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MAINTAINING THE WTO'S SUPREMACY IN THE INTERNATIONAL TRADE ORDER: A PROPOSAL TO REFINE AND REVISE THE ROLE OF THE TRADE POLICY REVIEW MECHANISM

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ABSTRACT

In light of the stagnating World Trade Organization (WTO) negotiations, this article argues that WTO should not only focus on the development of new rules or the resolution of disputes, but should also develop 'soft law' on the basis of informal mechanisms as the successful experiences of the International Competition Network or the International Monetary Fund demonstrate. In this respect, WTO should extend and refine the role of its Trade Policy Review Mechanism (TPRM) in order to be able to address essential issues of contemporary economic concerns and, hence, remain at the centre of global governance. This article explains how the TPRM role should be refined and revised with a view to cover key areas of international trade governance, such as harmonization and coordination of preferential trade agreements as well as convergence of measures dealing with greenhouse gas emissions and other environmental policies which are two key issues questioning the WTO's supremacy in the international trade order.

INTRODUCTION

Since its inception in 1995, the World Trade Organization (WTO) has been successful in establishing the rule of law in the international trading system. Its dispute settlement mechanism (DSM) has produced over 100 rulings by panels and the Appellate Body (AB), and the rules established through those

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decisions contribute to the stability and predictability in international trade relationships among WTO members. However, the WTO has not been very successful in international negotiations. In 1999 the Ministerial Conference in Seattle failed, and then the 2003 Conference in Cancun failed again. Although the Hong Kong Ministerial Conference of 2005 was not a total failure, it still produced only a small package for negotiation. Since then negotiations among WTO members in Geneva and elsewhere have stalemated many commentators now view the Doha Round as 'dead'.¹ To no one's surprise, the Eighth Ministerial Conference, which took place in December 2011 concluded without any breakthroughs on any of the contentious issues facing the organization.²

Reasons for this rather poor achievement are many³ but, among them, the 'single undertaking'⁴ and the consensus rule⁵ combined to a change in power

¹ In May 2011, Richard Baldwin and Simon Evenett edited a collection of essays which warned that 2011 was the do-or-die year (see Richard Baldwin and Simon Evenett, *Why World Leaders Must Resist the False Promise of another Doha Delay* (Geneva: Centre for Economic Policy Research, 2011) 106). As a matter of fact, US Congressional politics is likely to be much rougher after the 2012 presidential election while the 18th Communist Party Congress has chosen Xi Jinping to be President of China who cannot start off by making what can be viewed as major unilateral concessions to the USA. See Jean-Pierre Cabestan, 'China's Relations with the Major Powers: The United States, European Union and Russian Federation', in David Shambaugh (ed.), *Charting China's Future: Domestic and International Challenges* (London: Routledge, 2011) 77–86.

² Instead, the meeting concluded with a Chair's Summary composed of: (1) 'Elements for Political Guidance' statement previously prepared by the WTO General Council (which functions as the highest decision-making body in between Ministerial meetings); and (2) the Chair's factual summary of the proceedings. See, Rashid S. Kaukab, 'To Have Or Not to Have a Round: WTO at Crossroads', 10 (9) *Trade Negotiations Insights*, available at <http://ictsd.org/i/news/tni/121380>.

³ The 'trade community' itself has difficulties in naming the main problems and providing some solutions. See, Patrick Messerlin and Erik Van Der Marel, 'Polly wants a Doha Deal: What Does the Trade Community Think?', 10 (4) *World Trade Review* 551 (2011), at 551–56.

⁴ The 'single undertaking' principle practised by the WTO does not permit the conclusion and implementation of partial agreements. All negotiations must, therefore, end in a single final agreement covering all the subjects. In such a situation, an agreement on agriculture is entirely dependent on the advancement of negotiations on the protection of geographical indications and access to markets for industrial goods. It is, therefore, understandable that these negotiations, which are already highly complex, have also been very difficult at the political level. See, Matthew Kennedy, 'Two Single Undertakings—Can The WTO Implement the Results of a Round?', 14 *Journal of International Economic Law* 77 (2011), at 77.

⁵ WTO is at a disadvantage because all its decisions have to be taken by consensus which paralyses the progress of negotiations. On one hand, it is indisputable that consensus is by its very nature democratic and has an integral role to play as every member can, theoretically, oppose any proposition that comes up for discussion. On the other hand, the strategic aspect of consensus is very significant, especially during major trade negotiations. Thus, the need for consensus also detracts from WTO's efficacy as a single government can paralyse the decision-making mechanism. It is a fact that since the Seattle Ministerial Conference the pace of multilateral negotiations organized by WTO has slowed down considerably. Because it encourages some members to adopt bilateral or regional solutions and this approach appears to pose a question mark on the future of the multilateral trade system.

relationships⁶ within WTO are noteworthy. If the Doha Round fails, there is a danger that some members may move away from multilateral negotiations. Leaving the multilateral framework and fuelling bilateralism (especially through ambitious preferential trade agreements (PTAs), such as the Trans-Pacific Partnership Agreement)⁷ could pose a threat of resurrecting old mechanisms based on the balance of power and of exacerbating inequalities between large trading powers and developing countries; thus it could jeopardise the principle of the rule of law in international relations which is crucial for the constitutionalization of the international community. In this regard, unless some innovative negotiation methodologies are put into practice, WTO negotiations will continue to stagnate and the impact of WTO in the international trading system may decline.⁸ The idea put forward in this article lies in the new use of the Trade Policy Review Mechanism (TPRM) which is an existing WTO body, incorporated in Annex 3 of the Marrakesh Agreement, that has already proven its effectiveness. The TPRM is, however, under-exploited and its role should be extended in order to help WTO better address new and essential issues of the international economic order such as the uncontrolled proliferation of PTAs and recent efforts to regulate greenhouse gas (GHG) emissions and other environmental policies which have an impact on trade.

Since 2008 a great financial crisis has been weakening the world economy and some trading nations, such as the USA,⁹ India, or Argentina,¹⁰ have

⁶ More specifically, China, India, Brazil, Russia, and South Africa have emerged as great trading powers and they have formed a group representing developing countries to assert their position vis-à-vis developed countries as represented by the USA and the European Union (EU). A 'Green Room' style of negotiation in which a few developed countries decide the basic trade policies and persuade other countries, including developing countries, to accept is no longer working anymore and, thus, a new decision-making process in WTO is needed. See Bryan Mercurio, 'The WTO and Its Institutional Impediments', 8 *Melbourne Journal of International Law* 198 (2007), at 212 and footnote No. 74. See also, Bryan Mercurio, 'Reflections on the WTO and the Prospects for its Future', 10 *Melbourne Journal of International Law* 49 (2009), at 49–57.

⁷ See Chin Leng Lim, Deborah Elms, and Patrick Low (eds), *The Trans-Pacific Partnership (TPP) Trade Agreement* (London: Cambridge University Press, 2012) 352.

⁸ Ernesto Zedillo said in 2006: '[I] believe that very soon the relevant question will be, not how can the WTO save the Doha Round but rather how can the WTO be saved from the Doha Round.' See, 'The WTO's Biggest Problem at 10: Surviving the Doha Round', Address at Columbia University Conference, WTO at 10: Governance, Dispute Settlement and Developing Countries (7 April 2006).

⁹ For instance, in early 2009 the USA has announced that a 'Buy America' policy would be applied to purchases by enterprises if they have accepted financial assistance from the government. For a commentary see Gary Hufbauer and Jeffrey J. Schott, 'Buy American: Bad for Jobs, Worse for Reputation, Peterson Institute for Economics', (2009) Policy Brief No. Pb09-2, pp. 1–11. This kind of policy has triggered some other countries to follow. India has decided to increase tariffs on steel products and bean oil products. And the Philippines' introduction of export licensing system of iron ores as well as China's export controls on bauxite and zinc are also good examples.

¹⁰ Argentina, a member of G20, has adopted an imports policy has already triggered a strong joint declaration from 40 WTO Members last March during the meeting of the WTO Goods

resorted to protectionist trade measures. In order to warn against protectionism, Pascal Lamy, Director General of WTO, made use of the TPRM to gather data on the trade-restricting measures taken by some WTO members, and took this issue to the G20, urging them to deal with the rising trend of protectionism.¹¹ G20 countries agreed that this trend would be dangerous and, if no countermeasures were applied, would be harmful to the liberal trade order so they decided to ‘standstill’ those protectionist measures, i.e. not to increase such measures in the future. Moreover, at meetings in December 2008, G20, Asia-Pacific Economic Cooperation forum (APEC), and separately China, Japan, and Korea all pledged to refrain, in the following 12 months, from raising new barriers to trade and investment, imposing new export restrictions, or implementing measures inconsistent with the WTO to stimulate exports. This initiative on the part of WTO/Pascal Lamy has been followed by subsequent moves. On 20 April 2009, the G20 Global Plan requested WTO to report periodically on the results of the monitoring of trade-restrictive measures to the G20. The July 2009 WTO report by TPRM warned that WTO membership had not done enough to combat protectionist measures.¹² However, as pointed out by Bernard Hoekman, ‘the crisis monitoring initiative revealed that the Secretariat could not rely on notifications to the WTO for up-to-date information and that publication of the analysis was important to improve quality and coverage’.¹³

This article argues that, in addition to traditional ways of dealing with the governance of the international trading system, WTO should embark on a new and concrete project and promote the role of its TPRM. In this regard, WTO can retain its influence in the maintenance of the liberal international trade order. After a brief review of the basics of TPRM, the first section takes stock of relevant innovations in international economic relations which should inspire the future reform of the TPRM, both in terms of structuring negotiations (as illustrated by the International Competition Network) and

Council’s . Argentina. The claim is focused in the non-automatic licenses and other measures the Argentine Government applies to the imports. See, WTO, Council for the trade of goods meeting, document G/C/W/667 (and Argentina’s reply), G/C/W/668, 30 March 2012.

¹¹ See generally Pascal Lamy, Director-General, World Trade Org., *The Values of the Multilateral Trading System*, Address before the Lowy Institute (discussing in part the necessity of the WTO’s trade policy review mechanism in warding off protectionism), http://www.wto.org/english/news_e/sppl_e/sppl117_e.htm (visited 29 October 2012).

¹² Trade Policy Review Body, *Annual Report by the Director General: Overview of Developments in the International Trading Environment*, WT/TPR/OV/13 (24 November 2010); Trade Policy Review Body, *Report to the TPRB from the Director-General on Trade-Related Developments*, WT/TPR/OV/W/3 (14 June 2010); Trade Policy Review Body, *Annual Report by the Director General: Overview of Developments in the International Trading Environment*, WT/TPR/OV/12 (18 November 2009).

¹³ Bernard Hoekman, ‘Proposals for WTO Reform: A Synthesis and Assessment’, 20 *Minnesota Journal of International Law* 324 (2011), at 357.

the substance of soft law (as illustrated by the IMF Santiago Principles). The critical assessment of the current TPRM, which helps to identify the key procedural features requiring improvements, is conducted in the second section. The substantive issues that should be included in the TPRM mandate are discussed in the third section. Finally, some conclusions are drawn on the basis of the whole discussions.

I. TAKING INSPIRATION FROM OTHER TRANS-NATIONAL FORA

A brief review of the basics of TPRM is needed at this stage. The TPRM was an early result of the Uruguay Round, established during the negotiation period in December 1988.¹⁴ Later, Annex 3 of the Marrakesh Agreement placed the TPRM on an equal footing with other WTO agreements. The objectives of the TPRM, as expressed in Annex 3, include facilitating the smooth functioning of the multilateral trading system by enhancing the transparency of members' trade policies.¹⁵ Although not the most scrutinized component of the WTO, the TPRM has, however, attracted academic interest essentially because of the alternative that it presents to dispute settlement¹⁶ as well as the wealth of information that it provides.¹⁷ As addressed in the 2011 report, the TPRM has conducted 338 reviews since its formation. The reviews have covered 141 of 157 members,¹⁸ representing some

¹⁴ For a historical perspective, see Arunabha Ghosh, 'Developing Countries in the WTO Trade Policy Review Mechanism', 9 *World Trade Review* 419 (2010), at 419.

¹⁵ Annex 3 of the Marrakesh Agreement states that the objectives of the TPRM are 'to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members'. TPRM, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, 1869 U.N.T.S. 480 (1994).

¹⁶ A connection can be established between the TPRM and future trade disputes, See, Julien Chaisse and Debashis Chakraborty, 'Implementing World Trade Organization Rules through Negotiation and Sanction,' 28 (1) *Pennsylvania Journal of International Economic Law* 153 (2007), at 153–86 and Janet Martinez, 'An Analytic Framework for Dispute Systems Design', 14 *Harvard Negotiation Law Review* 123 (2009), at 160. Some authors note that the TPRM 'might be another suitable forum in which developing countries can raise issues regarding possible distortions in trade', see Amir H. Khoury, 'A Neoconventional Trademark Regime for 'Newcomer' States', 12 *University of Pennsylvania Law Review* 531 (2010), at 404. See also, Ghosh, above n 14, 419.

¹⁷ The main virtue of the TPRM lies in its contribution to the transparency of national trade policies. See, Joseph François, 'Maximizing the Benefits of the Trade Policy Review Mechanism for Developing Countries', in Bernard Hoekman and Will Martin (eds), *Developing Countries and the World Trade Organization* (London: John Wiley & Sons 2001) 147–66 and Bernard Hoekman, 'Proposals for WTO Reform: A Synthesis and Assessment', 20 *Minnesota Journal of International Law* 324 (2011), at 356.

¹⁸ For details of the WTO Members reviewed (1989–2011), see Trade Policy Review Body—Trade Policy Review Mechanism—Report of the Trade Policy Review Body for 2012, WT/TPR/306, 23/11/2012, Annex 1.

96% of the share of world trade¹⁹ what very well demonstrate its contribution in ensuring transparency of national trade policies.

The structure of an institution is important as it can facilitate or retard the realization of substantive policy goals, and may entail costs that make specific institutional arrangements undesirable when balanced against the costs and benefits of alternative arrangements or even of the status quo.²⁰ The TPRM has been active since the completion of the Uruguay Round and practice shows that some improvements are not only possible but advisable. More specifically, the current activities of the TPRB suggest that the TPRM does not create binding rules but emphasize recommendations for members to take into account how to improve their trade policies. This very role, however, may require reform of the TPRM. In this section, we will put the question in the wider context of international economic order in which new procedures and mechanisms have been established in the last decade in order to address new issues. In this regard, the International Competition Network as well as the regulation of Sovereign Wealth Fund (SWF) by the IMF are relevant cases to present. They are both issues that could have been addressed within WTO system since competition and investment were originally included on the Doha Development Agenda. We then will turn to a critical assessment of the TPRM and will identify the salient features of the TPRM which should be protected in the future as long as the WTO wants to keep in an active role.

In recent years, new international issues have emerged so that they need to find coordinated international regulatory answers. It is interesting to observe that many successful answers are essentially based on 'soft law' mechanisms. Among those examples, it is appropriate to detail two of them, which are of direct relevance to the WTO role. The first instance and source of inspiration is the 2008 IMF's 'Generally Accepted Principles and Practices' on Sovereign Wealth Funds (A). While the WTO would provide a relevant forum to regulate SWFs' operations, it failed to take into account the need for flexibility in such an undertaking. This set of principles is aimed at providing a SWF guidance on its operations and shows that while it might be impossible to negotiate binding rules for these wealthy investors, it is indeed possible to bring together main stakeholders in order to identify which principles could be agreed by both recipient countries and sovereign investors for the benefit of all. The second example of the International Competition Network relates not to a set of guidelines of principles but to the structure which the TPRM could adopt (B).

¹⁹ See *Ibid.*

²⁰ Daniel K. Tarullo, 'Norms and Institutions in Global Competition Policy', 94 *American Journal of International Law* 478 (2000).

A. Negotiating substantive soft law: the Sovereign Wealth Funds and the IMF

The recent emergence of SWFs as active and important players²¹ in international financial markets has raised a host of questions about their likely effect on markets and states. While some preeminent commentators called very legitimately for the WTO to take action and ensure that public financial investment would remain treated in a liberal manner by host countries, it is only the IMF that was capable to open the discussion among stakeholders and issue guidelines.²² The IMF set up an International Working Group of Sovereign Wealth Funds which announced a preliminary set of 24 principles and best practices for the funds to follow and to ensure their competitiveness in global financial markets. These 'Generally Accepted Principles and Practices' (GAPP) or 'Santiago Principles' were released in October 2008.²³ The IMF agreed on a set of 24 voluntary principles for the funds to follow and to ensure their competitiveness in global financial markets.

In substance, the GAPP sought to establish a framework for SWFs that promotes operational independence on investment decisions, transparency, and accountability.²⁴ To achieve this, it covers practices and principles in three key areas: legal framework, objectives, and coordination with macro-economic policies; institutional framework and governance structure; investment and risk management framework. The full list of principles includes recommendations that sovereign funds coordinate their activities with their respective governments and central banks to avoid interfering with domestic economic policy.²⁵

²¹ This trend is further reinforced in 2010/2011 by the fact that despite the fears and turbulences that spread all over the world as a result of the global economic and financial crisis, SWFs have blatantly retained their influence. See especially, Julien Chaisse, Debashis Chakraborty, and Jaydeep Mukherjee, 'Emerging Sovereign Wealth Funds in the Making - Assessing the Economic Feasibility and Regulatory Strategies', 45(4) *Journal of World Trade* 837 (2011), 837-76.

²² See Aaditya Mattoo and Arvind Subramanian, 'Currency Undervaluation and Sovereign Wealth Funds: A New Role for the WTO', Working paper No. 08-2 Peterson Institute for International Economics.

²³ International Working Group on Sovereign Wealth Funds, *Sovereign Wealth Funds—Generally Accepted Principles and Practices—'Santiago Principles'* (2008).

²⁴ Paul Rose, 'Sovereign Wealth Fund Investment in the Shadow of Regulation and Politics', 40 *Georgetown Journal of International Law* 1247 (2009), at 1214.

²⁵ The members have agreed that funds should disclose their sources of funding and the conditions under which their owners can withdraw them. They have agreed to make disclosures as applicable under local laws and regulations. The legal framework basically reflects the 'concern that SWFs be both predictable and accountable with respect to both domestic and recipient country regulators'. (See, Rose, *ibid.*, at 1215). Of key significance in this regard are Principles 11, 12, and 22. Furthermore, sovereign fund managers should be independent of the fund owners, but fully accountable, publishing annual reports and undergoing annual audits. To address criticism among some economists that the funds' secrecy contributes to volatility in capital markets, the principles call for funds to disclose 'relevant financial

Endorsement of, and adherence to, the GAPP is a completely voluntary matter which must be ratified by the competent authority in each participating country.²⁶ The issue for the IWG is ‘voluntary’ compliance with the GAPP. But there are some encouraging signs²⁷ since the Abu Dhabi Investment Authority (ADIA) expressed support for the ‘Santiago Principles’. Additionally, ‘[t]o underline its commitment to full compliance, ADIA has established an inter-departmental committee to oversee compliance with the GAPP. Furthermore, ADIA is analysing the feasibility of establishing a mechanism that would provide independent verification of its compliance with the GAPP’.²⁸

The implementation process will take some time, and different SWFs will probably be at differing levels of observance of the Principles for the near- and mid-term. What may appear at first as a burden could be turned into an advantage. Indeed, complying with the ‘Santiago Principles’ will mean accepting the multilateral rules agreed by all. Any SWF which would comply with such rules could expect a positive response from both the USA and the European authorities and will not be subject to uncertainties resulting from their procedures.

The ‘Santiago Principles’ encapsulate, as analysed by Norton, ‘a new ongoing “institutional”, “administrative”, and “qualified self-regulatory” process for implementing, interpreting, revising, adjusting, monitoring, and assessing these Principles and for further fostering their global acceptance as part of the post-global financial-crisis “international architecture”’.²⁹ It should be a source of inspiration to the trade community and the WTO members. Interestingly, the IMF worked on the Santiago Principles by involving all relevant stakeholders: central banks, financial ministries and top managers of the world’s most important SWFs (including the United Arab

information’ to ‘contribute to stability in international financial markets and enhance trust in recipient countries’. (International Working Group on Sovereign Wealth Funds, above n 23). Each fund’s investment policies should be made public, including the extent to which it employs outside managers.

²⁶ As the International Working Group of Sovereign Wealth Funds (IWG) noted in its release of the Principles, ‘The GAPP is a voluntary set of principles and practices that the members of the IWG support and either have implemented or aspire to implement. The GAPP denotes general practices and principles, which are potentially achievable by countries at all levels of economic development. The GAPP is subject to provisions of intergovernmental agreements, and legal and regulatory requirements. Thus, the implementation of each principle of the GAPP is subject to applicable home country laws.’ See International Working Group on Sovereign Wealth Funds, above n 23.

²⁷ See, Julien Chaisse, ‘The Regulation of Sovereign Wealth Funds in the European Union’, in Karl P. Sauvant and Lisa Sachs (eds), *Sovereign Investment: Concerns and Policy Reactions* (New York: Oxford University Press, 2012) 462–95.

²⁸ Available at http://www.adia.ae/ADIA_AE_press.asp (visited 29 October 2012).

²⁹ See Joseph J. Norton, ‘The “Santiago Principles” for Sovereign Wealth Funds: A Case Study on International Financial Standard-Setting Processes’, 13 *Journal of International Economic Law* 645 (2010), at 648–51.

Emirates, Kuwait, Singapore, China, Korea, Russia, and Norway). Of course, this is exactly what modern WTO negotiations should be doing: addressing contemporary and emerging international economic problems by involving all stakeholders in non-formalistic processes.

B. Structuring negotiations: the International Competition Network

The International Competition Network (ICN) was created in New York on 25 October 2001 as an informal network of 107 of the world's competition agencies willing to address practical competition enforcement and policy issues.³⁰ This young and innovative network is not a classical international organization as it serves to exchange of view and experiences in the implementation of competition law.³¹ The ICN's goal is in essence to promote the advocacy role of antitrust agencies and seek to facilitate international cooperation. Its members work in relation with business sector, domestic consumer groups, and academics on consensus-based projects to enhance international convergence in the field of competition. But, interestingly, the ICN also provides national competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns.³² The ICN's approach to addressing international competition law issues is relatively flexible, informal and non-binding. This allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community but, above all, it allows countries to participate without committing to specific changes in law or policy.³³ Continuous interaction fosters commonly defined goals, and regulators focus more on shared agendas instead of more narrowly defined national interests.

Before the ICN's formation, the most important international networks for competition policy were the OECD, the United Nations Conference on Trade and Development (UNCTAD) and the WTO which have progressively lost their role and relevance in the field of competition. The ICN portrayed itself as the 'fast, agile, highly maneuverable fighter aircraft

³⁰ See ICN website 'The ICN Factsheet and Key Messages' at <http://www.internationalcompetitionnetwork.org/about.aspx> (Accessed 30 December 2012).

³¹ For a detailed presentation, see, Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits', 34 *Yale Journal of International Law* 113 (2009).

³² The ICN is unique as it is the only international body devoted exclusively to competition law enforcement and its members represent national and multinational competition authorities. Members produce work products through their involvement in flexible project-oriented and results-based working groups. Working group members work together largely by Internet, telephone, and webinars.

³³ See Anu Piilola, 'Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation', 39 *Stanford Journal of International Law* 207 (2003), at 215–16; Hugh M. Hollman and William E. Kovacic, 'The International Competition Network: Its Past, Current And Future', 20 *Minnesota Journal of International Law* 274 (2011) 274.

juxtaposed with the OECD's and UNCTAD's slow, ungainly commercial transports. This compelled the ICN to produce quick, visible results consistent with its institutional vision. By contrast, the OECD and UNCTAD each enjoyed an established and, in many cases, loyal base of members and therefore had more margin for error. A large commercial airliner can glide for a considerable distance if its engines shut down. Turn off the engines on a fighter aircraft, and it glides like a two-car garage'.³⁴

The work done by the ICN is convincing. For instance, the mission of the ICN in the field of mergers is to promote the adoption of best practices in the design and operation of merger review regimes. Since 2001 the achievements have been significant: The Notification and Procedures Subgroup of the Merger Working Group addresses procedural aspects of merger notification and review, such as merger notification thresholds,³⁵ the scope of information production requirements, and the timing of merger reviews.³⁶ In addition, the Notification and Procedures Subgroup has developed other project among which the main is the set of non-binding 'Guiding Principles and Recommended Practices for Merger Notification and Review Procedures'³⁷ which was adopted in the ICN first year (2001–2002). These Guiding Principles outline eight precepts on which merger regimes should be based: sovereignty; transparency; non-discrimination on the basis of nationality; procedural fairness; efficient, timely and effective review; coordination; convergence; and the protection of confidential information.³⁸

The ICN has also adopted in 2005 a set of Recommended Practices for Merger Notification and Review Procedures (*N&P Recommended Practices*).³⁹ The *N&P Recommended Practices* address priority areas related to merger notification procedures as identified by public and private sector representatives, aimed at facilitating convergence towards best practices in

³⁴ Hollman and Kovacic, *ibid.*

³⁵ See Notification and Procedures Subgroup of the Mergers Working Group, Report on the Costs and Burdens of Multijurisdictional Merger Review, Address at the International Competition Network First Annual Conference, Napoli, Italy (28–29 September 2002) (surveying prior studies on the issue of costs and burdens associated with multi-jurisdictional merger reviews and recommending measures to eliminate unnecessary costs), at <http://www.internationalcompetitionnetwork.org/costburd.doc> (29 October 2012).

³⁶ See James S. Venit and William J. Kolasky, 'Substantive Convergence and Procedural Dissonance in Merger Review', in Simon J. Evenett, Alexander Lehmann, Benn Steil (editors) *Antitrust Goes Global: What Future for Transatlantic Cooperation?* (Washington, D.C.: Brookings Institution Press, 2000), at 79.

³⁷ See International Competition Network, Guiding Principles and Recommended Practices for Merger Notification and Review, at <http://www.internationalcompetitionnetwork.org/guidingprinciples.html> (visited 29 October 2012).

³⁸ See Douglas F. Broder and Leta McCollough, 'USA: Antitrust Enforcement – US House of Representatives', 24 (12) *European competition Law Review* 24 (2003), at 217–18.

³⁹ See Merger Working Group, Int'l Competition Network, Recommended Practices For Merger Notification and Review Procedures (2005), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> (visited 29 October 2012).

the procedural aspects of merger review.⁴⁰ Since the *N&P Recommended Practices* were first adopted, many ICN members turned them into a regulatory success as underscored by Sokol as many jurisdictions have made that bring their merger regimes into greater conformity with the *N&P Recommended Practices*.⁴¹ At the ICN's ninth annual conference in 2010, over half of the ICN member jurisdictions with merger laws had completed or were planning conforming revisions.⁴²

Of course, the fact that many countries have similar competition law systems does not necessarily reduce the probability that some may take into account different policy factors when they implement the law.⁴³ In other words, the implementation may result in discrepancies among these countries. However, the ICN has successfully followed this strategy since its inception and there is a significant increase in competition law convergence.

II. REFINING THE TPRM KEY FEATURES

Various issues relating to the working of the TPRM have attracted the attention of commentators in recent years. Donald Keesing, for example, has proposed a number of reform measures to enhance the effectiveness of the reviews, such as (1) to focus on recent policies from an historical perspective in order to assess the continuity of the reform process; (2) to include comments on the credibility and sustainability of the reform measure undertaken as well as the inclusion of analysis of general global issues comparable with the country case study in the TPRM; and (3) to calculate a measure of the overall protectionism extended to the industries in the country.⁴⁴ In addition, highlighting the need to enhance frankness, the Keesing study cautioned against adoption of an optimistic air by a study group, whereby the group barely highlights the worst problems of the economy in an effort to

⁴⁰ See J. William Rowley and A. Neil Campbell, 'Implementation of the International Competition Network's Recommended Practices for Merger Notification Procedures: Final Report', 5 *Business Law International* 110 (2004), at 111–12.

⁴¹ See Daniel Sokol, 'Antitrust, Institutions, and Merger Control', 17 *George Mason Law Review* 1055 (2010).

⁴² See, Verdier, above n 31, at 113.

⁴³ The ICN N&P Recommended Practices are cited in legislative history as a rationale for change, in countries such as Germany; in press releases announcing changes (e.g. as in Australia and by the European Commission); and in comments from members, bar associations, and other groups supporting change in ICN member jurisdictions like Brazil and India; as well as by other multilateral organizations, such as the OECD and UNCTAD. For example, in 2009, Germany introduced a second threshold for domestic turnover that brought its law more into line with ICN practice, concerning the nexus of the reviewing jurisdiction. More specifically, German law now states that undertakings contemplating a merger must only undergo merger review, if at least two parties to the transaction exceed specified volumes of domestic turnover. See also, Verdier, above n 31, at 113.

⁴⁴ See Donald Keesing, *Improving Trade Policy Review in the World Trade Organisation* (Washington: Peterson Institute for Economics, Policy Analyses in International Economics Vol. 52, 1998) 26–33.

encourage the country to move forward (by often saying what the country would like to hear). As for Joseph François, he argued that the TPRM could be improved through three channels: (1) the expansion and update of data sources and series, (2) wider dissemination, and, last but not least, (3) better follow-up.⁴⁵ Based on these insights, we can tell that (A) the current state of affairs seeks to enhance TPRM in the following aspects: improving data collection, working as a flexible network rather than a formal organization, and ensuring a wider dissemination of its work (B).

A. Ensuring the transparency of the trade policies

The Trade Policy Review Body (TPRB) regularly reviews trade policies of WTO members and when it finds that there are problems in their trade policies, it recommends improvements. Periodic reviews of members' trade policies⁴⁶ are carried out by the TPRB and each review is conducted on the basis of two reports: a detailed report by the WTO Secretariat, prepared under its own authority, and a 'policy statement' by the member under review. The instrument, therefore, does not only oblige different departments of the national administration to cooperate and to take stock but also assists them in identifying potential problems and legislative tasks. The underlying rationale for conducting detailed reviews on trade developments is that the wider agreement on the inherent value of the domestic transparency of government decision making on trade policy matters for both members' economies and the multilateral trading system at large.

Over a period of time, the economic policies of all WTO members will be scrutinized under the TPRM.⁴⁷ No matter what country is under review, two documents are always prepared:

- a policy statement by the government under review, which constitutes the basis of discussion within the TPRB,

⁴⁵ See Joseph François, above n 17.

⁴⁶ The reports are important sources of information not only on the trade regime but also on the legal and economic conditions in the country under examination. The frequency of review depends on the trading entities' shares of world trade. The four with the greatest share (presently the USA, the EC, Japan, and Canada) are reviewed every two years, the next 16 every four years and others every six years. Moreover, the TPRB carries out an annual overview of developments in the international trading environment that have an impact on the multilateral trading system. These overviews provide a welcome opportunity for a general stocktaking by WTO members of current trends in international trade policy.

⁴⁷ The frequency of the reviews depends on the members' share of world trade at the time of the Uruguay negotiations. While the Annex mandates that the four members with the largest share of world trade in the early nineties (the EU, the USA, Japan, and Canada) be reviewed every two years; the next 16 members be reviewed every four years; and others be reviewed every six years, a longer period may be fixed for least-developed members. The idea is to carry on a regular review of the import policies of major import destinations in order to ensure minimum trade diversion. See Hoekman, above n 13, at 324.

- and a detailed report (surely the more important of the two), which is written independently by the WTO Secretariat.

The reports consist of sections examining the trade policies and practices of the member in question and describing the functioning of the trade policy-making institutions and the macroeconomic situation within the member country in question. The WTO Secretariat report uses published material from national and international sources, such as the IMF and the World Bank, as its main sources of information. Apart from that, the WTO document database is another key source and has become even more important, given the increasing volume of notifications that are produced. Moreover, available, reliable, official national data and academic publications are also consulted wherever possible and necessary. Consequently, the report does not only consist of the answers of the government of the country under scrutiny. The Secretariat report and the member's policy statement are published after a review meeting, along with the minutes of the meeting and the text of the TPRB Chairperson's concluding remarks, which are delivered at the close of the meeting.

It must be emphasized that, albeit of their political significance, trade policy reviews have no legal effect.⁴⁸ Domestic action based on reviews remains voluntary. Part A (i) of the TPRM clarifies that the TPRB is not intended to serve as a basis for enforcing specific obligations under the WTO, nor can it impose new trade policy commitments on members. Moreover, Appendix 1 to the Dispute Settlement Understanding (DSU) stipulates that the TPRM is not a 'covered agreement' and thus is not subject to judicial review by the dispute settlement body (DSB).

As underscored by Bernard Hoekman, the TPRM is directly linked to one of the most important WTO principles—the transparency principle, which 'is a critical input into WTO processes as well as an important output of the organization'.⁴⁹ Transparency is required because states, individuals, and companies involved in international trade have to know as much as possible about the conditions of trade. The transparency principle makes the conditions of trade clearer in three ways:

- enabling contracting parties to appreciate and evaluate individual trade policies/practices and their impact on the functioning of the multilateral trading system,

⁴⁸ A paper analyzed the relationship between the findings of the TPRM and the outcome of cases lodged at the DSB. The analysis used an empirical method involving five countries (two developing countries—Brazil and India—and three developed countries—the European Community ('EC'), Japan and the USA). The paper showed that many issues raised by the TPRM of selected members have been successfully challenged at the WTO, as a result of which areas of concern have been rectified in the subsequent period. See Chaisse and Chakraborty, above n 16, at 153–86.

⁴⁹ Hoekman, above n 13, at 357.

- providing greater transparency and better understanding of the trade policies/practices of states, and
- demonstrating the lack of respect for any concessions.

Without doubt, these objectives can be reached through different WTO policies or institutions but among them the TPRM has an important place. Also, transparency is ensured by the notification obligation required by different WTO agreements,⁵⁰ and these notifications have been made with increased regularity since 1994. However, ‘deficiencies in the notification to the WTO level can be supplemented through parallel actions such as the Trade Policy Review Mechanism reports’.⁵¹ Indeed, the transparency is at the heart of the reports, with the TPRM maintaining a liaison and taking an overall look at how things are shaping, such as whether objectives are being fulfilled and whether any Agreement, frameworks and formats need any revision.

The Trade Policy Review (TPR) can also be read in accordance with the obligations and rights subscribed to by members under WTO law. The scope of its review is wide since all of the sectors covered by WTO agreements naturally come under that review. Furthermore, ‘reviews under the [m]echanism should continue to take place, to the relevant extent, against the background of the wider economic and development needs, policies and objectives of the [m]embers concerned, as well as of their external environment’.⁵² The TPR examines every adopted national policy to check its compatibility with the WTO agreements. After all, implementation of WTO agreements always remains one of the most important issues discussed within the TPR.

This review is performed independently of any litigation⁵³ and its results, as mentioned before, have no binding effect. Its function was outlined by the Ministerial Conference, which is the WTO’s top decision-making body. It stated that the TPRM:

‘had been conceived as a policy exercise and it was therefore not intended to serve as a basis for the enforcement of specific WTO obligations or for dispute settlement procedures, or to impose new policy commitments on

⁵⁰ See e.g. Agreement on Safeguards Art. 12, 1 June 1995, U.N.T.S. (Vol. 1869), at 159 (1995) (discussing ‘notification and consultation’); Agreement on Subsidies and Countervailing Measures Art. 25, 1 June 1995, U.N.T.S. (Vol. 1869), at 40 (1995) (explaining ‘notifications’).

⁵¹ Matsushita Mitsuo, Mavroidis Petros, and Schoenbaum Thomas, *The World Trade Organization – Law, Practice, and Policy* (Oxford: Oxford University Press, 2006).

⁵² Ministerial Conference of 30 November–3 December 1999, at para 3.

⁵³ Even if a link can be established between litigation and policy review as the ‘parties should engage in more dialogue, and communicate about the root issues of their dispute through various institutionalized avenues under the WTO, such as consultations, the SPS committee, and other peer review forums, e.g. the Trade Policy Review Mechanism (TPRM)’. See, Sungjoon Cho, ‘From Control to Communication: Science, Philosophy, and World Trade Law’, 44 *Cornell International Law Journal* 249 (2011), at 272.

Members. The Mechanism should continue to focus on improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements...⁵⁴

However, several members have had to revise their national legislation to adapt to WTO rules in the wake of certain TPRs. Because even if the TPR issues will not bring about condemnation from the WTO, diplomatic pressure is sometimes so severe that a country will have to conform to the report to avoid a potential litigation. Meanwhile, from the results of these reviews, one can find the differences between the internal (i.e. national) and external (i.e. international) spheres have been significantly reduced in a way typical of the new international economic law.

The TPRM continues to function effectively in meeting its transparency goals. However, as the Membership of the WTO increases, the pressure on the TPRB to review more Members grows. As warned by the TPRB in 2009, the heavy work load and the limited resources available to the Secretariat to prepare the reviews make it even more important for the TPRM to keep functioning as effectively as possible within these constraints. In particular, continued cooperation between Members and the Secretariat in preparing the reports is essential in order to maintain the quality of the reports, and in the successful reviews of Members by the TPRB.⁵⁵

B. Improving the collection of extended data

Data limitations at both the national and international levels are pervasive in the trade negotiation and regulation domain. Weak data means that the predictive value of economic models of reforms is itself weaker. There is an unquestionable and large lacunae in information which exists in a variety of relevant policies affecting international integration. As underscored by Hoekman, even 'in the area where information is the best—barriers to trade of goods—the focus of data collection (and thus analysis) is mostly on statutory most favoured nation (MFN) tariffs. Data on the types of non-tariff policies that are increasingly used by countries—such as subsidies or excessively burdensome product standards—are not collected on a comprehensive and regular basis. Matters are much worse when it comes to information on policies affecting services trade'.⁵⁶

It is precisely on these aspects that the WTO TPRM could develop its role. We agree that the organization must find relevant 'steps to remedy these gaps—through strengthening and more effective enforcement of notification

⁵⁴ Ministerial Conference, above n 52.

⁵⁵ Trade Policy Review Body—Trade Policy Review Mechanism—Report of the Trade Policy Review Body for 2009, WT/TPR/249, 29/10/2009.

⁵⁶ Hoekman, above n 13, at 356.

requirements, cross-notification, as well as direct collection of data (including from secondary sources)—are a precondition for better policy analysis and monitoring of policies. For the secretariat to do more to compile data on a comprehensive basis, WTO members must give it the mandate and resources to do so and permit the results to be made publicly available in a format that lends itself to analysis by third parties'.⁵⁷ Without doubt, there is urgent need to add the collected tariff data to an integrated database and to construct time-series data on protection from all available sources, which should finally be linked with trade and production. Second, all protection-related data, after construction, should be distributed to all interested parties through the WTO website. Finally, the collected and constructed protection data should be linked with databases of other international bodies, such as the Trade Analysis and Information System (TRAIS), the simulation module (SMART) and the Global Trade Analysis Program (GTAP).

C. Working as a network rather than a new institution

Relying on 'soft power' based on persuasion and socialization, ICN is characterized by flexibility and adaptability that dispense with the time-consuming formality of more traditional international organizations with large numbers of administrative staff and protocols. Since 2001, the ICN has operated at three levels which should be kept in mind:⁵⁸ (i) to produce a more thorough understanding of competition principles and norms with the aim of building international convergence; (ii) to provide technical assistance to enable states to build domestic capacity; and (iii) to develop modalities for greater international cooperation and coordination.

The voluntary nature of the ICN with its associated emphasis on adaptability appears to have overcome apprehension associated with regulatory coercion and the possible concomitant loss of sovereignty. The same approach prevailed at the IMF when the Santiago Principles was negotiated and it led to a prompt result agreed by all stakeholders.

Tension between environmental and trade objectives must not engender a confrontational perspective where one objective is persistently pursued at the cost of the other. Although the TPRM is acting within the framework of the WTO, its membership should not be limited. Moreover, it is very likely that no major country would oppose such a reformed TPRM as it is informal, flexible, and non-binding. Even bigger powers, such as the USA, can promote the influence of the new TPRM over the other WTO members and non-members through regular monitoring.

⁵⁷ Ibid.

⁵⁸ Brendan Sweeney, 'International Competition Law and Policy: A Work in Progress', 10 *Melbourne Journal of International Law* 1 58 (2009).

As a practical, results-oriented network, the ICN has developed a tremendous body of work including recommended practices, case-handling and enforcement manuals, reports, templates on legislation and rules in different jurisdictions, databases and toolkits, workshops and discussions at annual conferences. The new TPRM could, as the ICN does, convene a conference once a year on any subject that interests members. For example, finance and investment in hedge funds. In addition, an institutional mechanism should be set up with the goal of providing technical assistance to least-developed members as part of a follow-up exercise of the WTO.

III. EXTENDING THE SUBSTANTIVE COVERAGE OF THE TPRM

Given the imbalance between the very efficient and binding judicial system and the inefficient and cumbersome WTO rule-making process, there is a danger that members will increasingly turn to the judicial system for 'creating' new laws. The Doha Agenda reveals the limitations of the rules inherited from the general agreement on tariffs and trade (GATT) pertaining to negotiation and decision making.⁵⁹ It is particularly difficult to apply the rule of consensus to negotiations involving 153 members. However, WTO's constitutive texts envisage that in the absence of consensus, most decisions can be taken by a majority according to the principle of one country one vote. The consensus rule could be justified during the early years of the GATT when it had less than 30 members. Furthermore, the contracting parties were not so diverse. Today the limitations of this rule are very apparent.⁶⁰ However, one should be wary of what appear to be good ideas: the return of the majority vote may change WTO into a kind of duplicate of the UNCTAD and the main trading powers would keep away from its discussions. As a matter of fact, developing countries who now represent more than two-thirds of the members of the WTO, would systematically command a majority. WTO thus finds itself in a very uncomfortable position: between an institutional stalemate and contentious reforms. The question, therefore, arises whether some countries would not be prepared to accept stricter

⁵⁹ WTO's recent failures bring to mind the setbacks suffered by the GATT whose rules could not be amended from 1948 to 1994 due to a lack of consensus among the contracting parties. So nothing has really changed: during the Tokyo Round, some countries were obliged to go ahead on their own and conclude multilateral agreements (the Tokyo 'Codes') which were binding only on consenting countries. During the last round of GATT negotiations, after four years of talks, Arthur Dunkel got the idea of creating a new organization to break the deadlock and impose the negotiated regulations: this meant that countries had to accept the entire package to become members of the Organization. Resorting to such imposed solutions is no longer considered acceptable in the case of an institution that has become truly global. Neither is it possible to set up a new WTO. It is therefore necessary to reform it or to rethink it.

⁶⁰ For example, the USA was the only country to hold up the settlement of the dispute concerning the access to pharmaceuticals (paragraph 6 of Doha Declaration) for almost nine months.

WTO rules on a plurilateral basis, for example, in the areas of competition and investment. *De facto*, however, bilateral and regional trade agreements, whose number has increased considerably during the past few years, masquerade as plurilateral agreements while only a few countries participate in the discussions and negotiations when they are drafted. Hence, plurilateral agreements negotiated under the aegis of the WTO would be preferable to regional agreements that are often obscure and do not always respect either GATT provisions or WTO agreements. Moreover, from the developing countries' point of view, more effective provision for special and differentiated treatment would make it even easier to adapt disciplines and procedures to the developmental level of each country than in the case of plurilateral agreements. As Steve Charnovitz notes, TPRM 'could be adapted more broadly to deal with issues beyond trade'.⁶¹ By saying this, he underscores the interest of the TPRM and suggests that a similar structure could be set up in order to support financial regulation. Indeed, TPRM can be used in other areas in international trade in order to keep WTO relevant and at the heart of the system. Such important areas are, among others, harmonization and coordination of PTAs⁶² and convergence of measures in dealing with environmental protection.

There may be arguments, both for and against, in regard to the scope of the mandate stated in the TPRB and some may argue that the above mentioned initiative of the TPRB is beyond the mandate given to it. It should be noted that the function of the TPRM is confined to 'examining the impact of a Member's trade policies and practices on the multilateral trading system' according to Annex 3 of WTO Agreements and that the Annex explicitly prescribes that the TPRM is 'not intended to serve as a basis to impose new policy commitments on Members'. If certain multilateral principles (equivalent to the GAPP) are set up through the process of TPRM, such a result may be tantamount to setting an international standard in, sometimes, WTO plus areas; and it may well impose new policy commitments on Members, despite its non-binding nature.

However, there is no explicit prohibition in Mandate G for the TPRB to engage in activities of this nature. Reports of the TPRB to G20 on the

⁶¹ Steve Charnovitz, 'Addressing Government Failure through International Financial Law', 13 (3) *Journal of International Economic Law* 743 (2010), at 743–61.

⁶² As stated by Lester and Mercurio, many of the so-called FTAs favour certain countries in trade relations and are basically discriminatory rather than 'free trade'. The term PTA encompasses many different kinds of bilateral and regional trade agreements and underscores their common denominator, which is to establish preferences for the signatories over others in trade relations. See Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements – Commentary and Analysis* (Cambridge: Cambridge University Press, 2009), at 4–5.

financial and economic crisis and trade-related development stated that the reports were based on Mandate G of the TPRM which reads:

'An annual overview of developments in the international trading environment which are having an impact on the multilateral trading system shall also be undertaken by the TPRB.'

Besides, WTO does not stand alone in the governance of the international trading system so it can play a very important role in resolving major international economic issues, such as the financial crisis that we have experienced since 2008, by cooperating with other international organizations as well as with a group of trading nations, such as G20. In this respect, this new move on the part of WTO shows that a new horizon may be opening up for the WTO in which it can be a key player in governing the international trading order.

In this section we turn to those areas and see how TPRM can be applied. Considering the number of PTAs has increased dramatically in recent years, for many reasons, including the need to avoid contradiction among PTAs, it will be necessary to have a centre to handle it and that, in our view, should be the TPRM (A). Apart from that, WTO could still rely on the TPRM to remain informed of other issues affecting trade policies, such as GHG emissions and other environmental policies which are at the heart of the recent UN Conferences on Climate Change (B).

A. Managing the proliferation of preferential trade agreements

Nowadays WTO members are actually trying to conclude bilateral and regional agreements instead of multilateral agreements within the WTO framework, which inevitably inaugurates a new era of trade negotiations. Following the failure of the fourth WTO Ministerial Conference in Seattle in 1999, the number of regional trade agreements has constantly increased.⁶³ PTAs really began coming into their own in the 1990s. Prior to that, there were virtually no such agreements until 1970 and less than 50 in 1990.⁶⁴ This suggests that greater reduction in trade barriers (both tariff and non-tariff) was achieved in the earlier rounds of the GATT, which precluded the need for countries to resort to PTAs. Once, however, this initial thrust via the multilateral route was saturated, countries took recourse to other avenues for expanding their

⁶³ See UNCTAD (2011) *World Investment Report 2011 – Non-Equity Modes of International Production and Development*, New York and Geneva (UNCTAD/WIR/2011) 26 July 2011.

⁶⁴ While the USA started negotiations with other regional groups in 2003, the European Community refrained from doing so at the instigation of Pascal Lamy. As a matter of fact, no agreement of this kind was negotiated after 1999 in order to send a clear message that only a multilateral framework would serve as a reference. See Simon Lester, Bryan Mercurio, and Arwel Davies, 'World Trade Law: Text, Materials and Commentary' 330–33 (Oxford: Hart Publishing, 2012). See also, Sophie Meunier, *Trading Voices: The European Union in International Commercial Negotiations* (Princeton: Princeton University Press, 2007) 240.

trading opportunities.⁶⁵ Regional cooperation between countries enhances the potential trade in goods or services among themselves as well as helping them to realize economies of scale and greater specialization in production by overcoming the constraints of the domestic market.⁶⁶

These bilateral agreements are, by definition, intended to further liberalize international trade with WTO agreements representing the minimum requirements. This deepening of the scope of regional trade agreements, observed during the last decade, was recently illustrated by the growing recourse to the concept of what is called 'WTO Plus' agreements. A 'WTO Plus' agreement may be defined as a free trade agreement whose terms go beyond those provided for by WTO law. In addition to the preferential nature of the free-trade agreement in the field of tariffs (as compared to MFN rights) and services (as compared to the proposals made within the WTO by State Parties to liberalize services markets), this type of agreement covers areas that are not, or are only partially, regulated by WTO agreements.⁶⁷

The complexity and slow pace of WTO negotiations (with one round lasting 5–10 years) inevitably drive states and private participants to resort to other methods of pursuing their interests, even if regional trade agreements are only an imperfect substitute for multilateralism. Some scholars and commentators are overtly worried about these changes and the risks that they involve for the multilateral system by undermining, they fear, the efforts made towards the liberalization of international trade on a multilateral and non-discriminatory basis. Moreover, from the point of view of global governance, this tendency towards fragmentation may further jeopardize the ambition of the WTO, acting as a generalist organization, to play a decisive role in the coordination of international cooperation in order to resolve structural problems and guide economic decisions at international level. Others, on the contrary, prefer to look at this phenomenon from the point of view of complementarity⁶⁸ and see regionalism as one of the means of bringing about a rapid change in the systems of multilateral governance⁶⁹ or

⁶⁵ See especially Jagdish Bhagwati, *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (Oxford: Oxford University Press, 2008); Bryan Mercurio, 'Should Australia Continue Negotiating Bilateral Free Trade Agreements?: A Practical Analysis', 27 *University of New South Wales Law Journal* 667 (2004).

⁶⁶ See e.g. United Nations, Economic and Social Commission for Asia and the Pacific. Meeting the Challenges in an Era of Globalization by Strengthening Regional Development Cooperation (New York: United Nations Publications, 2004), at 24.

⁶⁷ Such as the adoption, under free-trade agreements, of terms in the multilateral Agreement on Public Markets (APM) (mainly concerning the principles of national and non-discriminatory treatment); or even treatment under the above agreement of 'new issues for regulation' not yet covered at the multilateral level like investment, protection of geographical indications and competition.

⁶⁸ Richard Baldwin, 'Multilateralising Regionalism: Spaghetti Bowls as Building Blocs on the Path to Global Free Trade', 29 (11) *The World Economy* 1451 (2006), at 1451–518.

⁶⁹ Frederic Abbott, 'A New Dominant Trade Species Emerges: Is Bilateralism a Threat?', 10 (3) *Journal of International Economic Law* 571 (2007), at 571–83.

even as a strong tendency heralding the emergence of a new 'multiregional' order. The catalyst needed for a more multi-polar world is already there. We must, however, add one legal comment on regionalism. WTO is deeply interested in the effectiveness of its law. It is not certain whether the law resulting from regional agreements can claim to produce the same type of benefits. Far from it, the European Union itself has had, and still has, difficulties in implementing the law related to the free movement of services and capital. Although the new PTAs negotiated worldwide coverage of a wide range of issues, we have doubts about their effectiveness. In his analysis, Richard Pomfret concludes that '[t]he threat to the multilateral trading system does not appear to be as large as is often reported, because the long-term dynamics of regional trade agreements (RTAs) lead either to state formation, which is important but rare, or to ineffectiveness, which is the fate of the vast majority of RTAs'.⁷⁰ Having said this, the phenomenon should also favour South-South trade, particularly through the integration of emerging countries. This development should be generally beneficial for their peoples even though it is not yet known whether it should be just an intermediary phase leading to the worldwide integration.

Similarly, the proliferation of PTAs causes two problems to the WTO and the world trading system. One is that, as indicated above, PTAs may undermine the basis of multilateral international trading order. This is an issue of how we can keep PTAs within the remit of Article XXIV of the GATT.⁷¹ The other problem is that PTAs are bilateral, regional or plurilateral agreements and the trade rules, such as origin rules and trade remedies contained in a PTA, may be different from other PTAs. However, enterprise activities are becoming more and more globalized. A multinational enterprise may have 10 different installations for producing parts and components of a product. Moreover, they may be assembled together in a factory in the 11th country and the finished product is shipped to the 12th country. In this situation, 12 countries are involved and each may have entered into PTA

⁷⁰ Richard Pomfret, 'Is Regionalism an Increasing Feature of the World Economy?', 30 (6) *The World Economy* 923 (2007), at 942. Likewise, Bryan Mercurio's analysis demonstrates the reticence of Asia in embracing regional integration. He reached this conclusion by evaluating the scope and coverage in a broad range of 16 intra-Asian RTAs, with commitments in goods contrasted with that of other sectors, namely services, intellectual property and government procurement. Too often, intra-Asian RTAs exclude or only marginally include these and other economically important sectors within the scope of the agreements. Moreover, liberalization commitments in the goods sector are also sometimes lacking depth, with Sensitive and Highly Sensitive Lists and liberalization pullbacks providing protection to domestic markets. Bryan Mercurio, 'Bilateral and Regional Trade Agreements in Asia: A Sceptic's View', in Ross Buckley, Richard Hu, and Douglas Arner (eds), *East Asian Economic Integration: Law, Trade and Finance* (Cheltenham: Edward Elgar, 2011).

⁷¹ See Nicholas Lockhart and Andrew Mitchell, 'Legal Requirements for FTAs under the WTO', in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge: Cambridge University Press, 2009).

agreement with others and, in total, there may be more than 20 PTA agreements with trade rules that are different from each other.

This situation, as one can imagine, creates a tremendous systemic problem for the international trading order. Due to differences in trade rules among different PTA members, the transaction costs for traders will go up because they have to comply with different and inconsistent rules on the same subject. It is necessary for someone to coordinate activities of harmonizing and converging such different trade rules.

How to justify the new role of the TPRM in light of the failure of the committee on Regional Trade Agreements? Virtually all the WTO agreements establish notification requirements to this effect, and they usually set up committees or other bodies, which are required to oversee the operation of the agreement concerned. Examples of such bodies are the Council for Trade-Related Aspects of Intellectual Property Rights, the Committee on Balance-of-Payments Restrictions, the Textiles Monitoring Body, the Committee on Regional Trade Agreements, the Committee on Agriculture, and the Committee on Technical Barriers to Trade. Unfortunately, because of the consensus requirements for decisions in the WTO/GATT and the imprecision in the definition of several key terms for applying the requirements of Article XXIV, the GATT working parties and the new WTO committee have been incapable of reaching any conclusions in respect of PTAs that have been reviewed by them. Even worse, this state of affairs has raised the question of whether it would be possible to control the use of PTAs through dispute settlement (The principal case, also a prime example, was the Turkey-Textiles case!)⁷² Theoretically, the Committee on RTAs, just as other committees of the WTO, can recommend and request information as well as request members to change their policies. But so far it has not done much because many members, especially developing countries, will not trust committees whose role is to push for new rules. Compared with these committees, the TPRM has a more positive function.

TPRM can play a role in such activities. As in the current financial crisis and recession, TPRB can collect data on different PTA agreements; compare them and come up with model rules. Apart from that, another important area is that of rules of origin because there are no agreed rules of origin in WTO yet but each PTA has its own rules of origin. As the number of PTAs increases, discrepancy between origin rules incorporated in many PTA agreements may be a serious problem in the future. In light of this situation, a recommended procedure is that TPRB gathers information in cooperation

⁷² On the landmark *Turkey-Textiles* case and the nature of the hierarchy that arises when a WTO violation is defended by the MFN exception possible in a WTO regional trade agreement, see Warren H. Maruyama, 'A Race to the Bottom?: A Symposium on Preferential Trade Agreements and Discrimination in International Trade', 46 *Stanford Journal Of International Law* 177 (2010), at 181 and 186.

with the PTA Committee in the WTO; compares them and sees whether there may be common principles in them. By doing so, TPRB can point out differences in origin rules incorporated in different PTAs and can recommend WTO members participating in such PTAs to try their utmost to harmonize the contents of such rules or, at least, to minimize the differences. Moreover, since TPRB can review the progress on a regular basis, maybe after some years, origin rules in different PTAs can be remarkably harmonized. So far comments about PTAs and the WTO have been mainly focused on whether PTAs are compatible with the WTO rules. This, without doubt, is an important issue. However, before the dispute is resolved, WTO can still play an important role in harmonizing and converging trade rules—such as origin rules—among WTO members that are also members of PTAs.

B. Reducing the gap between trade and environment

Another area in which TPRB can be useful is that of environment and trade as the expansion of WTO regulation and worsening global environmental problems has brought trade and environmental interests into conflict.⁷³ In this area of trade and environment, diversity of trade rules regarding environment affects international competitiveness among trading nations and may lead to trade disputes. It is important to find ways to avoid such conflicts. The UN Conference on Climate Change convened in Copenhagen in 2009 (COP 15), in Cancun in 2010 (COP 16) and in Durban in 2011 (COP 17) to discuss the environmental regime that would be the successor of the Kyoto Protocol. Although it is premature to predict the future developments, it is clear that reduction of GHG emission and other environmental policies will be increasingly an important issue in the world.

The EU has already enacted directives requiring member states to establish and impose emission allowances. In the USA, several bills have been introduced in the Congress with the purports of establishing a cap and trade system to be imposed on domestic industries and of introducing some trade measures to ensure the protection of domestic industries against the imports coming from those countries where no comparable environmental measures are adopted. For a variety of reasons including economic downturns and political climates, none of those bills has passed the Congress. However, it is clear that in the future the USA will have to face this issue and to introduce some measures to deal with GHG. As to Japan, when the Hatoyama Cabinet was inaugurated, the Prime Minister Hatoyama announced that Japan would reduce the emission of GHG by 25% from the level of 1990. Due to the great earthquake and tsunami that hit Japan in 2011, this move has been stalled for a while. However, Japan will have to take up environmental measures in the future for sure.

⁷³ See, for instance, Steve Charnovitz, 'The WTO's Environmental Progress', 10 (3) *Journal of International Economic Law* 685 (2007), at 685–706.

In order to illustrate the link between environmental policies and trade, let us suppose that a major trading nation introduces a cap and trade mechanism whereby a cap on the emission of GHG is imposed on its domestic industries producing certain types of products which generate GHG in their production processes. When installation producing such products in that country exceeds the cap, it has to purchase allowance from the emission market (trade) to make up the difference between the cap and actual amount of emission. In this case, producers in that country are actually imposed a certain economic burden because of the obligation to purchase allowance from the emission market and this will inevitably affect their international competitiveness. Meanwhile, if some other developing countries do not introduce a similar measure to control GHG emission or, even if they do, to a lesser degree, then when a product is imported from a country where no cap and trade is imposed on that product to a country where a cap and trade is imposed on such a product, the relevant industry in the importing country will be at a comparative disadvantage because of the cap and trade system. Understandably, this will trigger the importing country to take some protective measure to make sure that its domestic industries will not be unduly disadvantaged. Also, even among countries where a cap and trade system is introduced, a system introduced in a country may be more stringent than that introduced in other countries. All these differences create complexity and confusion in international trade and will raise the transaction costs to enterprises operating globally. To deal with the similar situation, Article II: 2 of the GATT 1994 allows WTO members to impose a special levy on imports to counterbalance the disadvantage incurred by domestic industries due to domestic taxation. This is called border tax adjustment. However, it is not certain whether a border tax adjustment can be applied in relation to a cap and trade system.

The above is only an example of how a difference in environmental rules may adversely affect international trade. Moreover, such a problem is not limited to a cap and trade system but can arise with regard to any environmental measures that trading nations may adopt. If a difference exists in international competitiveness of industries because of the difference in the stringency of environmental policies, those nations whose environmental policies are strict will tend to take measures to protect their domestic industries from imports coming from the countries whose lax environmental measures allow their products to enjoy high competitiveness.

With the COP 15 and COP 16, this possibility will be more realistic because the approach taken in the COP 15 and 16 is more decentralized than that in the Kyoto Protocol.⁷⁴ Each member is given more freedom to adopt environmental measure as it sees appropriate. Therefore, if the

⁷⁴ See Lavanya Rajamani, 'The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves', 60 (2) *International and Comparative Law Quarterly* 499 (2011), at 499–519.

approach proposed in the COP 15 and 16 is adopted in the COP 17 or any future COPs, there will be more possibility of divergent environmental rules adopted by different trading nations. The divergence and inconsistency in environmental rules affecting international trade will be a massive trade issue in the future as environmental policies are promoted and it is important to think about a mechanism through which such diversity and inconsistency can be reduced.

IV. CONCLUSION

It is still too early to tell how successful the new move of the WTO may be in stabilizing the troubled world economy. However, it is noteworthy that Pascal Lamy's initiative has been used and it suggests that WTO can play a role, through the TPRM, in shaping the international trade order in a way different from the traditional approaches, such as trade negotiations in the WTO ministerial conferences where new binding agreements are negotiated and signed and any disputes that will be settled by the DSB. This is not to suggest that the traditional WTO practices have lost their viability. At least, the accomplishment of the dispute settlement system of the WTO has been remarkable and this should continue to be so in the future. But the trade negotiations in which WTO has encountered problems nowadays may be revitalized if proper changes are made to the decision-making process of the WTO. These recent innovations and successful developments open up a new horizon for the future WTO activities. This suggests that WTO can act as a moderator or coordinator of activities of G20 countries as well as of other international organizations, such as International Monetary Fund (IMF) and the Organization for Economic Co-operation and Development (OECD), in combating financial crises and protectionist trends that usually follow economic difficulties. The change in the role of the WTO is recent but not surprising. As Anne-Marie Slaughter argued,⁷⁵ in today's society states can no longer govern effectively by sticking to the old concept of *Westphalian* sovereignty⁷⁶ which requires States to be left alone and by

⁷⁵ Anne-Marie Slaughter has characterized the evolving concept of sovereignty by comparing Westphalian sovereignty with a redefined sovereignty where governments cooperate with one another through international networks and institutions to accomplish what they once could only hope to accomplish alone within a defined territory. See Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order', 40 *Stanford Journal of International Law* 283 (2004).

⁷⁶ Under the Westphalian system established in 1648, international law was conceived as a law of coordination between sovereign powers as opposed to domestic law, which was a law of subordination (See, Thomas Cottier, 'The Prospects of 21st Century Constitutionalism', in T. Cottier (ed.), *The Challenge of WTO Law: Collected Essays* (London: Cameron May, 2007) 415-16).

leaving other states alone. This new concept of sovereignty has been largely illustrated by transnational legal processes⁷⁷ and government networks.⁷⁸

The above-mentioned activities of the TPRM are characterized by a non-formalistic approach. TPRM does not create binding rules but emphasizes recommendations for members to take into account when they try to improve their trade policies. GATT and WTO have concentrated on creating binding and compulsory rules regarding trade. The ‘Uruguay Round’ established in WTO’s powerful dispute settlement mechanisms that can discipline trading nations to act within the range of WTO norms. This has been a tremendous accomplishment and should be maintained and promoted. However, it is also time to consider that there is another role for the WTO in formulating and promoting international trade. This approach can be termed as that of ‘soft law’ rather than ‘hard law’. This is a set of activities characterized by data collection, recommendation and regular monitoring on trade policies of WTO members for the necessary improvement of the international trading system.

As discussed earlier, it is a task for the UN conferences to discuss and decide the policies to deal with GHG and other environmental issues. However, WTO still can meaningfully contribute to this very important trade issue. Again, we propose that the TPRB can engage in coordination of the efforts of major countries to deal with environmental measures including GHG issues so that environmental policies among major trading nations can be conducted in a more harmonious way. Since there is a committee on trade and environment in the WTO, both TPRB and that committee can cooperate together to collect information regarding this issue. More specifically, TPRB can convene and sponsor frequent meetings for environmental and trade officials of the WTO members; engage them in active discussions among themselves with a view to promote understanding of each other’s system and to reduce the differences of rules as much as possible. In this way, the seriousness of the problem may be mitigated and, in the long run, there may be a prospect for convergence of rules.

Currently TPRM is a mechanism in the WTO to collect data concerning trade policies of WTO members; conduct regular reviews of those members and recommend their improvement. However, we believe that, in addition to such reviews and recommendations, the role of TPRB can be expanded to that of coordinating trade policies of WTO members. For example, it can initiate and sponsor of PTAs activities to coordinate their functions and to

⁷⁷ See, Harold Koh, ‘Transnational Legal Process Illuminated’, in Michael Likosky (ed.), *Transnational Legal Processes – Globalisation and Power Disparities (Law in Context Series)* (London: Butterworths, 2002) 327–32. See also, Daniel Kalderimis, ‘Is Transnational Law Eclipsing International Law’, in Pieter Bekker et al. (eds), *Making Transnational Law Work in the Global Economy* (London: Cambridge University Press, 2010) 93–131.

⁷⁸ See, Paul Schiff Berman, ‘From International Law to Law and Globalization’, 43 *Columbia Journal of Transnational Law* 485 (2005), at 484–556.

converge their diverse trade rules and policies. Because each of PTAs is a separate entity and there is not much communication, not to mention mutual understanding, among them. Moreover, since the number of PTAs is very huge now, it is also impossible for any PTA to take a lead to establish a joint forum in which officials of all or the most of PTAs can meet regularly; discuss similarities and differences in their policy and rule and negotiate for convergence. Considering both the need and the capacity, TPRB can convene such meetings with a view to offering a common forum for PTAs.

In reason of the limited scope of this article we could not (and did not intend to) provide with a comprehensive list of new topics WTO TPRM could deal with. In this conclusion, we would simply like to underscore the need of further research on the TPRM coverage could also be extended to investment treaties, be they Bilateral Investment treaties (BITs) and PTAs with investment chapters. The current international legal framework for foreign direct investment (FDI) is highly fragmented⁷⁹ while new cases are being lodged at an exponential rate. The result is an increasingly complex international setting for international investment⁸⁰. Considering these circumstances, a certain degree of coordination would be desirable for the purpose of enhancing the investment environment. The approach suggested here is that in the future TPRB could play a role based on three key features: notification of International Investment Agreements to the TPRM, transparency of domestic rules on investment, and sharing of crucial investment related information to all WTO members enabling on the mid-term to start multilateral investment negotiations. Last but not least, such an approach could also prove useful for many other issues, notably the manipulation of currency which remains a source of tension between the USA and China threatening the stability of the international economic order. In this regard, Brazil has recently raised this as a trade-related issue that requires action within the WTO.⁸¹

⁷⁹ Different standards and disciplines are beginning to be exerted over foreign investments. See, for instance, on the definition of 'fair and equitable treatment' or 'expropriation', Julien Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?', 15 (1) *Journal of International Economic Law* 51 (2012), at 51–84.

⁸⁰ According to the United Nations Conference on Trade and Development (UNCTAD) studies and statistics, the network of International Investment Agreements has been expanding considerably over the past decade; in 2011 to almost 3,000 BITs, whereas fewer than 400 BITs existed at the end of the 1990s. See UNCTAD (2010) *World Investment Report 2010* (UNCTAD/WIR/2010) 22 July, at 81.

⁸¹ See, e.g. 'Brazil Sounds New Warning of 'Currency War'' 16(9) *Bridges Weekly Trade News Digest* (7 March 2012), available at <http://ictsd.org/i/news/bridgesweekly/127884/>. On the difficulties of enforcing rules against currency manipulation at both the IMF and WTO, see Bryan Mercurio and Celine Sze Ning Leung, 'Is China a 'Currency Manipulator'? The Legitimacy of China's Exchange Regime Under the Current International Legal Framework', 43 *International Lawyer* 1257 (2009), at 1257.

In our view, maintaining the supremacy of the WTO in the international trade order requires a new methodology which should be non-formalistic and non-binding and should be expected to immediately produce new multilateral trade rules. We believe that this exercise will, however, be beneficial because each PTA can have a better understanding of what other PTAs are doing. If meetings, conferences, and interactions between PTA officials are held regularly and frequently, as in the case of ICN, there will be a deeper understanding among PTA officials and other relevant interested persons, and eventually this will ferment the spirit of collegiality or *esprit de corps* among them. Since one of the main purposes of WTO is to promote international trade, its TPRB should be a logical mechanism to accomplish this goal. Meanwhile, WTO can utilize TPRB to establish a proper relationship between PTAs and WTO itself. Whether one likes it or not, PTAs are proliferating and WTO has to face this reality. The best strategy for the WTO is to build a constructive relationship with the totality of PTA so that WTO and PTA can reinforce each other and can maximize the benefit to the international trading system. In order to accomplish this, communications and coordination between WTO and PTAs are essential. Here, again, TPRM seems to be a fit mechanism for this purpose.

Although hard law of WTO has contributed much toward a rule-oriented international trading system, it can be complemented by soft law of WTO as well. We expect that a combination of hard law plus soft law will make a better world for trading nations to coexist and prosper.