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The Role of Regional Agreements in Trade and Investment Regimes

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1.0 Introduction

Two themes have been central to recent work on international trade and investment agreements; the scope and legitimacy of the WTO, in particular with regard to the so-called behind the border issues, and the growth of regional agreements. Whilst much has been written on the trade creating and diverting effects of regional agreements, there has been much less work on the role of regional agreements in rulemaking in trade and investment. This paper argues addresses the question of how rulemaking at the multilateral and regional level interact. After outlining the two central themes in the current trade and investment debate it then offers a framework for analyzing the relatively neglected question of how developments at the regional (or bilateral level) shape the evolution of the international trade and investment regime. The paper draws on a number of recent case studies the evolution of rules for behind the border issues, the findings of which are summarized. The paper argues that it is necessary to view rulemaking (or regime formation) in trade and investment as a multi-level process. It suggests that in this process the regional level played a broadly benign role in the period between the mid 1980s and mid 1990s, but that recent developments suggest that some more malign features of regional initiatives are now creeping in. To overcome this there is a need for meaningful negotiations on new rulemaking within the WTO even if this may require a plurilateral approach.

2.0 Two broad themes in research on the international trade and investment system

The first theme concerns the scope of World Trade Organisation (WTO) rules. In other words, should there be common rules established at the multilateral level for policy areas such as public procurement, intellectual property, competition, investment etc. and if so how far should these rules go in constraining national policy autonomy? On the one hand it is argued that as tariffs and other measures at the border have been reduced there is a

need to address such 'behind the border' issues that can limit or distort competition in trade and investment. On the other hand, it is argued that multilateral rules for behind the border issues take the WTO 'too far' by limiting national policy autonomy, undermining accountability, reducing beneficial 'policy competition' between national jurisdictions and imposing unsuitable rules on developing countries.

In practice the trade and investment regimes of today do constitute a balance between the adoption of common rules and policy autonomy, the issue is what sort of balance is struck and at which level of policy-making, bilateral, regional, plurilateral or multilateral? Compared to earlier decades, when GATT rules were drawn up on a range of behind the border issues from technical regulations to services and intellectual property, the WTO have become more inclusive. In the 1960s and 1970s a core group of developed countries led by the US shaped rulemaking. In the 1980s the plurilateral level of the OECD with the active involvement of other developed countries played a key role. In addition to this 'club' model of rulemaking, there was also close transatlantic co-operation between the two major proponents of trade and investment rules. Now there are more countries with an effective voice (and veto) in negotiations on rulemaking. This change in the nature of decision making in the WTO makes the task of finding the right balance between rules and policy autonomy more difficult. As a result the WTO member governments have effectively decided that significant new rulemaking is too difficult to handle in the current Doha Development Agenda (DDA).

The second theme concerns the role of regional (or bilateral) trade agreements (RTAs). Although the debate or customs unions and FTAs goes back at least a century the recent significant increase in the number of RTAs concluded or being negotiated, has brought the issue to the top of the trade agenda. (Irwin, 1993) In the 'first phase' or regionalism in the 1960s Europe provided a model for countries in Africa and Latin America to emulate but without much success. Economic integration in Europe stagnated in the 1970s also. Things changed in the 1980s with the 'second phase of regionalisation' in which the EU moved forward again with the single European market and monetary union projects, and the US began to conclude (bilateral) free trade agreements. Since the early-to-mid 1990s

there has been a veritable explosion of regional and bilateral trade agreements that has stimulated a great volume of research. (World Bank, 2005; WTO 2005)

The trade economic literature on RTAs drew heavily on customs union theory and on tariff based models. Much of the work took the form of quantitative assessments of the trade creating and trade diverting effects of tariff preferences, an important field but one of diminishing importance as tariffs, at least among the major economies of the world, have continued to come down. (Winters, 1996) Imperfect competition models assessed also the dynamic and growth effects of deeper or positive integration in regions, with studies being especially focused on the EU. (Baldwin and Venables, 1996). There has also been a good deal of economic literature on the question of whether RTAs constitute building blocs or stumbling blocs for the multilateral system. (Bhagwati, 1999) But this work, like the rest of the trade literature has neglected rulemaking that is not immediately trade-related. In other words the focus has been on areas such as anti-dumping and safeguard rules.

Legal studies have looked at the question of the legal compatibility of RTAs with the GATT Article XXIV and GATS Article V provisions, but these have been encumbered by the loose wording of these provisions and the lack of any operational criteria for assessing the impact of rulemaking in RTAs and FTAs. The GATT 1994 Article XXIV stipulates that preferential agreements must not result in an increased incidence of protection as a result of 'other restrictions on commerce' (ORC) in addition to tariffs. There has been work on how to apply Art XXIV to tariff preferences and ORCs clearly applies to border measures such as quotas or other quantitative restrictions. (Trachtman, 2002) But there is no consensus on how to apply Arts XXIV or GATS Art V to common rules on behind the border issues within a region. Without operational criteria for the impact of rulemaking at the bilateral or regional level the current discussions on how to improve WTO disciplines on RTAs in Geneva are going nowhere, because there is no way of assessing whether common regional rules restrict or facilitate trade and investment.

Political economists have also studied RTAs and have in particular addressed the question of the motivation behind such preferential agreements. Broadly speaking this work

suggests that there are a number of different motives ranging from strategic and foreign policy considerations to commercial interests in gaining new markets or locking in reforms in signatory states. (Schott, 2004) But the political economy research has tended not to look at the detailed substance of the agreements themselves and has in particular not looked at the rulemaking aspects. (Krueger, 1999)

In general terms therefore the increased debate on RTAs and the outpouring of new studies has not resulted in any consensus on whether they are building blocks or stumbling blocks and the rulemaking dimension has not been covered much. The case has been made that RTAs are creating a 'spaghetti bowl' of different rules, but this argument relies essentially on the indisputably 'spaghetti-bowl-like' rules of origin. (Bhagwati and Kreuger, 1995) With little work done on other areas of rulemaking it is unsound to draw wider conclusions from just one case. Equally, the case that deep integration is likely to be benign because rules in this area are less likely to be applied in a discriminatory fashion, (Winters, 1999; Lawrence, 1995) appears to require some more empirical testing that involves looking at the substance of the various RTAs.

What is needed therefore is more work on how the two themes of the scope and the WTO and the growth of regional agreements interact. The recent research that gets closest to addressing this question is that on whether RTAs or bilateral agreements go 'beyond the WTO'. This work has to some extend been undertaken by the WTO itself, which keeps an inventory of RTAs including the rulemaking elements of these agreements. The OECD has also produced a number of studies comparing RTA provisions in a range of behind the border issues. (OECD, 2002) This paper draws on this work as well as a number of horizontal case studies (i.e. studies in specific policy areas such as investment, that assess rulemaking on all levels) conducted in a research project funded by the United Nations Comparative Research in Integration Studies (CRIS) in Brugge and additional case studies carried out by the author. (Ullrich, 2004; Reiter, 2006;Pugatch, 2004; Delombaerde and Garay, 2005)

3.0 Towards a multi-level analysis of trade and investment regimes

The proposition here is that existing research has been constrained by a number of assumptions. First, it has been assumed that there is a clear distinction between trade and non-trade issues or between market access and rulemaking. This assumption has simplified things for those looking at the impact of RTAs, who have by and large focused only on the tariff, border/market access issues. The distinction between market access and rulemaking has also been used to simplify negotiations. But in reality there never has been and is unlikely to be any clear distinction between rules and access. Rules have and will continue to have important consequences for the degree of openness of economies and must therefore be considered alongside market access in assessments of trade policy. This includes an assessment of rulemaking in RTAs.

Second, much of the literature on RTAs tends to assume that the issue at hand is the extent to which trade (and investment policy) policy is regional or multilateral. Regional agreements are often presented as a new development that threatens the existing multilateral order. The assumption in this article is that multi-level rulemaking is normal and multilateral rulemaking the exception. In other words rulemaking in terms of trade and investment regimes has always been multi-level in nature, involving unilateral, bilateral, regional, plurilateral and multilateral rulemaking. The issue at hand is therefore how the role of the regional level might be changing, rather than whether regionalism is undermining multilateralism.

If rulemaking cannot be distinguished from other aspects of trade and investment policy and the process of regime formation is multi-level in nature, it is important to understand the role of regional/bilateral agreements in rulemaking. This necessitates analyzing the substance of RTA (and bilateral) rules on trade and investment in some detail, which is something that few studies have done until recently. [1]

4.0 An analytical framework

When assessing the impact of RTAs it may help to equate the effects of rules in RTAs with the generally understood effects of tariffs. There are three analogies that might be made with conventional trade theory. First, there is the question of what degree of preference do regional rules represent. As will be shown below this varies between elements of rulemaking. Second, there is the question of trade creation and diversion. Rulemaking in RTAs can be said to facilitate trade and investment (analogous to trade creation) when common regional rules replace divergent national rules and thus reduce frictional and compliance costs for third parties (as well as for the signatories). Trade and investment restricting (diversion) effects could be said to result when the stringency of the rules (norms or standards) exceeds the level of the previous national rules. In GATT terminology the RTA would then result in a higher incidence of protection due to 'other restrictions on commerce'?

For example, the introduction of common contract award procedures for public contracts within a region to replace diverse national procedures could be said to facilitate trade and investment because third country suppliers, as regional suppliers, will henceforth only need to conform to a unified set of rules. If on the other hand, regional technical regulations are introduced that exceed the level of regulation of the previous national regulations, these will have both trade (and investment) facilitating effects in the form of a common technical regulation, and trade (and investment) limiting effects in the shape of the higher regulatory standard.[2]

A third analogy can perhaps be made with optimal tariffs that may help us to understand how RTAs might have wider systemic effects. Optimal tariff theory envisages the use of asymetric bargaining power to shape international prices and thus shift the terms of trade. It is easy to see how, by analogy, dominant actors such as the US and EU or other 'hubs' might use a network of RTAs (or bilateral agreements) to promote rules to shape international rules to match their narrow national interest and thus enhance their 'terms of trade'. From international political economy one can also use the analogy of regional hegemons. But hegemony can be benign and malign. In this sense benign regional hegemons would be those that promote regulatory best practice or rules that enhance

sustainable development throughout the region. In contrast the malign or 'selfish hegemon' would promote rules that predominantly serve their own narrow vested interests, such as rules aimed primarily at enhancing market access in regional partners.

In order to address these questions we need an analytical framework that enables us to make qualitative assessments of the impact of regional rules. A summary version of this framework is set out in the chart. The chart illustrates the typical elements in rulemaking in any trade or investment agreement, the likely impact of each element, the scope of WTO rules (in very general terms as these will of course differ from case to case), and the nature and degree of preference.

4.1 Coverage

Regional rules will be deeper the greater their coverage. Coverage can be defined by sector schedules, regulatory entities covered, for example, whether rules apply to state and local government and regulatory agencies as well as central government, and the type of instruments covered. Rules that cover only legislation are shallower than those that also cover secondary instruments or regulatory decisions. The greater the coverage the more 'liberal' the regime if the rules constrain the scope for the use of regulatory instruments as means of protection. The degree of preference is then determined by the greater coverage of regional rules than wider multilateral rules. Analogous to tariffs, preferences in terms of the coverage of rules are subject to erosion through increased coverage of equivalent multilateral rules. For example, a regional preference resulting from greater sector coverage for services is subject to erosion by further negotiations in the GATS.

4.2 Non-discrimination

Principles, such as non-discrimination are common to all regimes. Here the nature of the preference is clear in the sense that the extension of national treatment or MFN only to regional partners constitutes a clear preference. How important this preference is will

depend very much on the specific case. For example, NAFTA requires national treatment for technical barriers to trade, as opposed to policy approximation. But the NAFTA parties are already bound to provide *de jure* national treatment under the WTO, so there is no preference. On the other hand, NAFTA also provides for pre-investment national treatment. This is equivalent to the right of establishment and therefore a significant preference for investors from within the region because there are no equivalent multilateral rules requiring pre-investment national treatment except in some service sectors under the GATS.

4.3 Transparency

Transparency provisions can also be found in virtually every agreement. These may cover statutes, or in cases of deeper integration secondary instruments. Transparency can also extend to decision-making procedures in the form of 'due process' provisions. For example, there may be regional rules, as in NAFTA, that grant parties the right to make submissions to regulators and require regulators to respond to these submissions. Taken together such transparency rules can facilitate trade and investment and promote regulatory best practice by shedding light on any abuse of regulatory discretion to restrict trade or investment. Transparency provisions in regional agreements therefore tend not to constitute a preference.

4.4 Substantive provisions

In the area of substantive rules RTAs can have both benign and malign effects. Common rules or standards can facilitate trade and investment by replacing different national rules. But full or partial harmonization of rules or standards may set higher standards than the national rules and thus represent a form of preference for regional suppliers that are more able to comply with these. Regional rules may also threaten to undermine multilateralism if, for example, they promote competing interpretations or norms. For example, in the area of sanitary and phytosanitary (SPS) rules the EU promotes the precautionary principle in the FTAs it concludes with third parties. This differs from the approach to precaution in US centred FTAs and arguably that in the WTO SPS agreement. Another example, of this is the interpretation of detailed provisions in intellectual property rights incorporated in

recent US FTAs that appears to be seeking to make up some of the 'ground lost' at the multilateral level in the shape of the codification of greater flexibility in TRIPs provisions in the Doha Declaration of 2001. In other words FTAs can be used to promote competing sets of norms, which can be expected to have malign effects on third countries and the trading system as a whole in that they will tend to create competing sets of rules.

Mutual recognition is another typical substantive provision that can constitute a clear preference, but one that will be subject to erosion only if MRAs are open to third parties that satisfy the same criteria as the original signatories.

4.5 Co-operation

Many RTAs include both general and specific co-operation commitments. General commitments to cooperate in specific policy areas can be found in many RTAs. For example, the EU association agreements call for cooperation in policy issues such as competition and environment policy, but without specific implementing provisions. There are however, provisions in RTAs that explicitly require technical cooperation at the level of specific policies, such as TBT, or competition. These may also provide for the exchange of regulators or funding for expert technical assistance. In such cases the resources made available are likely to be greater than those under general cooperation clauses or under multilateral rules where resources are much more thinly spread. In this sense the RTA might constitute a modest form of preference, but one that will be of some importance to developing countries.

4.6 Regulatory safeguards

All trade and investment agreements contain safeguards. Rulemaking therefore also generally includes a form of 'regulatory safeguard' that offers scope for exemptions from commitments in agreements. In terms of rulemaking these may often take the form of 'right to regulate' provisions. The degree of stringency of regional rules with respect to these regulatory safeguards is therefore important. Do regional rules leave less scope for national regulatory discretion, if so this could be seen as a form of preference because

regulators within the region would be able to use more discretion in their treatment of third party investors or products. On the other hand, tighter rules on the use of regulatory safeguards, if applied to all comers would be seen as a step towards wider liberalization.

4.7 Enforcement

Finally, rules generally include provisions on enforcement. If RTAs include more effective or far-reaching enforcement provisions these may facilitate trade and investment, for example, if they implement agreed international rules more effectively. Regional rules may however offer better access to reviews and remedies for regional suppliers or investors, through for example, investor-state dispute settlement or rights for legal persons to have regulatory decisions reviewed or set aside. Regional rules may also offer specific regional dispute settlement procedures. These could be seen as a form of preference. 'Jurisprudence' from regional dispute cases may also help shape future rulemaking. The interpretation of 'regulatory taking' investment protection under NAFTA is an example of this.

Elements of rulemaking in trade and investment agreements

Rule element	Typical provisions	Likely impact	Typical scope of WTO rules	Nature and degree of preference
Coverage	(i) Sector schedules (ii) type of entity e.g central, state, local, independent regulator or private entities (iv) regulatory instruments covered	more extensive coverage implies greater 'liberalisation'	(i) use of positive and negative lists (ii) generally limited to central government and 'best endeavours' for other entities (iii) full coverage of legislation but less of secondary instruments	third parties do not benefit from the greater WTO-plus coverage of sectors, entities or regulatory instruments analogous to tariff preference subject to erosion
Principles	(i) national treatment (ii) Most favoured nation status	(i) precludes discrimination against foreign suppliers (ii) no discrimination between third parties	MFN and national treatment central to WTO rules but exceptions, specifically for customs unions and free trade agreements	third parties do not benefit from non-discrimination provisions limited scope for preference as most areas subject to WTO rules
Trans-parency	(i) Notification of legislation (and) secondary instruments (ii) opportunity to make submissions on proposed regulation (iii) obligation on regulator to respond to submissions	facilitates compliance with national rules promotes regulatory best practice helps guide against regulatory capture by national interests	transparency is principle of WTO rules but often does not reach to secondary instruments some agreements also require (ii) and (iii)	Information generally public so no preference third parties might be denied right to make submissions, but in practice regulatory procedures unlikely to discriminate
substantiv e measures	(i) harmonisation (ii) partial harmonisation (iii) approximation as a general aim (iv) equivalence (v) mutual recognition	(i)– (iii) eliminate or reduce 'frictional 'costs (iv)-(v) reduces costs whilst retaining regulatory autonomy	selective harmonisation e.g telecommunications and financial services encourages but does not require mutual recognition or equivalence	preference for regional norms or rules over international rules and preference in the form of mutual recognition degree of preference potentially great
Co-operation	(i) joint bodies (ii) inter-govt. committee to oversee agreement (iii) specialist committees (iii) technical cooperation and capacity building	(i) promotes convergence on rules and/or best practice (ii) helps identify regulatory barriers before these create disputes (iii) helps less developed economies develop best practice	(i) exist by unwieldy (ii) general provisions for cooperation and technical assistance (iii) specialist committees in key policy areas (iv) limited resources for technical assistance	third parties excluded from more intensive cooperation within the RTA no third parties benefit from technical assistance under RTA could be important for developing countries
Regulator y safeguards	(i) tight controls on the use of 'safeguard measures (ii) general exceptions permitting discrimination,	(i) tight controls promotes confidence and thus trade and investment (ii) broad scope for exceptions has a chilling effect	generally broad exceptions that offer considerable scope for regulatory discretion , but some tightening e.g. SPS agreement	loose discipline enables scope to discriminate against third parties could be significant but case dependent
Enforce-ment implement -ation	(i) states or private legal persons have standing (ii) ind. reviews remedies (e.g financial penalties) (iii) regional dispute settlement	effective implementation promotes confidence and thus trade and investment flows	state-to-state dispute settlement only	third parties have no recourse to tougher and more immediate remedies and reviews

5. 0 Empirical evidence

This section summarises the findings of a number of horizontal case studies of rulemaking.[3] These case studies are illustrative and given space constrains cannot be comprehensive. The following section provides broad conclusions based on these case studies.

5.1 Rules of origin

Rules of origin is the classic case of how a number of regional preferential agreements can create the 'spaghetti bowl' effect described by Bhagwati. Diverse and often restrictive rules of origin - including preferential rules of origin - have emerged to fill the vacuum left by the absence of adequate international rules. World Customs Council provisions specify that substantial transformation should be the test of origin, but different regional agreements have set different criteria for what constitutes 'substantial transformation'. Some rules are based on change of tariff heading, some on value added and some on specific processes that must be carried out in the customs territory to impart origin.

Divergent rules of origin can be said to be restrictive or trade rather than facilitating trade.[4] The complexity of rules also means that they are the antithesis of transparency.
Divergent rules add to costs for third country suppliers and thus represent a degree of protection.

A closer, more detailed look at the evolution of rules in this area shows there is a trend towards the consolidation of rules of origin around two dominant approaches; the NAFTA approach and the Pan-Euro system, although there remain a large number of different rules in particular in Latin America.[5] Although consolidation around two major approaches might be said to have some advantages, the complexity of both approaches provides considerable scope for the rules to be used to protect sensitive sectors.[6]

5.2 Technical barriers to trade

Technical barriers to trade constitute an important impediment to trade and are therefore often the first 'behind the border' issue to be addressed in trade agreements. (Chen, 2004) Rules are needed to ensure a balance between liberalisation and the right to regulate to satisfy other legitimate policy objectives, such as health and safety and consumer protection. In this policy area rulemaking has been multi-level for many years. The first work on TBTs was carried out in the OECD in the 1960s. Thus formed the basis of the qualified MFN 'Standards Code' negotiated during the Tokyo Round between 1973 and 1979. These plurilateral rules required non-discrimination and transparency, but they were ineffective and national technical barriers continued to develop. Nor were the various international standards making bodies able to keep up with national voluntary standards.

Rulemaking in TBTs was revitalised by initiatives at the regional level, especially in the EU after 1985. The EU 'new approach' to TBTs extended coverage, enhanced transparency and facilitated trade both within the EU and for third parties because access to one EU Member State market meant access to all due to the system of mutual recognition within the EU.[7] In terms of substantive rules neither the EU nor the other RTA provisions on TBT went much if anything beyond the WTO rules. Indeed, the regional initiatives tended to take WTO approaches and implement them more effectively. In the field of voluntary standards Europe remained dominant, but rather than develop a stronger regional identity in standards-making the European standards bodies concluded cooperation agreement with international standards making bodies to ensure the maximum coherence between European and international standards.[8]

In other words regional initiatives had a benign effect of trade. They build on existing agreed approaches by introduced new methods and more effective implementation of what were essentially the agreed multilateral (or at least plurilateral) rules.

Mutual recognition agreements is a potentially less benign aspect of rulemaking in TBTs in the sense that they create preferences and could result in two sets of rules, one for the developed economies that can meet the conditions of MRAs and one for the developing

economies that could cannot because they lack the domestic institutional capacity in the shape of effective compliance testing and accreditation bodies. [9] But if regional and bilateral agreements contribute to establishing such institutional capacity, they may facilitate the entry of developing countries into the regimes maintained by the developed economies.[10]

5.3 Sanitary and phytosanitary (SPS) measures

Work on SPS rulemaking suggests that two dominant regional models for rulemaking are emerging, in this case despite the existence of strong multilateral rules in the shape of the WTO SPS agreement. (Isaac, 2001) It has been argued that the existence of these dominant models threatens the long term viability of the multilateral rules. The fact that the EU rules are based on a social rationality could, in particular, threaten the sustainability of the multilateral rules in that this EU approach is behind the push for changes in the SPS rules to include, for example, the precautionary principle.

It is worth noting that rulemaking in the SPS field started at the (European) regional level and in particular with European regional standards for food safety back in the 1950s and then moved to international standards in the shape of a the WHO's Codex Alimentarius. A major change in the nature of the multilateral rules occurred in the Uruguay Round when the Codex standards were linked with trade rules in the sense that the SPS Agreement draws on Codex standards.

The SPS case points to the danger of divergent regulatory norms and standards leading to 'regulatory regionalism' or the emergence of divergent, competing approaches to rulemaking in major world regions. The WTO rules are based on the scientific rationality approach used in North America so that it is pressure from the EU for more flexibility in these rules to enable scope for the social rationality model that appears to be the force for change. The issue is to what degree regional or other agreements will be used by the EU to push its agenda. All EU RTAs that include SPS provisions are based on the social rationality model of the EU and as one would expect all RTAs concluded by the US or Canada are based on the scientific rationality model.

The SPS case study therefore shows that trade and investment regimes are not static. Even if there are multilateral rules may be undermined if there are divergent interpretations of agreed norms. WTO SPS rules are much less ambiguous than those on rules of origin, but what scope there is may be used by the EU to push its social rationality model and by the US and Canada and others to strengthen the existing scientific rationality.

5.4 Services and public procurement

In the cases of services and public procurement, which are both of major economic significance, (Evenett and Hoekman, 2004) there appears to have been a positive synergy between regional and multilateral rulemaking in which developments at one level have complemented developments at the other. Work in these sectors (Ullrich, 2004, Woolcock, 2004) argue that international rules have been built up by a kind of iterative process in which regional/bilateral, plurilateral and multilateral levels of negotiation have all played a role. For example, in the case of public procurement work at the plurilateral level of the OEEC in the 1960s led to the plurilateral/multilateral code of the Tokyo Round. (Blank, 1997) The approach and principles established in this code were then applied at the regional level, first in the EU and then in the CUSFTA and NAFTA agreements. But these regional/bilateral level agreements improved on the plurilateral rules and implemented them more effectively. Enhancements at the regional level were then subsequently incorporated in the 1994 GPA plurilateral rules. The fact that rules on procurement are substantially about transparency means that the regional rules have facilitated trade rather than restrict it.

The procurement case study shows that this synergy between the regional and plurilateral/multilateral levels was particularly marked during the Uruguay Round negotiations. The fact that there were multilateral negotiations underway that served as a reference point for negotiators and rulemaking at the regional level. The case is special in the sense that it was characterised by very close EU-US cooperation. After the Uruguay Round the interaction between the regional and multilateral levels appears to have changed, with both the EU and US using the FTAs they negotiate to effectively increase the number

of countries adopting the rules (1994 Government Procurement Agreement) agreed at the plurilateral level. In some cases signature of the GPA is a condition for the EU and US concluding an FTA with the third country. In other cases the rules on procurement in the FTAs are equivalent to the GPA.

The case of services in general and telecommunications in particular exhibits some of the same features as procurement. This case also shows that the interaction between the levels of rulemaking has tended to be synergistic, with for example, developments at the regional/bilateral level facilitating more progress at the multilateral level. AT the same time multilaterally/plurilaterally agreed rules, such as in the case of the Telecommunications Reference Paper (TRP) agreed under the GATS sector negotiations have subsequently been used as the basis for RTAs provision on telecommunications.

The services sector more generally illustrates how the coverage of RTAs can be wider than multilateral rules. Sector commitments in services is often wider in RTAs than in the GATS. This is especially the case for NAFTA type FTAs that use the negative list approach. The RTAs concluded by the EU tend to be more GATS compatible than GATS plus in terms of coverage. In the case of procurement regional agreements tend to have greater coverage, including, for example, more entities such as the sub-national purchasing entities that were excluded from the coverage of the plurilateral rules. Here there is a clear case of regional preferences, but one that is likely to be subject to preference erosion over time as the coverage of the WTO rules is extended.

5.5 Investment and intellectual property rights

Finally, the cases of investment and intellectual property illustrate how regional level agreements can/are being used by dominant players to push a particular approach to rule making.

The case of investment illustrates how a *de facto* international regime of investment rules can be created by means of a patchwork of rules at different levels. (Reiter, 2004) Similar to the procurement and services case study, investment shows how the bilateral, regional,

plurilateral and multilateral levels have all played a role in establishing investment rules. In the case of investment efforts to establish multilateral rules (for investment protection) go back to the 1920s and 30s. In the 1950s and 1960s bilateral investment treaties (BITs) provided the model for investment protection agreements and the plurilateral OECD Codes the model for investment liberalisation agreements. In the 1980s US-centred regional/bilateral agreements (i.e. NAFTA) provided the model for comprehensive agreements covering both investment protection and liberalization. Finally, the multilateral level agreements on GATS and TRIMs provided rules for investment in services and performance requires. (OECD, 2004; UNCTAD, 2004)

The investment case appears to show how sequential negotiations at different levels can be used to promote a particular model of investment rules. Thus the US first established a comprehensive model for investment, covering investment protection as well as liberalisation in the NAFTA, before seeking to apply this model at the plurilateral level in the MAI negotiations from 1996 to 1998. When the MAI failed the US opted to promote the NAFTA model for investment rules in regional/bilateral agreements rather than in the multilateral setting of the WTO, because opposition from developing countries stood in the way of any high standard rules for investment in the WTO.

In contrast the EU approach to investment rules has made less use of such sequential negotiations. First the EU favoured negotiations in the WTO over the OECD in the late 1990s, and second it has not used RTAs or bilateral agreements to promote a coherent model for investment rules. This appears to be due to 'domestic' factors in the EU concerning competence over investment in international negotiations as much as anything else. (Reiter, 2004)

Compared to the procurement and telecoms cases therefore investment appears to be a case in which RTAs/bilaterals have been used as an alternative for those seeking a high standard for investment rules. RTAs are thus likely to detract from any efforts to agree multilateral level rules that will inevitably be much more modest. The fact that a range of developing countries have been willing to sign up to RTAs that include investment whilst blocking any

substantive progress in the WTO on a wider investment agreement has contributed to this strategic use of RTAs to push investment rules.

Intellectual property is another case in which binding multilateral rules were adopted during the Uruguay Round of negotiations. In IPR existing international standards in the WIPO were integrated into the trading regime through the TRIPs agreement. The reasons why this integration should occur with intellectual property rights (and SPS) rather than in industrial, labour or the environment, where there were equally agreed international standards was clearly due to pressure from sector interests in a number of key countries.

The intellectual property rights case raises questions as to the sustainability of the multilateral rules in this field. Similar to the SPS case the TRIPs agreement in the Uruguay Round established binding rules of considerable scope, but, inevitably left a number of ambiguities. These ambiguities have been the substance of much subsequent debate and conflict. The details of this debate need not concern us here and have been adequately described elsewhere. But one of the implications of the Doha Declaration on TRIPs has been a growth in the TRIPs – plus provisions in RTAs. A close look at the substance of recent IPR provisions in RTAs suggests that these may be being used a means of regaining some of the ground lost at the multilateral level in the sense of introducing binding interpretations of the rules favouring the owners of intellectual property rights. In other words the major sectoral interests, such as in the pharmaceutical sector have become disillusioned with the WTO following the Doha Declaration on TRIPs and how it has been interpreted, and shifted the focus of their lobbying to FTAs. Here as in the case of investment one can therefore find elements of a more malign strategic use of multiple level rulemaking in which major interests switch between for a in order to further their own narrow agenda.

6.0 Assessing the benign and malign effects of regional/bilateral rulemaking

All the policy areas summarized above show that the issue is not regionalism versus multilateralism, but that rulemaking has always been multi-level and is likely to continue to be multi-level. It is certainly true that the role of regional (and bilateral) rulemaking has

increased in importance relative to plurilateral and multilateral levels, so the aim must be to determine what role the regional level plays, an din particular whether it is benign or malign.

6.1 Benign and malign effects of preferential rules

It is necessary to be clear about what is meant by benign and malign effects of RTAs in rulemaking. The analytical framework provides a basis for assessing the impact of regional level rulemaking.

First of all rulemaking in an RTAs will tend to be benign if the margin of preference is limited and national preferences are not replaced by regional preferences in rules. From the discussion of the elements of any rules system, it was argued that transparency measures and cooperation arrangements are least likely to represent a form of preference, so agreements that emphasis such procedural measures are likely to be benign. Rules that promote transparency and due process in rulemaking, both of which tend to promote improved regulatory practices and reduce the scope for discretion and thus discrimination in regulation. This is benign because better, more consistent and objective regulatory practice facilitates trade and investment with third countries as well as improving economic performance within the region.

Equally, RTA rules that facilitate trade and investment by replacing divergent national rules but do not set the common regulatory norms or standards at such a level as to restrict competition from third parties, will also be benign. Those that set high standards could on the contrary be malign.

Finally, as a general rule of thumb, RTAs in which substantive provisions are consistent with generally agreed international standards will be benign whereas RTAs thus go significantly beyond the prevailing agreed rules pose more of a risk. Jurisprudence or precedents set in implementation might also take an RTAs may also go beyond generally

agreed international norms (or the interpretation of equivalent rules in the WTO), for example, in how to define the scope for regulatory safeguards or the right to regulate.

Regional rules that are benign for the trading system as a whole would be those that complement multilateral rules. This may take the form of regional agreements implementing principles adopted multilaterally. Often however, regional initiatives are likely to be developed alongside wider multilateral rules. Here they could be said to be benign if there is synergy between the two levels of rulemaking in which developments on one level enhance progress on the other level. Regional or preferential rules would also have a malign influence if they serve narrow vested interests by seeking to strengthen relative gains for one party over another rather than seek to establish an agreed framework of rules from which all can benefit. In the past rulemaking has been closely linked to market access and or the interests of specific sector interests. For example, the TRIPs agreement at a multilateral level clearly served a narrow set of interests and is generally not seen to have achieved a sustainable balance between the interests of intellectual property right holders and consumers and health policy objectives. Rulemaking initiatives to curb subsidies and to promote liberalization of public procurement markets also served narrow sector interests, such as the US steel industry and the telecommunications and energy equipment sectors in the US. The fact that vested interests captured multilateral rulemaking illustrates that the threat of such malign rulemaking is not just one at the regional level.

Another example of rulemaking that is malign effect on the trading system as a whole that which tends to lead towards 'regulatory regionalism.' Regulatory regionalism occurs when regional or preferential rules go beyond the existing agreed (WTO) rules, either in terms of substantive provisions in preferential agreements or how they are interpreted. The respective regional approaches then compete by ensuring that their preferred approach is included in future bilateral or regional agreements. Competition between the two approaches to rulemaking is then conducted through preferential agreements. For example, it has been argued elsewhere that the European and North America approaches to rules in the field of SPS are divergent and that both the EU and US/Canada seek to promote their respective approaches through bilateral agreements with third countries.[11]

Once again it depends in which elements of rulemaking the preferential agreements go beyond the WTO rules. If they go beyond the WTO in terms of the sectors or activities covered, then a preference is created, but one that will be subject to erosion provided multilateral negotiations result in an extension of the multilateral coverage. Equally, if preferential rules exceed the WTO with regard to transparency, there is unlikely to be a threat to the system. It is mainly the area of substantive rules that pose a systemic threat. Interpretations of rules that diverge from the accepted multilateral interpretation may also pose a systemic threat.

6.2 Benign effects during the second phase of regionalism

The findings from recent research suggests that regional agreements during the period between the mid 1980s and mid 1990s, had on balance, a benign effect. In terms of the impact on third parties, regional agreements did not constitute much by way of a preference. National preferences do not appear to have been replaced by regional preferences. Rules were mostly in line with existing WTO rules and when they did go beyond the WTO this was predominantly in terms of coverage, closer cooperation, enhanced transparency and 'due process' rather than substantive measures.

This finding is consistent with the view that deep integration will be less discriminatory, but at odds with the image of a 'spaghetti bowl' of conflicting rules. The close interaction between rulemaking at different levels would suggest that the appropriate analogy is 'lasagna' not spaghetti. There are a number of features of the mid 1980s to mid 1990s period that may have contributed to this generally benign impact of RTAs in the field of rulemaking.

First, it was a period shaped by a liberal paradigm in which progressive liberalization at the regional and other levels went hand in hand. Second, the rulemaking at the RTA and bilateral level during the late 1980s and early 1990s could draw on a reservoir of norms and approaches developed in the (plurilateral) OECD. In all the cases reported on the OECD provided the source of norms and rules. Third, regional rulemaking occurred against the background of active multilateral negotiations on new rulemaking. This appears to have

acted as a real constraint on negotiators, who went to considerable lengths to ensure that the regional initiatives were consistent with the emerging multilateral rules. This was clearly shown in the cases of services, TBTs and public procurement, although to a lesser degree for investment due to the absence of any negotiation on comprehensive investment rules at a multilateral level. Forth, it was a period in which there was close cooperation between the EU and US. Indeed, the Uruguay Round was, like the previous Tokyo Round of the GATT characterised by the central importance of the transatlantic negotiations. This was especially the case with regard to rulemaking in which the US and EU were the main protagonists.

6.3 Less benign effects post Uruguay Round

Comparing the 'second phase' of regionalism with the period after the end of the Uruguay Round one comes to a less benign balance on the impact of regional and preferential agreements. In the policy areas discussed above there are a number of indicators that preferential agreements are being used to promote the interests of the 'selfish' hegemon by going beyond the prevailing international rules or indeed by seeking to undermine agreed international rules.

Investment illustrates how a series of bilateral free trade agreements have extended NAFTA type rules to a range of the US's trading partners. These rules combine high standards of investment protection, negative list liberalization of investment, tough rules on performance requirements with investor-state dispute settlement. These provisions go well beyond existing agreed multilateral rules. In the case of public procurement, bilateral free trade agreements are being used by both the EU and US to increase the number of countries signing up to GPA type rules, because the public procurement provisions in these bilateral agreements are essentially based on the GPA. At least in this case the GPA represents a set of agreed rules even if they were only agreed by a core group of countries.

In terms of the systemic effects of the post Uruguay Round agreements there must be some concern that regional and other preferential agreements are being used to push divergent regional approaches. In the case of TBTs differences between the US and EU approaches

have not had much impact because of the difficulties making rapid progress in this field. The EU has not made as much progress towards concluding mutual recognition agreements with its major trading partners because of the ambition of the EU approach and the reluctance of its trading partners, including the US, to cede regulatory sovereignty. But in SPS there are two distinct regulatory approaches being promoted at all levels of negotiation. In the public procurement case the EU and US/NAFTA approaches are in fact very close. So close indeed that Mexico has been able to conclude agreements with both the EU and US (NAFTA) covering public procurement without having to adopt different rules. In investment the US is pressing ahead with its NAFTA standard in bilateral FTAs and has had some success having this adopted by other countries, such as Mexico and Singapore, that are pursuing region hub strategies and wish to attract foreign investment by offering high standard of investment protection and liberal rules on FDI. The EU has not included significant investment rules in its bilateral agreements because of 'domestic' issues within the EU. But if the EU were to include investment it would probably use a more modest framework based on positive listing for coverage, conventional expropriation clauses (rather than the 'regulatory taking' type clause in the NAFTA model and eschew investor state dispute settlement.

7.0 A US – EU comparison

There has been much general debate about the respective US and EU approaches to preferential/bilateral agreements and what motivates the respective policies, but there has been much less discussion of the substance of the US and EU preferential agreements. Detailed differences exist in each of the policy areas that have been covered by recent studies.[12] Detailed differences can be very important. For example, the North American and European approaches to the regulation of biotechnology are in general terms very similar, but differences on how to interpret 'precaution' in regulating products has been enough to create major problems.

Aside from the detailed differences it is possible to identify some general differences between the EU and US approaches to RTAs/bilateral agreements.

There are some general differences between the European and US approaches to rulemaking in RTAs, as well as some detailed but important differences in their respective approaches in each of the case studies covered here. In general terms the EU appears to adopt a more comprehensive approach to rulemaking with more extensive rules covering more aspects of policy, and the development and use of international standards in most policy areas. The US on the other hand, tends to favour a policed non-discrimination approach consisting of framework rules backed up by extensive enforcement provisions that facilitate private access to judicial reviews. The stress on private access to reviews is illustrated in the bid challenge rule for public procurement first introduced in the CUSFTA and investor-state dispute settlement in NAFTA. This of course is the approach used in the US for its domestic regulatory reviews and remedies.

8.0 Prescription

Finally, there is the question of what this all means in terms of policy. The first general conclusion with relevance to the policy debate is that RTAs can be good or bad when it comes to rulemaking, just as they can be good or bad, trade creating or trade diverting in terms of tariff preferences. It all depends on the substance of the specific RTA and how it interacts with other levels of rulemaking.

The conclusion that multilateral or plurilateral negotiations serve to constrain negotiators of RTAs who ensure conformity as much as possible, would argue for effective multilateral negotiations on rules. At present this is not happening and the DDA has dropped new rulemaking agenda items in a search for consensus among the developed and developing country members of the WTO. If multilateral rulemaking is blocked because of the difficulties finding a consensus among all the WTO members, then plurilateral approaches would offer a second best option. The negotiation of plurilateral rules on some of the issues covered in this volume will be second best because they will exclude some countries, but agreement among a core group of major economies on the kinds of norms that should form the basis of rulemaking, would be better than leaving rulemaking to the bilateral or regional level. To neglect international rulemaking risks seeing the emergence of competing regional systems of rules as the dominant players use bilateral or regional level

negotiations to establish their own, possibly divergent systems. Whilst dropping new rulemaking from the DDA may be expedient in the short term, rulemaking at the plurilateral or multilateral level cannot be neglected for too long without risking competing systems developing that will provide difficult if not impossible to reconcile in the future. Divergent systems of rules will then undermine multilateralism.

If formal biding agreements are not possible in multilateral or plurilateral negotiations there should at least be efforts to find convergence on the core regulatory approaches and norms, as for example, the various networks in the field of competition policy are seeking to do. As the case studies discussed here have shown, such agreed norms can provide the basis for rulemaking over decades.

In terms of how RTAs might be structured in order to promote benign rather than malign effects, the conclusions that might be drawn from the case studies are that regional rules that promote transparency and cooperation are unlikely to represent much of a preference if any and are unlikely to pose much of a threat to the trading system. RTAs that go beyond agreed multilateral rules in terms of coverage, such as sector coverage or coverage of more entities represents a preference, but a preference that one can expect to be eroded over time, provided work continues on international rulemaking. Therefore sch provisions in an RTA may have some impact on third parties, but pose not long term systemic threat to the system.

Systemic threat would be expected to come from RTAs that go beyond existing substantive rules. Therefore this kind of provision in an RTA should be looked at carefully in any scrutiny process such as in the Committee on Regional Trade Agreements in the WTO. Substantive provisions in RTAs should therefore make use of existing agreed international standards, such as those of the ISO, Codex or agreed standards for intellectual property ect. Unless such rules are used there will be little incentive for governments to put resources into developing international standards and regulatory norms.

The approach proposed here is therefore to break down regional rulemaking into its component elements in order to assess their impact. Such an approach could then help to develop criteria that could result in operational criteria for the work of the CRTA of the WTO an din particular help with the question of how to assess 'other restrictions to commerce' under Article XXIV of the GATT.

Finally, the major protagonists in rulemaking should seek to cooperate more closely. In the past US – EU cooperation was sufficient to ensure that the broad approaches adopted were consistent. But transatlantic regulatory cooperation is not what it was, despite repeated attempts to strengthen the bilateral dialogue. But the transatlantic cooperation is no longer sufficient it will be necessary to reach out to include other major economies including developing economies in effective negotiations or dialogue on rules. This will mean setting more modest objectives for rulemaking even to achieve plurilateral agreements.

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Endnotes

[1] Among the first studies of whether RTAs go beyond the WTO were Organisation for Economic Cooperation and Development (OECD) *Regional trade agreements and the multilateral trading system,* November 2002, OECD, Paris and Sampson Gary and Stephen Woolcock (eds) (2002) Multilateralism and Regional Integration Agreements: the recent experience United Nations University Press.

[2] With suitable econometric models one might well be able to estimate the real trade creating and diverting effects of such common rules

[3] The case studies are drawn from a number of recent sources. There are general compilations of case studies assessing the role of regional agreements in rule making, see OECD 2002 and Sampson Woolcock 2003 as well as Woolcock 2006 forthcoming. In addition there have been a number of studies looking at the role of regional agreements in specific policy areas. These are cited at the relevant points.

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[11] See Grant Isaac Sanitary and Phytosanitary Measures in Woolcock (ed) The interaction between levels of rulemaking in international trade, UNU forthcoming.

[12] Official reports such as those produced by the OECD or WTO tend to avoid any direct comparison of US and EU approaches. For a more comprehensive comparison see Woolcock (ed) forthcoming The interaction between levels of rulemaking in trade and investment, UN University Press (2006)