# From the board: Preferential trade agreements: the WTO speaks... again

Mathis, J.H.

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# From the Board

## Preferential Trade Agreements: The WTO Speaks . . . Again

Those interested in the phenomenon of preferential trade agreements (PTAs) received a summer reading treat care of the WTO and its Annual World Trade Report (2011), subtitled 'The WTO and Preferential Trade Agreements: From Co-existence to Coherence'.[1] A new Secretariat study documenting the economic, legal, and policy trends in the ever-expanding world of PTAs offers an opportunity to reflect on how they have evolved over time and how they are currently perceived to interact with the WTO system as it stands. An interesting backdrop is also provided where PTAs have been a recurring subject in a trade policy discussion on the future of the Doha Negotiation Round as the WTO looks toward its Eighth Ministerial Conference later this year.[2]

The Report also reminded one that the WTO has been here before with its 1995 publication titled 'Regionalism and the World Trading System'. That Report's accompanying press release makes a good starting marker to note the changes over these intervening eleven years – as it declared, 'No evidence of polarization of World Trade among three "blocks" and no clash between world and regional Trade Systems'.[3] This recalls the big PTA events of those times, the formation of the North American Free Trade Agreement (NAFTA, 1994), the EC and EFTA free trade agreements with the transitioning countries of central and eastern Europe (early 1990s), and the development and expansion of the Association of Southeast Asian Nations (ASEAN, AFTA 1992 and 1995). Well, we are past the perception that 'regional blocks' are the issue for the multilateral trading system. As the new Report notes, the more inclusive term is now 'preferential' rather than 'regional' since so many current agreements are not limited in any way to contiguous territories or regions.

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1 WTO Secretariat, Economic Research and Statistics Division, 2011 Report, available at <www.wto.org/english/res_e/reser_e/wtr_e.htm>.

2 Consumer Unit Trust Society (CUTS), 'Polly Wants a Doha Deal', CUTS Trade Forum, thread available at <http://groups.google.com/group/cuts-tradeforum/browse_thread/thread/b390c8905152796b#>.

3 WTO News, 1995 Press Releases, Press/10, 18 Apr. 1995, available at <www.wto.org/english/news_e/pres95_e/3_4.htm>.

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However, other core themes in that first Report are still resonant in the new one. Underlying both studies is the Secretariat analysis demonstrating that traditional tariff preferences in PTAs play a relatively minor role as a motivator for their formations. In 1995, this was attributed to the impending effects of implementing the Uruguay Round commitments. Those binding levels (now achieved) are yet credited in dictating the same outcome for the current generation of PTAs. While this seems a bit counter-intuitive, given that so many new agreements are formed with developing countries with higher levels of overall protection, there is apparently not that much to gain for PTA members in the elimination of additional tariff duties. The point is made that for those subject areas where there could be a strong preferential result by a tariff cut, these are the same sensitive sectors (agriculture) that were left behind in the Uruguay Round and in the preferential world.

Thus, for both eras, the Reports emphasize – and in the terminology of the 1995 Report – 'the issue of non-tariff measures, which are seldom administered preferentially, and domestic policies (such as production subsidies), which cannot be administered preferentially'.[4] The 2011 Report instead uses the term 'deep integration'. Both expressions put us in the same domain of 'domestic regulation' issues, but there are some notable differences in the subject areas considered and the extent of their treatment. For one example, in 1995, there were very few formed economic integration agreements under the General Agreement on Trade in Services, GATS Article V. Now there are over eighty such agreements notified, and the new Report concludes on these – that services commitments in PTAs have gone well beyond the commitments made by WTO members in the GATS.[5] This can also be explained by the low level of initial GATS commitments and the lack of conclusion of the current multilateral negotiations. However, the Report forms similar 'go-beyond' conclusions for PTA provisions dealing with investment, intellectual property, public procurement, competition policy, and technical barriers to trade. These are also identified by the Report as the subject areas correlated with international production networks for trade in parts and components. As a recent contributor to the *Financial Times* put it, 'the most pressing concerns of global firms, beyond formal trade rules, are issues like government procurement, competition policy, product safety rules and intellectual property law'.[6]

While the Report concludes that these deep integration provisions 'frequently entail legally enforceable commitments',[7] the overall effect of these provisions on the WTO system is perceived to be more benign where these subject areas, domestic and

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4 WTO News, *ibid*.
5 2011 Report, Executive Summary, 11.
6 Phillip Zelikow, 'The Global Era and the End of Foreign Policy', *Financial Times*, 16 Aug. 2011, online UK edition.
7 2011 Report, Executive Summary, 11.

regulatory by nature, are difficult to design and apply in any preferential manner. The absence of a most-favoured-nation (MFN) issue in deep integration endeavours is understood to eliminate a point of conflict between PTAs and the WTO system.[8] Perhaps this supports the 'Co-existence-to-Coherence' concept expressed in the Report title.

This summation establishes two planks for further consideration. The first considers the 'binding nature' of the regulatory provisions in PTAs, and the second examines the question of most-favoured nation. For the first, one does not sense either from the Report or the current literature that there is a clear methodology for characterizing domestic regulatory provisions in trade agreements. While one can make the easy cut between the terms 'should' and 'shall', we also sense that national regulatory systems and the way they respond to trade agreements are more complicated than this. A wholly non-binding provision can be supplemented by a highly demanding and constraining institutional process. A provision binding on its face can be excluded from any institutional oversight or redress. There are many anecdotes of non-binding provisions having a significant domestic impact. There are also easy examples of fully institutionalized regional arrangements that remain completely non-implemented. The variations are nearly endless. As lawyers, we tend to think that the development of dispute settlement systems has some discernible impact on the quality of an agreement's implementation, at least where the provisions have some capacity for interpretation and a resulting legal effect. However, this view may also be a bit narrow. For example, a number of PTAs include provisions for addressing anti-competitive practices that affect trade and provide for cooperation mechanisms to assist enforcement among the PTA members. These provisions are nearly universally excluded from the dispute settlement chapters of the agreements. Nevertheless, many competition authorities (South Africa, Mexico, even Canada) have attributed the institutional development and resulting capacity of their agencies to the competition policy provisions in their important PTAs. In these cases, it is not so much the 'legal effect' of the provisions in play but rather their softer impact in raising the profile of a regulatory subject as a domestic priority.

This leads to a suggestion that a methodology for treating the diversity of PTA regulatory provisions might be more multifaceted in going beyond the terms of a provision to include its larger interpretative context, its institutional setting and potential for additional development, and, of course, its relation to dispute settlement and redress. Each layer of the cake is added and analysed, and the resulting 'shape' of the provision and its roll in the overall agreement emerges. Now one can perhaps sense the provision's legal effect or enforceability, although in light of the above, we can also ponder if this is the only question we are trying to answer. The more subjective notion

[8] 2011 Report, 168–170.

of 'effectiveness' comes to mind. In short, while we are still not really sure of what we are trying to assess and what methodology we should be using to assess it, it is difficult to entirely follow the Report's conclusion that 'PTAs cover many more policy areas than tariffs and frequently entail legally enforceable commitments'.[9]

This broader field of play in the realm of domestic regulation also impacts the concept of discrimination, which, for the WTO, should remain a prime consideration and a significant aspect of the coherence question between PTAs and the WTO. The 2011 Report mimics elements of the 1995 study in its determination that many of the domestic subjects are not prone to discriminatory design and implementation. In that sense, deep integration looks to be a positive sum game where what one country does to bring its regulations into more international conformity or practice is a win for all comers. At the same time, there are some shades of complexity that also enter here. Formal and informal intergovernmental cooperation mechanisms also impact effective implementation, as do the institutional elements of a regional dispute settlement system.

While the underlying regulatory provision may not be a subject of discriminatory design, the course of additional cooperation and mutual implementation by the PTA members may be a decidedly bilateral endeavour and not open to the participation of other WTO members, whether or not they may be incidental beneficiaries. Emphasizing the point that these systems may be non-binding, we can also conclude that discrimination is not an issue because no discriminatory behaviour is obliged. However, established WTO law casts a notably wide net for capturing discrimination when governmental action needs to only *affect* the importation or internal sale of a product or the delivery of a service. This is to contrast with the example of many bilateral investment treaties that tend to prescribe the operation of their MFN clauses into the categories of 'substantive' (MFN applied) and 'institutional' (MFN not applied).

The only clue WTO law offers for excluding the broad operation of its non-discrimination provisions is still to be found in the text of the regional exceptions themselves, GATT Article XXIV, GATS Article V, and the 1979 Enabling Clause. For the first, this is not the place for a discourse on the scope of 'other restrictive regulations of commerce' to either capture or not capture regulatory cooperation activities. However, one can note that the committee discussions on regional trade agreements in the Doha negotiations have not yet made it to this item after ten years under the mandate to clarify the Article's provisions. Given the widening gap between PTA regulation developments and the likely limited outcome of the Doha Round (if it concludes at all),

[9] 2011 Report, Executive Summary, 11.

one can also see that PTAs are now the 'facts on the ground' that are setting the real framework by which WTO members will assess the coherence of their PTAs with the multilateral trading system.

This might explain one of the Report's recommendations to employ a soft-law approach to enhance coherence by relying on transparency, the development of a non-binding code of good practice for PTAs, and perhaps eventual negotiations to a more binding set of rules.[10] There is merit in this idea, as it, at least, represents a form of motion and perhaps the evolution of common state practice into norms. One has to finally acknowledge, however, that the legal relationship between PTAs and the WTO system has become much more of an exercise of 'what is' rather than 'what should be'.

*JHM, September 2011*

[10] 2011 Report, Executive Summary, 190.

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*Please direct submissions to:*
James Mathis, Managing Editor
Legal Issues of Economic Integration
Department of International Law
University of Amsterdam
PO Box 1030
1000 BA Amsterdam
The Netherlands

*e-mail: J.H.Mathis@uva.nl*