambitious market access commitments – the Trade in Services Agreement (TiSA), also sometimes called the International Services Agreement (ISA).[7]

It remains to be determined how the TiSA would be integrated within the WTO, if at all. One option would be to treat it as a plurilateral agreement that would fall under Annex 4, akin to the Agreement on Government Procurement.[8] However, pursuant to Article X:9 of the Marrakesh Agreement Establishing the World Trade Organization,[9] this would likely require the consensus acceptance of all WTO Members: "The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4." It seems unlikely that all non-participating developing countries would agree to this step. At present, none of the BRICS countries (Brazil, Russia, India, China, and South Africa) is planning to participate in the talks, and a

number of these countries have expressed concerns that conducting plurilateral negotiations outside the WTO may undermine the multilateral trading system.^[10]

Another possibility would be for TiSA to be integrated as a special services protocol, akin to the Financial Services and Telecommunications Annexes to the General Agreement on Trade in Services (GATS). This approach seems unlikely, as it would require the TiSA parties to provide their concessions on an MFN basis to all non-TiSA signatory WTO members. While this might be a trade-off worth making if TiSA covered a very large percentage of global services trade, the prospect of China, India and Brazil, among others, benefitting from the agreement without making any commitments, is not likely to be an attractive option.

Alternatively, the negotiations may lead to an Economic Integration Agreement outside the WTO framework, pursuant to Article V of the GATS (which, like Article XXIV of the General Agreement on Tariffs and Trade 1994 for trade in goods, permits WTO members to enter into comprehensive services FTAs with one or more other WTO members). While this option may be the easiest to achieve, it would not achieve the goal of integrating TiSA into the WTO directly.

Anti-Counterfeiting Trade Agreement

A group of primarily developed-country WTO members have completed negotiating a plurilateral Anti-Counterfeiting Trade Agreement (ACTA). ACTA's signatories have agreed to heightened intellectual property protections, focusing in particular on trademark counterfeiting and copyright piracy. The initial agreement was signed in 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea, and the United States. In 2012, the European Union and twenty-two of its member states also signed, as did Mexico. By its terms, ACTA will come into force once the sixth signatory ratifies it; however, thus far only Japan has ratified the treaty. The European Parliament declined to ratify the treaty, exercising its Lisbon Treaty power for the first time to reject an international trade agreement.^[11]

Implications

Will the new plurilateral trade agreements result in fragmentation for the multilateral trading system, or pave its path forward? The answer may be a bit of both. In the case of dispute settlement, the potential for fragmentation seems genuine. However, the agreements may well spur WTO members to achieve some sort of conclusion to the Doha Round, and may signal the future to come.

Dispute Settlement

Although commentators have in the past raised concerns over the potential for decisions to emanate from FTA dispute settlement tribunals that are inconsistent with the jurisprudence of the WTO dispute settlement panels and the Appellate Body, such concerns have remained largely hypothetical. While in theory a WTO member could seek to resolve a dispute with its FTA partner (and fellow WTO member) through reference to the FTA's dispute settlement mechanism, in practice such complaints are much more commonly brought before the WTO. While it is only feasible to use the WTO dispute settlement mechanism if the matter at issue arises "under the covered agreements" of the WTO,^[12] most FTAs contain commitments that overlap significantly with those present in the WTO Agreements. Where an issue could be brought before the FTA dispute settlement mechanism or that of the WTO, WTO members seem largely to prefer the WTO. This is

likely due to the WTO's substantial experience in resolving Members' disputes, the overall high level of satisfaction with the WTO dispute settlement system, the presence of the Appellate Body to reduce the possibility of a rogue panel decision having a lasting negative impact, and concerns over using an untested mechanism via the FTA.

The plurilateral agreements discussed above, however, have a higher potential (should they ever come into force) to result in dispute settlement decisions that may overlap or even clash with those of WTO panels or the Appellate Body. Because all of these agreements feature, or will feature, content that does not overlap with the WTO agreements, to the extent disputes arose pursuant to this novel content, such disputes could not be brought before the WTO, because they would not arise "under the covered agreements." This is not a matter of great concern for disputes that solely relate to non-WTO commitments, but could raise concerns in the case of disputes featuring some WTO-overlapping provisions and some plurilateral agreement-only provisions. While it might be possible to bifurcate the dispute and bring part of it before the WTO and part of it before the plurilateral agreement's dispute settlement mechanism, the complainant might well find it more convenient to have the entire dispute resolved by the tribunal established pursuant to the terms of the plurilateral agreement. Thus the spectre of inconsistent jurisprudence may be less theoretical in the case of the new plurilateral trade agreements than the more traditional FTAs to which we have become accustomed.

WTO Negotiations

In the short-term, the new plurilateral agreements may merely impede progress in the WTO negotiations due to the diversion of negotiating resources and attention away from Geneva. However, such arrangements may be the final push multilateral negotiators need. The Uruguay Round was concluded shortly after, and some would say that timing was because of, the completion of the NAFTA negotiations. Further, history has shown that multilateral agreements often derive from plurilateral arrangements comprising a smaller coalition of the willing. Let us not forget that the current WTO agreements on antidumping, subsidies and countervailing measures, technical barriers to trade, import licensing and customs valuation all derived from plurilateral agreements — the so-called GATT Codes. Thus, while the new plurilateral agreements cover new areas and raise legitimate concerns over fragmentation and diversion of attention away from the WTO, they may also be planting the seeds for future changes and additions to the WTO agreements.

About the Author:

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Endnotes:

[1] Such agreements are also often referred to as preferential trade agreements (PTAs) or regional trade agreements (RTAs).

[2] See, e.g., Press Release, United States Trade Representative, Obama Administration Notifies Congress of Intent to Negotiate Transatlantic Trade and Investment Partnership (Mar. 20, 2013), <http://www.ustr.gov/about-us/press-office/press-releases/2013/march/administration-notifies->

congress-ttip.

[3] See, e.g., *The United States in the Trans-Pacific Partnership*, U.S. Trade Representative, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership> (last visited July 11, 2013).

[4] This has led scholars to consider the question, "what is a twenty-first century trade agreement?" See *The Trans-Pacific Partnership: A Quest for a Twenty-first-Century Trade Agreement* (C.L. Lim, Deborah K. Elms & Patrick Low, eds., 2012).

[5] Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, *available at* https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

[6] Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, the European Union, Hong Kong China, Iceland, Israel, Japan, Korea, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey, and the United States.

[7] Doug Palmer, *The US Says to Negotiate Services Trade Pact with EU, Japan, Others*, Reuters (Jan. 15, 2013), <http://www.reuters.com/article/2013/01/15/us-usa-trade-services-idUSBRE90E0TI20130115>.

[8] Agreement on Government Procurement, Apr. 15, 1994, 1869 U.N.T.S. 508, *available at* https://www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf.

[9] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (1994), *available at* https://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

[10] *Formal Plurilateral Services Negotiations May be Launched in March*, Int'l Ctr. for Trade and Sustainable Dev., (Dec. 20, 2012), <http://ictsd.org/i/news/bridges-africa-review/152186/>.

[11] Press Release, European Parliament, European Parliament Rejects ACTA (July 4, 2012), <http://www.europarl.europa.eu/news/en/pressroom/content/20120703IPR48247/html/European-Parliament-rejects-ACTA>.

[12] See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.