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The WTO Doha Round and Regionalism

From the Board

As of this writing, the World Trade Organization (WTO) Doha Round of global trade negotiations has again derailed. In what has become a mid-summer ritual of diplomatic efforts that gradually become real expectations of a final deal – and then the big letdown as the gaps are unable to be bridged to the satisfaction of the major players, developed and developing territories alike.

Each summer also brings forth the consequential wringing of hands and the press releases asking, ‘who was to blame ... and what can be done’ to put the round back on track. This is followed by more reflective commentary pondering whether the WTO can survive a failure of the Doha Round and warning of the dangers of increased regionalism if the Round cannot be concluded. This leads to the questions considered here – What are the implications of a failed WTO round on the world of regional trade agreements? Does a failure of multilateralism cause regionalism? If so, does this increased regionalism jeopardize the multilateral trading system?

Economists will tell us that a lowering of global tariffs (as the result of a successful multilateral round) will erode the margin of preferences that are secured in a bilateral free-trade arrangement. A successful round should therefore reduce the impetus to form new regional arrangements. As the argument goes, if there was ‘free trade’ in ‘everything’, then there would be ‘nothing’ remaining upon which to establish preferential treatment.

Given that the share of preferential trade has steadily – and sometimes dramatically – increased over the last decades, one can suggest that regionalism has not been noticeably diminished as a result of successful multilateralism, including the last successful round (Uruguay 1986-1994) nor the entry of the WTO itself in 1995. Over the twenty-year span of both multilateral rounds, the geographic impetus and legal shape of regional trade agreements (RTAs) has alterably changed, but the pace of new regional formations has rarely slowed below the level of a torrent.

This recalls the counter-intuitive view that successful multilateralism is actually a cause of regionalism. Because territories are operating within a more secure multilateral structure, they have more freedom to form regional agreements without risk to the legal security of their underlying conventional trade. Because mother sits and guards at the edge of the playground, the children feel more confident to roam with impunity. But we also sense that regional strategies come with a certain price. Many anecdotes have been heard about the diminished attention countries bring to the WTO talks while their policy capacities are diverted by major regional negotiations operating on tight deadlines.

In spite of the diversionary trade and policy effects of regional trade negotiations, there have also been several RTA efforts during the Doha era that have failed to reach conclusion. One can ponder if the 'EU – Mercosur' FTA or the hemispheric 'Free Trade Area of the Americas' would be more able to be completed in the absence of a Doha negotiation round. To the extent that agriculture trading issues have also tended to block these regional initiatives, one thinks maybe not. There is an awareness that some issues are bigger than even a big RTA – and that these global issues require global agreements. Regionalism can hand-tailor market access between smaller groups, but more likely than not – the bigger issues are deferred rather than resolved in these negotiations. Following the counter-intuitive view, it may be that a successful Doha Round will remove some of the barriers for those RTAs now on hold.

These economic and political factors all operate as a context for the legal relationship between multilateralism and regionalism and how this may be affected by a concluded or unconcluded Doha Round. Here one considers in turn the negotiations seeking to clarify Article XXIV of the General Agreement on Tariffs and Trade (GATT), and the role of the WTO Dispute Settlement Understanding in applying the regional exception.

For the rules negotiations, the real losers in a failed Doha Round will be the regional players themselves, i.e., all WTO Members who are members to one or more regional trade agreements. They are the ones who need to negotiate functional terminology for the trade thresholds of a qualifying RTA – that troubling 'substantially all trade' (SAT) requirement. This would remove some of the legal uncertainty of how a dispute panel might handle the SAT requirement when ruling on whether a respondent can successfully invoke Article XXIV as an exception to a most-favoured nation claim. The purpose of an Article XXIV RTA is to have the benefit of this exception. As things stand now, a regional respondent raises an Article XXIV defense at its peril. Who knows how a panel or the Appellate Body (AB) would interpret the SAT requirement – and is it not better for all to have a negotiated and finalized text in place prior to that case?

The 2007 dispute panel of *Brazil – Retreaded Tyres* came as close as yet seen to tackling this issue head-on. In that case the European Community (EC) submitted its arguments that Brazil had not met its burden to establish that it was a 'qualified' customs union in accord with Article XXIV, in part by raising the issue of 'SAT' directly for two large tradable sectors (sugar and autos) that were not fully liberalized for internal Mercosur trade.¹ The panel exercised judicial economy on this and the EC appealed to the AB to complete the legal analysis on Article XXIV. The AB reversed the panel on other grounds that relieved it also of completing the analysis. But then the AB cautioned that:

1. *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, 12 Jun. 2007, para. 4.397.

we have difficulty seeing how the Panel could have been justified in not addressing the separate claims of inconsistency under Article I:1 and Article XIII:1 directed at the MERCOSUR exemption.²

The EC thus appears willing to challenge the specifics of another RTA member's Article XXIV defense, and the AB is telling future panels to not sidestep the analysis as necessary to resolve the case. The lack of a concluded Doha text that clarifies – by consensus – the terms that govern legal regionalism is no longer a winning hand for regional parties in the WTO.

Brazil – Tyres also clarified an aspect of the so-called hierarchy issue, which is at the centre of the legal discussion on the relationship between RTAs and the WTO. (As we know, all treaties are created equal; an RTA's relationship to the WTO is governed by affected third party rights and other treaty interpretation rules governing later-in-time conflicts and *lex specialis* – Fine.) In this case Brazil successfully invoked a GATT Article XX(b) defense for measures necessary to protect human health. When it came to analyzing the governing Article XX Chapeau, the panel found that Brazil's failure to apply the tyre prohibition to its Mercosur partners was not an act of 'arbitrary or unjustifiable discrimination' in respect of other WTO Members. This was based on Brazil's requirement to exempt its regional trading partners from the import prohibition in accord with a binding regional Mercosur court determination and the panel's sense that Brazil's compliance with it could not be viewed as arbitrary.³

On appeal the AB disagreed. In order for a discrimination (in favour of regional partners) to be non arbitrary – it must bear a relationship to the same objectives being served by the individual exception being invoked, i.e., the discrimination among WTO Members is also connected to the objective of protecting human health, in this case.⁴

This means that WTO Members in regional trade agreements are subject to the Article XX Chapeau requirements, as now interpreted, irrespective of the text of the regional agreement or the rulings of its arbitral bodies. They can either match the outcome that would be conducted on an Article XX exception analysis, or they can violate the GATT Agreement. Now, there is some interesting 'hierarchy' to consider, and asking whether all RTAs now need to conform their general exceptions to those of GATT Article XX?

This case can suggest that a failure in the Doha Round will not make that much difference where the AB continues to grind along on interpreting the rights and obligations of WTO Members in respect of RTAs for the existing rules. Doha or no Doha, a case like *Brazil – Tyres* suggests that there are plenty of legal surprises still lingering in the woods for RTA Members.

2. WT/DS322/AB/R, 3 Dec. 2007, para. 257.

3. WT/DS332/R, paras 7.270 to 7.283.

4. WT/DS322/AB/R, para. 246.

From the Board

But it also raises a troubling aspect for the legal relationship between RTAs and the WTO, and between regionalism and the multilateral system in a failed Doha Round. The WTO 'legislative' apparatus, as we all know, remains hopelessly tied to the outcome of trade liberalization negotiations. 'Regime-enhancing' text does not come forward without progress on a trade deal. While there are no Doha results, the dispute settlement system is of course called upon to fill the interpretation gaps, as necessary. Whether the system can fill in for 'ever-increasing' gaps in the absence of refreshed agreements is of concern to many. This is a bigger issue than regionalism, but the regionalism issues pose a fair example of it.

Brazil – Tyres shows how it works both ways: that the existing GATT rules (Article XX) can be conclusively applied as they stand to the relationship between RTAs and the WTO. At the same time the door is now open for an ambitious interpretation exercise for the qualifying requirements of 'SAT'. To the extent that RTA members' interests have also dragged the process of WTO liberalization and regime negotiations, they may then wish they had been a bit more forthcoming in the Doha negotiations.

J.H.M., August 2008