Mega-Regional Trade Agreements and the Future of the WTO

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Abstract

Major economies such as the United States, European Union, Japan, and even China have shifted trade negotiating emphasis toward 'mega-regional' agreements, including the Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), and the Regional Comprehensive Economic Partnership (RCEP). This paper explores why countries have chosen to pursue mega-regionals, what is likely to be contained in the agreements, and some of their potential implications for the multilateral trading system under the World Trade Organization (WTO). I call for revisiting the historical approach of introducing plurilateral and critical mass agreements – that would cover some of the mega-regionals' new provisions – into the WTO so as to avoid a more substantial, long-run erosion of the relevance of the nondiscriminatory system. I also highlight potential reforms to the WTO's dispute settlement procedure that are required to strengthen its already prominent role.

The major economies have shifted trade negotiating emphasis toward mega-regional agreements. The emergence of three sets of negotiations – the Trans-Pacific Partnership (TPP) agreement among Australia, Canada, Japan, Mexico, the United States, and seven other countries; the Transatlantic Trade and Investment Partnership (TTIP) negotiations between the United States and the European Union (EU); and China's pursuit of the Regional Comprehensive Economic Partnership (RCEP) negotiations – raises a host of short and long-term questions for the multilateral trading system and the World Trade Organization (WTO).

The General Agreement on Tariffs and Trade (GATT) and WTO established a multilateral system for trade that has remained largely unchanged since 1995. The desire to write new rules to address potential nontariff barriers to trade – covering public health and product safety standards, labor and the environment, international investment, digital trade and e-commerce, and state-owned enterprises – is an important driver of both the TPP and TTIP negotiations.[1]

These new regional trade agreements (RTAs) pose some potential threats to the multilateral system. First, they are discriminatory agreements that provide preferences to insiders at the expense of outsiders, and this could lead to economic distortions or a fracturing of global trade into competing blocks. Second, many of these issue areas are being brought into a trade agreement for the first time. The full consequences of this policy decision – including for the WTO – are still largely unknown.

However, direct steps can be taken to help mitigate such concerns. One is to return to plurilateral and critical mass agreements to bring some of the mega-regionals' important new disciplines into the WTO. However, reforms to the WTO's dispute settlement procedures are also needed to further strengthen and sustain its most prominent, day-to-day function.

The multilateral trading system

The GATT was established in 1947, and it shepherded the multilateral trading system until it was replaced by the WTO in 1995. Over their history, the GATT and WTO have provided three critical functions to the international system.

First, they have established a forum for countries to routinely convene, write basic rules, and negotiate over country-specific commitments to improve market access. Second, they have established a forum to resolve disputes. The WTO legal process allows for each interested country to make its case, and the WTO provides impartial, third-party adjudicators that generate legal rulings and determine compensation in the event of noncompliance. Third, they have established a technical administrative forum by which countries make and then report changes to their policies that affect trade. This reporting standardization provides transparency and leads to more globally efficient information dissemination.

These fundamental institutional pillars of the current WTO evolved over decades, but they have received little updating since 1995. The second and third functions have worked well over the WTO's first 20 years. However, even a relatively modest attempt to negotiate some rules changes multilaterally – through the Doha Round established in 2001 – failed and the effort was abandoned in 2015. The breakdown of the WTO's legislative function, despite a number of new issue areas of interest arising from the trading system's major actors, contributed to these countries shifting their negotiating efforts toward the mega-regionals.

Mega-regional agreements in the twenty-first century

The global proliferation of RTAs began in the early 1990s. The initial RTA approach of the United States and the EU was to negotiate agreements with different sets of partners and add some disciplines beyond the simple import tariff barriers that had been the focus of the GATT and WTO. For the United States, for example, this began with the side agreements on the environment and labor that accompanied the 1994 NAFTA with Mexico and Canada.

The more recent shift toward the mega-regional negotiations has taken place only since the recovery from the Great Recession.[2] First, multinational firms became increasingly interested in new types of trade disciplines that were not even up for discussion at the WTO.[3] Companies involved in global supply chains want to produce goods that can be certified for multiple jurisdictions; they have thus urged policy makers to improve coordination of product regulations historically set independently across different markets. Perhaps unintentionally, the lack of prior coordination had resulted in some of these regulations turning into significant nontariff barriers to trade.

Second, the rise of China as a major power also triggered geopolitical and national security concerns, especially in the United States, and contributed to a shift in negotiating emphasis toward the Asia-Pacific region and the TPP.

Mega-regional agreements: new provisions and their enforceability

The aggregate market-access implications arising from traditional tariff cuts under the prospective TPP and TTIP agreements are anticipated to be modest, despite their coverage of nearly 60 per cent of world GDP and 40 per cent of world exports.[4] Many TPP countries already have preexisting RTAs with each other. Furthermore, the TTIP involves economies starting from relatively low applied tariffs; and in sectors in which one has maintained high border taxes (e.g. footwear, textiles, and apparel), the other may not be a viable export source driving potential increases in comparative advantage-based trade.

The TPP and TTIP are less motivated by gains resulting from tariff reductions and more from new rules to coordinate reductions to perceived nontariff barriers to trade. To the extent that quantitative economic models predict sizeable gains to well-being arising from these agreements, the increases typically result from assumed reductions in nontariff barriers stemming from the agreements' new rules and disciplines.

The agreements would make some rules enforceable for the first time. For example, the TPP updates provisions like labor and environmental standards found in previous US RTAs like NAFTA by making them enforceable through RTA dispute settlement.

New rules are also being brought into major RTAs. The growth of the internet since 1995 has required new provisions for digital trade and electronic commerce. The prospect of future TPP accession by economies that embrace state capitalism, such as China and Russia, led to the incorporation of new disciplines on state-owned enterprises (SOEs). Other relatively new provisions now enforceable through TPP include government procurement, transparency, and anticorruption.

Some new 'soft law' TPP provisions, including competition policy and regulatory coherence, are not yet enforceable through dispute settlement. TPP provisions on regulatory coherence build from the US model that has established a federal-level office of information and regulatory affairs (OIRA) that attempts to rationalize the standards set by individual US regulatory agencies. To increase cooperation and reduce the chance that such standards develop into unintended nontariff barriers to trade, the provisions encourage regulators across TPP countries to conduct cost-benefit analyses or regulatory impact assessments, and allow for public comment before implementing policy changes.

Regulatory coherence has arisen as an even more important topic for the ongoing TTIP negotiations between the United States and the EU. The TTIP has been lauded as an attempt to deal with the evolving regulatory divergence between standards introduced in Washington and those in Brussels. Establishing not only rules but also an institutional process for regulatory cooperation between two high-standards economies could de facto result in their establishing product standards globally, that is, even for those goods produced and consumed well outside these two markets.[5]

New rules on dispute settlement over trade and investment

The TPP and TTIP also have the potential to substantially affect the process by which countries resolve bilateral frictions over trade and foreign investment.

Despite the existence of dispute settlement provisions in many RTAs, most formal disputes arising since 1995 between RTA partners have been adjudicated at the WTO. Looking ahead, at least one of the twelve future TPP members was involved in more than two-thirds of all WTO disputes initiated from 1995 to 2016.[6] Including the EU, the combined membership of the TPP and TTIP make up most of the WTO's historical caseload. Any effect of these new agreements – whether increasing or decreasing the number or types of disputes being litigated in Geneva – could substantially alter a WTO system that currently works well.

TPP dispute settlement procedures appear designed to elevate the WTO's system to primacy. While a handful of provisions are only enforceable through TPP dispute settlement, the TPP concedes most areas of traditional, market-access emphasis to WTO dispute management. Furthermore, unlike the WTO, there is no possibility of appeal for any disputes under the TPP's system, and there is no TPP staff that would provide the same sort of support that assists jurists. Under the WTO, appeals and secretariat staff help contribute to the stability of the system by ensuring that consistent legal decisions are made over time.

One of the most significant proposed changes under TTIP involves the rules for dispute settlement under the agreement's investment provisions. Currently, in the investment provisions of RTAs and in bilateral investment treaties, a distinct and much less transparent process governs, by which investors (e.g. firms) can bring cases directly against foreign states for arbitration under investor-state dispute settlement (ISDS). The European Commission has proposed a significant modification to ISDS in TTIP after experiencing substantial domestic political backlash at the onset of TTIP negotiations.[7]

The European Commission proposal for investment draws some inspiration from the WTO's system for resolving trade disputes: establishing a publicly appointed set of judges to hear disputes and allowing an appeals process to review and potentially modify first-stage decisions. However, even the Commission's proposal would not alter the right of investors to initiate disputes against states directly, in contrast to the dispute settlement procedures of the WTO and most RTAs, including the TPP. Those provisions require governments to litigate on behalf of firms.

Risks and benefits of mega-regional trade agreements

Not surprisingly, there are divergent views on the economic implications of RTAs, especially those that have already been implemented. One source of divergence involves drawing lessons from the effect that RTAs have had on subsequent policy decisions: whether RTAs are stumbling blocks or building blocks toward future multilateral liberalization. Economic theory has long predicted that both outcomes are possible. In some important historical cases, multilateral liberalization has followed the formation of RTAs, but in others, RTAs created impediments that resulted in less liberalization.[8]

A separate source of disagreement involves the issues covered by the mega-regionals and whether they should be in trade agreements. Here, the more primitive concern goes back to the purpose of the trade agreement.[9] Many of these disciplines require that governments give up an increasing amount of their policy space. For past negotiations focused on tariffs, this made sense. Tariffs are never a first-best policy globally, and restricting their use prevented countries from imposing externalities on one another.

The same cannot be said for most behind-the-border policies negotiated in the mega-regionals. From a global perspective and if set properly, domestic taxes, subsidies, and regulations are frequently the first-best policy to address market failures without introducing major, secondary side effects. The haste of negotiators to conclude the mega-regionals could impose ill-conceived constraints on policy makers. This could, in turn, produce inefficient levels of domestic regulation, which could lead to domestic political backlash and potentially failed trade agreements. Such failure could even erode the cumulative global efficiency gains achieved through 70 years of cooperative agreements, such as the GATT/WTO, that concentrated on lowering barriers to trade.[10]

Policy recommendations for the trading system

The idea that RTAs might undermine the GATT/WTO system is not new; indeed, some of the concerns regarding regional agreements date back to the classic work of Jacob Viner (1950) on the inefficiencies of 'trade diversion'. Yet the explosion in the number of RTAs since the early 1990s is unparalleled in earlier eras, and the policy issues covered by these RTAs are increasingly complex.

The WTO's response to the rise of regional trading arrangements

Unfortunately, although the WTO membership appears to recognize problems associated with RTAs that might undermine the multilateral system, the WTO has taken only a few concrete steps thus far to address the competition introduced by RTAs. The WTO has created a notification process and database for cataloguing RTAs. The WTO secretariat's economics research staff has brought the risks of RTAs to the attention of the membership by devoting its annual flagship publication to the topic. Furthermore, the WTO has undertaken some analytical work to characterize the different types of provisions arising across RTAs, perhaps in case the membership provides the WTO the policy directive to 'do' something more about it.[11] Overall, however, WTO efforts to address RTA proliferation have been minimal.

More analysis and data collection are needed to better understand and showcase potential conflicts between RTAs and multilateral cooperation, even if the RTA provisions are not direct violations of the WTO agreements. For example, the WTO's integrated database on import tariffs does not contain information on preferential tariffs arising under RTAs. It also provides little information nontariff barriers that may arise under the provisions of RTAs and discriminate against excluded countries.

A framework to bring new issues into the multilateral system

The rise of mega-regional agreements indicates that major economies have the appetite to negotiate a more expansive set of disciplines over new issues, to lock them in under trade agreements, and to make them enforceable through dispute settlement.

There are many reasons why these new trade provisions have not been successful at the WTO. Some developing countries resist their inclusion because of the unfulfilled promises of the Uruguay Round and failure to conclude the Doha Development Round. Since WTO negotiations among more than 160 members have been mostly consensus-based and given that WTO agreements are in the form of a single undertaking, a minority of members have blocked multilateral progress.[12]

The WTO's single undertaking approach is a recent development that resulted from the Uruguay Round of negotiations (1986–94). However, under the two immediately preceding multilateral sets of negotiations – the Kennedy Round (1964–67) and the Tokyo Round (1973–79) – the results also included a set of plurilateral agreements that applied to only those GATT members who accepted their obligations. They addressed a number of new – at the time – nontariff measures affecting trade, including antidumping, subsidies and countervailing duties, standards or technical barriers to trade, government procurement, import licensing, and customs valuation.

Today, the WTO retains a legal mechanism to allow members to develop new plurilateral agreements.[13] If no new rules are needed, then all that is required is for a core group of major economies to come together and agree to lock in nondiscriminatory – to the full membership – commitments to further reduce border barriers in a particular sector. This can also arise through what are referred to as critical mass agreements (CMAs).

One important example of a CMA was the Information Technology Agreement (ITA) of 1997. Under the ITA, a group of major economies locked in tariffs at zero for an expansive set of IT-related products covering billions of dollars in annual trade. The 1997 ITA was subsequently updated by a group of countries that agreed to add another 201 IT products to the zero-tariff list in 2015. Separate plurilateral negotiations have also begun over a potential trade-in-services agreement (TiSA) and an environmental goods agreement.[14] However, the TiSA negotiations, for example, do not yet include all major powers: China and India are not yet parties.

A priority for the multilateral system is to decide which new issues arising under the TPP and TTIP could and should also be plurilateralized under the WTO. Beyond sector-specific agreements on border barriers, there is a need to examine whether new rules – not only those related to labor and environmental standards – such as regulatory coherence for public health and product standards should be part of new plurilateral agreements.

Countries promoting the mega-regional agenda could also use the plurilateral forum to discuss topics largely blocked from comprehensive talks under the WTO. This includes the internet and e-commerce, consumer data privacy, and new issues involving intellectual property rights. The rising importance in global trade of economies with non-market origins (China and Russia) has also prioritized new disciplines and transparency for SOEs.

Sustaining the preeminence of the WTO's functioning dispute settlement system

The mega-regional agreements avoid introducing direct competition with the WTO in the area of dispute settlement. Two different trade agreements covering the same economic (market access) jurisdiction with competing court systems would not work.

More should be done to strengthen the WTO dispute settlement system. The WTO secretariat requires both additional resources and a reordering of existing resources given new needs arising from the mega-regional agreements. Appellate body jurists should be moved from part-time to full-time schedules, because of their increased workload and as a means of improving transparency and preventing conflicts of interest. The permanent, full-time staff of the WTO secretariat that supports the dispute settlement jurists is too small. More economists are needed to assist in increasingly data-intensive litigation. Each of these staffing improvements would contribute to a more efficient dispute resolution process and enhance support for and trust in the multilateral system.

Finally, discussions could be launched, perhaps on a plurilateral basis initially, to bring investment disputes into a multilateral system similar to the WTO. In the long term, this appears to be an aim of the European Commission, which included the idea of setting up a permanent international investment court in their TTIP ISDS proposal of 2015.

Conclusion

Strengthening the WTO's dispute settlement provisions and legislating new rules to address 21st century trade issues through plurilaral agreements will also ensure a resilient WTO that can continue to provide its third critical function: transparency. By disseminating information on all of its members' policy changes, the WTO provides essential information for both market participants and increasingly globally interconnected policy makers.

The Great Recession illustrates the point. In 2008, the global economy became embroiled in the deepest economic crisis since the Great Depression, presenting the WTO with its first major stress test. Global trade flows collapsed, and the global proliferation of the financial crisis sparked fears that protectionist forces had either struck or might still be forthcoming. Yet the Great Recession also highlights the essential nature of the WTO system. Other players – such as the World Bank and Global Trade Alert – emerged to enhance transparency in the trade regime. But their monitoring efforts were only possible because of the trade policy reporting infrastructure that the WTO system had put in place long before the crisis.[15]

Although the WTO may have reacted slowly and imperfectly during the crisis, the major RTAs at the time made no contribution to transparency. It is inconceivable that trade policy monitoring efforts would arise under the EU or NAFTA or in the mandate of the mega-regionals. In the interests of transparency and nondiscrimination, the WTO remains an indispensable institution.

Notes

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1. Unfortunately, less will be said regarding a potential RCEP agreement, given the lack of negotiating progress to date.

2. Mansfield and Milner (2012) provide a book-length treatment of the political-economic determinants of RTA formation, with a particular emphasis on variation explained by domestic political forces.
3. The fact that global supply chain activity has affected trade policy negotiations is not new. Indeed, Blanchard et al. (2016) provide evidence that such influences even affected the tariffs set by high-income and emerging economies over the period 1995 to 2009.
4. PIIE (2016) and Schott and Cimino-Isaacs (2016) provide a textual assessment of the TPP and economic model-based estimates of anticipated market access changes associated with the agreement. For estimates resulting from a potential TTIP, see Egger et al. (2015).
5. Legal introduction to issues involving regulatory coherence and cooperation include Sheargold and Mitchell (2016), Hoekman (2015), and Lester and Barbee (2013).
6. These statistics draw from Bown (2016); for introductions to WTO dispute settlement, see Bown (2009) and Davis (2012). Hillman (2016) introduces TPP dispute settlement.
7. For background on the proposal, see European Commission (2015). For an analysis of the proposal, see Kho et al. (2016).
8. Stumbling block evidence that RTAs negatively affected the Uruguay Round's multilateral tariff liberalization of the United States and EU is provided, respectively, by Limão (2006) and Karacaovali and Limão (2008). Building block evidence for Latin America during the 1990s is provided by Estevadeordal et al. (2008).
9. A more complete articulation of these concerns can be found in Bagwell et al. (2016). See also Bagwell and Staiger (2006), which suggests that current WTO rules limiting subsidies may be excessively stringent.
10. One open research question is motivated by the UK referendum to exit the EU ('Brexit') in June 2016, and whether regulatory inefficiencies in the UK-EU relationship contributed to its decision to leave the RTA.
11. On WTO databases, see WTO (2015a,b); on the annual flagship, see WTO (2011); and on the characterization of RTA provisions across agreements, see Chase et al. (2013) and Horn et al. (2010).
12. The only multilateral agreement negotiated since the establishment of the WTO has been the Trade Facilitation Agreement (TFA), which was concluded in Bali in 2013.
13. See Hoekman and Mavroidis (2014, 2015) in particular.
14. Plurilateral agreements under the WTO are not a new idea, see Lawrence (2006) and Levy (2006).
15. For discussions, see Bown (2011) and Drezner (2014).

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