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Setting the Rules of the Game: Mega-Regionals and the Role of the WTO

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SETTING THE RULES OF THE GAME: THE RISE (AND FALL) OF MEGA- REGIONALS, DEEP INTEGRATION AND THE ROLE OF THE WTO

*Billy A. Melo Araujo**

ABSTRACT

Faced with a World Trade Organization (WTO) in a state of paralysis, large developed trading nations have shifted their attentions to other fora to pursue their trade policy objectives. In particular, preferential trade agreements (PTAs) are now used to promote the regulatory disciplines that were previously rejected by developing countries at the multilateral level. These “deep” or “twenty-first century” PTAs address a variety of issues, from technical norms, procurement, investment protection, and intellectual property rights to social and environmental protection. Moreover, developed countries have recently sought to negotiate highly controversial PTAs that are large in scale, both in terms of economic size and geographical reach, including the “mega-regional” PTAs, such as the EU-US Transatlantic Trade and Investment Partnership, the EU-Japan PTA, the Transpacific Partnership, and the China-backed Regional Comprehensive Economic Partnership. These mega-regional PTAs are distinctive not only in terms of their sheer size and the breadth and depth of issues addressed, but also because some of their proponents readily admit that one of the central aims pursued by such agreements is to design global rules on new trade issues. In other words, these agreements are conceived as alternatives

* Lecturer, Queen’s University Belfast (B.Melo-Araujo@qub.ac.uk). This Article was prepared for the International Legal Theory Colloquium organized by the Institute for International Law and Justice of the New York University School of Law in Spring 2016. I am very grateful to Professor Grainne De Burca, Professor Benedict Kingsbury and the rest of the colloquium participants for their insightful comments on an earlier draft

to multilateral rule-making at the WTO level. The proliferation of twenty-first century trade deals raises important questions concerning the continued relevance of the WTO as a global rule-making venue, and the impact that the regulatory disciplines promoted in such agreements will have on both developing and developed countries.

This Article discusses the emerging features of an international trading system that is increasingly populated by large-scale PTAs and discusses some of the points of tension that arise from such practice. Firstly, this Article examines the extent to which the proliferation of PTAs represents a threat to multilateral trade governance. Second, this Article discusses the manner in which the imposition of regulatory disciplines through trade agreements can undermine the ability of countries to pursue legitimate public interest objectives. Finally, this Article proposes a number of steps that should be considered to address some of the adverse effects associated with the fragmentation of the international trading system; of particular focus is the option of embracing variable geometry within the WTO framework and the need to develop mechanisms that provide flexibility for developing countries in the implementation of regulatory disciplines.

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INTRODUCTION

Since the launch of its Doha Development Round of negotiations (Doha Round), the World Trade Organization (WTO) has not had the easiest of times. The Doha Round was billed as an opportunity for the WTO to maximize the gains that could be made by developing countries from trade liberalization by addressing issues such as agricultural subsidies, non-agricultural market access, and trade facilitation.¹ As the fanfare died down, fundamental disagreements within the membership as to the future direction of the WTO were exposed, and it soon became apparent that a new wave of multilateral trade agreements would not be forthcoming in the short term. While developing countries remained adamant that the Doha Round focus exclusively on “development” issues, advanced industrialized economies such as the European Union (the EU) and the United States demanded comprehensive reforms on a number of topics.² One of the main areas of contention concerned developed country demands for the adoption of disciplines on non-discriminatory regulation on issues such as competition, services, investment protection, and procurement. The internationalization of supply chains over the past two decades and the success of the WTO in cutting tariffs mean that addressing regulatory barriers to trade has become a main focus of trade policy for the western trade powers.³ However, developing countries have steadfastly refused to countenance such

¹ See World Trade Organization, Ministerial Declaration adopted of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002).

² See Andreas Falke, *EU–USA Trade Relations in the Doha Development Round: Market Access versus a Post-modern Trade Policy Agenda*, 10 EUR. FOREIGN AFF. REV. 339 (2005); Will Martin & Patrick Messerlin, *Why Is It so Difficult? Trade Liberalization under the Doha Agenda*, 23 OXFORD REV. ECON. POL’Y 347 (2007); Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations* 45 TEX. INT’L L.J. 573 (2010); Susan C. Schwab, *After Doha: Why the Negotiations Are Doomed and What We Should Do About It*, FOREIGN AFF. <https://www.foreignaffairs.com/articles/2011-04-09/after-doha> [<https://perma.cc/QV3X-BEBL>] (last visited Fed. 18, 2017); David Kleimann & Joe Guinan, *The Doha Round: An Obituary*, GLOBAL GOVERNANCE PROGRAMME POL’Y BRIEF (European Univ. Inst., Robert Schuman Ctr. Advanced Studies) (2011).

³ See generally Richard Baldwin, *Trade and Industrialization after Globalization’s Second Unbundling: How Building and Joining a Supply Chain Are Different and Why It Matters*, in GLOBALIZATION IN AN AGE OF CRISIS: MULTILATERAL ECONOMIC COOPERATION IN THE TWENTY-FIRST CENTURY 165 (Robert C. Feenstra & Alan M. Taylor, eds., 2013); Kenneth Heydon, *The Political Economy of International Trade*, in THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL TRADE POLICY 29 (Kenneth Heydon & Stephen Woolcock, eds., 2012).

proposals.⁴ The rejection of regulatory disciplines and the push for the establishment of common regulatory frameworks are not only a consequence of the desire of developing countries to focus the attention of the WTO on issues that matter to them (e.g., reduction in tariffs and subsidies), but also reveal a deep-rooted unease concerning the intrusion of international trade politics into areas that have hitherto been the preserve of national sovereignty.⁵

These conflicting views partially explain why the Doha Round stalled for more than a decade. Faced with a WTO in a state of paralysis, large developed trading nations have shifted their attentions to other venues. In particular, preferential trade agreements (PTAs) are now used to promote the regulatory disciplines rejected by developing countries at the multilateral level. These “deep” or “twenty-first century” PTAs address a variety of issues, from technical norms, procurement, investment protection, and intellectual property rights to social and environmental protection. The first generation of these deep PTAs were mostly bilateral and concluded between developed and developing countries where the former could use their superior bargaining power to push their regulatory agendas through.⁶ By using the carrot of enhanced market access, developed countries have been able to commit developing countries to regulatory issues.⁷ More recently, however, developed countries have sought to negotiate PTAs that are large in scale, both in terms of economic size and geographical reach, including the “mega-regional” PTAs, such as the EU-US Transatlantic Trade and Investment Partnership (TTIP), the EU-Japan PTA, the Transpacific Partnership (TPP), and the China-backed Regional Comprehensive Economic Partnership (RCEP)⁸ These mega-regional PTAs are distinctive not only in terms of their sheer size and the breadth and depth of issues

⁴ Simon J. Evenett, *Five Hypotheses Concerning the Fate of the Singapore Issues in the Doha Round*, 23 OXFORD REV. ECON. POL'Y 392 (2007); Kevin P. Gallagher, *Understanding Developing Country Resistance to the Doha Round*, 15 REV. INT'L POL. ECON. 62 (2007).

⁵ *Id.*

⁶ Peter Drahos, *Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution*, 41 J. WORLD TRADE 191, 200 (2007).

⁷ See L. Alan Winters, *The WTO and Regional Trade Agreements: Is It All Over for Multilateralism?* 10 (European Univ. Inst., Robert Schuman Ctr. Advanced Studies Working Paper RSCAS 2015/94, 2015).

⁸ Vinod K. Aggarwal & Simon J. Evenett, *A Fragmenting Global Economy: A Weakened WTO, Mega FTAs, and Murky Protectionism*, 19 SWISS POL. SCI. REV. 550, 550 (2013); Melissa Griffith, Richard Steinberg & John Zysman, *Great Power Politics in a Global Economy: Origins and Consequences of the TPP and TTIP* (Oct. 17, 2015) (unpublished manuscript) (on file with author).

addressed, but also because some of their proponents readily admit that one of the central aims pursued by such agreements is to design global rules on new trade issues. In other words, these agreements—alongside plurilateral trade agreements such as the Trade in Services Agreement (“TiSA”)⁹—are conceived as alternatives to multilateral rule-making at the WTO level. Accordingly, the proliferation of twenty-first century trade deals raises important questions concerning the continued relevance of the WTO as a global rule-making venue and the impact that the regulatory disciplines promoted in such agreements will have on both developing and developed countries.

The Introduction of this Article maps out the emerging features of an international trading system that is increasingly populated by large-scale PTAs promoting regulatory disciplines, and discusses some of the points of tension that arise from such practice.

Part I provides a descriptive overview of the evolution of the international trading system. First, this Part explains how recent changes in global commerce have led developed countries to shift the focus of trade politics away from the removal of border and discriminatory measures and towards the disciplining of non-discriminatory domestic regulation. Their attempts to introduce regulatory disciplines within the realm of international trade law, however, were not well received by developing countries, which led to the eventual petering out of the Doha Round. The upshot of this conflict has been the fragmentation of the international trading system as developed countries are now increasingly resorting to PTAs to achieve their trade policy goals. This Part makes use of theoretical frameworks, including “contested multilateralism” and “regime complexity,” to make sense of this trajectory from an integrated to a fragmented legal system.

Part II explores two competing visions for the international trade system. The first would go beyond what is provided in the WTO by disciplining domestic regulation. The second vision seeks to maintain the status quo. In particular, this Part examines the type of regulatory disciplines that are being included in PTAs. It first looks at the type of rules included in PTAs concluded by the European Union and the United States, the main proponents of deep integration at WTO level. Subsequently, this Part contrasts these PTAs against the approach taken by emerging

⁹ *United States Trade Representative, U.S. Trade Representative Ron Kirk Notifies Congress of Intent to Negotiate New International Trade Agreement on Services*, OFF. U.S. TRADE REPRESENTATIVE (Jan. 14, 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/january/ustr-kirk-notifies-congress-new-it-as-negotiations> [https://perma.cc/C3ZE-FTW9].

economies, such as China, which opposed reform proposals submitted by developed countries in the Doha Round.

Part III discusses some of the main challenges faced by the international trading system as a consequence of these changes. This Part examines instances of horizontal tension resulting from the proliferation of PTAs, particularly the extent to which such PTAs represent a threat to multilateral trade governance. Second, it looks at examples of vertical tension by examining the manner in which the imposition of regulatory disciplines through trade agreements can undermine the ability of countries, especially developing countries, to pursue legitimate public interest objectives. Finally, this section considers possible steps that could be taken to address some of the adverse effects associated with the fragmentation of the international trading system, including the option of embracing variable geometry within the WTO framework and the need to develop mechanisms that provide flexibility for developing countries in the implementation of regulatory disciplines.

I. EVOLUTION OF THE INTERNATIONAL TRADING SYSTEM

A. *From Shallow to Deep Integration*

The international trading regime developed in the aftermath of the Second World War and embodied by the General Agreement on Tariffs and Trade (“GATT 1947”)¹⁰, was one based on shallow (or negative) integration,¹¹ a model of economic integration that requires parties to remove discriminatory barriers to trade. Members of GATT 1947 were enjoined to reduce border measures—notably tariffs and quantitative restrictions—and to comply with the principle of non-discrimination, which encompassed the most favored nation (MFN) rule (prohibiting discrimination between goods of the members of the organization)¹² and the

¹⁰ The General Agreement on Tariffs and Trade, July 1986, 61 Stat. pt. 5, 55 U.N.T.S. 194.

¹¹ ROBERT LAWRENCE, ALBERT BRESSAND & TAKATOSHI ITO, A VISION FOR THE WORLD ECONOMY: OPENNESS, DIVERSITY AND COHESION 5 (Brookings Institution 1996); Beth A. Simmons, *From Unilateralism to Bilateralism: Challenges for the Multilateral Trade System*, in MULTILATERALISM UNDER CHALLENGE? POWER, INTERNATIONAL ORDER AND STRUCTURAL CHANGE, 441, 442–43 (Edward Newman, Ramesh Thakur & John Tirman eds., 2006); Ernst-Ulrich Petersmann, *From Negative to Positive Integration in the WTO: Time for Mainstreaming Human Rights into WTO Law*, 37 COMMON MKT. L. REV., issue 6, 1363, 1363 (2000).

¹² General Agreement on Tariffs and Trade art. 1, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

national treatment rule (prohibiting discrimination between domestic and imported goods).¹³ But while GATT 1947 members were required to eliminate discriminatory trade barriers, there were no rules constraining their ability to determine the content of domestic regulation.¹⁴

For much of the twentieth century, negative integration remained the main objective of international trade law, with successive rounds of GATT negotiations focusing on the reduction of tariffs worldwide.¹⁵ However, beginning in the 1970s, it became apparent that trade liberalization could no longer be conceived exclusively in terms of eliminating barriers resulting from border measures, but should also seek to discipline non-discriminatory “behind-the-border” measures affecting trade. This realization was in part due to the GATT’s success in removing tariff barriers that had previously obscured the role of domestic regulation as barriers to trade. Although most domestic rules are adopted to pursue legitimate public interest goals, it is not uncommon for countries to use their domestic regimes for protectionist purposes, such as implementing technical barriers to trade (TBTs) that regulate production in order to achieve health, safety, and environmental goals.¹⁶ As a consequence, trade policy has progressively moved away from the negative integration approach associated with GATT 1947 towards “positive integration” (or “deep integration”) models where greater emphasis is placed on disciplining domestic regulation, particularly through the development of common market rules and policies.¹⁷

This process was further accelerated by fundamental changes in the structure of the global economy. First, while the world of GATT 1947 was dominated by trade in goods, the latter part of the twentieth century was

¹³ *Id.* at art. 3.

¹⁴ Veijo Heiskanen, *The Regulatory Philosophy of International Trade Law*, 38(1) J. OF WORLD TRADE 1 (2004).

¹⁵ JOHN W. EVANS, THE KENNEDY ROUND IN AMERICAN TRADE POLICY: THE TWILIGHT OF THE GATT? (1971); J. Michael Finger, *GATT Tariff Concessions and the Exports of Developing Countries—United States Concessions at the Dillon Round*, 84 ECON. J., no. 335, 556 (1974).

¹⁶ MIROSLAV JOVANOVIĆ, INTERNATIONAL ECONOMIC INTEGRATION 5–10 (2d ed., Routledge 1998); Gilbert R. Winham, *The Evolution of the World Trading System – The Economic and Policy Context*, in OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW 6, 17 (Daniel Bethlehem, Isabelle Van Damme, Donald McRae & Rodney Neufeld eds., 2009); Chad P. Brown, *Trade Policy Instruments over Time*, in OXFORD HANDBOOK OF THE POLITICAL ECONOMY OF INTERNATIONAL TRADE 57, 71 (Lisa L. Martin ed., 2015); Heiskanen, *supra* note 14, at 5–6.

¹⁷ ROBERT Z. LAWRENCE, REGIONALISM, MULTILATERALISM, AND DEEPER INTEGRATION (Brookings Institution 2000).

defined by the rise of trade in services. Consequently, domestic rules tend to represent the biggest obstacles to trade in services because such products rarely pass through customs controls. Instead, they are delivered through other means such as e-trade, the temporary movement of persons, and the establishment of permanent commercial presences in host countries.¹⁸

The other fundamental change, which occurred from the 1980s onwards, was the result of advances in transportation logistics and information technology that increased the global mobility of firms.¹⁹ The “internationalization of supply chains”²⁰—that is, the ability of firms to perform offshore manufacturing and to establish processing facilities across the world—means that the domestic regulatory environment of countries has become a prevalent concern in international trade politics, especially given that domestic regulations that limit market access have the potential to negatively impact a country’s ability to attract foreign investment. For example, market access may be undermined by burdensome establishment requirements, by the absence of an effective antitrust legal system, or by the deficient enforcement of intellectual property laws. Even mere regulatory divergences between countries may increase the costs of market access for foreign firms, thus placing them at a competitive disadvantage compared to domestic economic operators.²¹ Trade policy has responded to these changes with a growing emphasis on enhancing market contestability and minimizing “the regulatory constraints to enter, operate in and exit from markets.”²² In this vein, deeper integration aims to go beyond non-discrimination requirements by improving both market contestability and rules of operation for multinational firms by requiring the adoption of rules that guarantee tangible and intangible property as well as a favorable

¹⁸ JOHN H. JACKSON, *INTERNATIONAL COMPETITION IN SERVICES: A CONSTITUTIONAL FRAMEWORK* 4 (Am. Enter. Inst. 1998); Juan Marchetti & Petros Mavroidis, *What Are the Main Challenges for the GATS Framework? Don't Talk About Revolution*, 5(3) EUR. BUS. ORG. L. REV. 547 (2004).

¹⁹ Paul J. Welfens, *Globalization of the Economy and International Organizations: Developments, Issues and Policy Options for Reform*, in *ECONOMIC GLOBALIZATION, INTERNATIONAL ORGANIZATIONS AND CRISIS MANAGEMENT* 13–33 (Richard Tilly & Paul Welfens eds., 2000).

²⁰ Richard Baldwin, *Policy Insight No. 64, WTO 2.0: Global Governance of Supply Chain Trade*, CENTRE FOR ECONOMIC POLICY RESEARCH 5 (2010). See also Richard Baldwin, *WTO 2.0: Governance of 21st Century Trade* 9(2) THE REV. INT. ORG. 261 (2014).

²¹ LAWRENCE ET. AL., *supra* note 11, at 49–52.

²² Bernard Hoekman & Michael Kosteci, *Towards Deeper Integration? The 'Trade and' Agenda 414*, in *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: WTO AND BEYOND* (Bernard Hoekman & Michael Kosteci eds., 2008).

business climate.²³

The trend towards deep integration eventually led to the successful conclusion of the Uruguay Round Negotiations and the creation of the WTO. The WTO revolutionized international trade law not only by establishing a truly multilateral trading regime with a dispute settlement mechanism capable of issuing legally binding rulings, but also because it represented a shift away from the focus on negative integration and towards positive rule-making whereby WTO members are required to adopt common rules.²⁴ The most notable example of deep integration within WTO law can be found in the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS),²⁵ which requires members to adopt minimum standards of intellectual property protection and enforcement.²⁶

There have been subsequent efforts to further pursue deep integration within the realm of WTO law. For example, in 1996, the European Union proposed the negotiation of multilateral agreements on investment, procurement, competition, and trade facilitation (“Singapore Issues”).²⁷ The United States had also previously demanded the introduction of labor standards within the WTO and consistently demanded the enhancement of intellectual property rights protection and enforcement standards.²⁸ While some of these issues were included in the negotiation agenda of the Doha Round in 2001, all but trade facilitation would eventually be removed, mostly (though not exclusively) at the request of developing countries, most of which were unwilling to engage in another round of onerous and time-consuming WTO-induced regulatory reforms. These reforms were not only

²³ Baldwin, *WTO 2.0: Governance of the 21st Century Trade*, *supra* note 21, at 266.

²⁴ William Dymond & Michael Hart, *Post-Modern Trade Policy, Reflections on the Challenges to Multilateral Trade Negotiations After Seattle*, 34(3) *J. OF WORLD TRADE* 22 (2000); Joel P. Trachtman, *Embedding mutual recognition at the WTO*, 14 *J. OF EUR. PUB. POL’Y* 780 (2007).

²⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 *ILL.M.* 1197 (1994).

²⁶ J. Reichman & David Lange, *Bargaining around the TRIPS agreement: the case for ongoing public-private initiatives to facilitate worldwide intellectual property transactions*, 9 *DUKE J. COMP. & INT’L L.* 21 (1998).

²⁷ WTO, Singapore Ministerial Declaration, adopted on Dec. 13, 1996, WT/MIN(96)/DEC, paras. 20-22.

²⁸ P. Drahos, *Doing Deals with Al Capone: Paying Protection Money for Intellectual Property in the Global Knowledge Economy*, in *INTELLECTUAL PROPERTY AND INFORMATION WEALTH* 146 (P. Yu ed., 2007).

perceived as undermining their ability to pursue developmental goals, but also as an unwanted distraction from the development agenda.²⁹

B. Contesting Multilateral Trade Governance

The inability of proponents of deep integration to achieve their agenda in the context of multilateral trade negotiations has led them to pursue such objectives in other fora. This has led to a fragmented international trading system where rule-making increasingly occurs outside of the WTO. Scholars Julia Morse and Robert Keohane recently devised “contested multilateralism” as a conceptual framework to explain the global trend away from unitary international legal regimes and towards fragmented and diffuse regimes.³⁰ This concept relates to the practice of using different international institutions to “challenge the rules and practices, or missions of existing multilateral institutions.”³¹ The framework posits that where coalitions are dissatisfied with the operation of a particular multilateral regime, actors may challenge it by shifting the focus of rule-making to different institutions. The causes of dissatisfaction can be varied, ranging from issues relating to the organizational structure of the contested regime to concerns about its rules, practices, and goals.

The current contestation of the existing multilateral trade system can be attributed to a number of factors that together have led to the current paralysis affecting the WTO. The first factor is the diffusion of power in international relations, which is the result of a shift from a unipolar to a multipolar world. The WTO itself was the result of a unique set of circumstances, namely the fall of the Soviet Union and the resulting collapse of an ideological counterpoint to the US-backed free market doctrine that allowed the latter, flanked by the European Union, to push through the establishment of a truly multilateral trading system.³² However, the subsequent rise of large emerging economies, in particular the powerful BRIC countries (Brazil, Russia, India, and China), has caused a fundamental change in the dynamics of international trade relations — insofar as these

²⁹ Gallagher, *supra* note 4, at 62-85

³⁰ Julia Morse & Robert Keohane, *Contested Multilateralism*, 9(4) REV. OF INT'L ORG. 385 (2014).

³¹ *Id.* at 387.

³² Silvyia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for future negotiations*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW, ESSAYS IN HONOR OF ROBERT E. HUDEC 299-300 (D. Kennedy & J. Southwick eds., 2002); JOHN BARTON ET AL., THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO 3 (2008).

can no longer be delivered by a duopoly of the European Union and the United States³³ and must accommodate a diverse group of interests and nation-states.³⁴ The impact of this diffusion of power on multilateralism can be seen in the failure of the Doha Round negotiations, where developing countries, led by emerging economies such as India, Brazil, and China, demonstrated their capability both to withstand pressures exerted by the United States and the European Union and to mobilize developing country opposition.³⁵

The fall of multilateralism's stock in the international trading order is also a reflection of the difficulties resulting from the incorporation of regulatory disciplines. As the classic understanding of what constitutes trade is extended beyond the mere cross-border movement of goods to include new areas that impinge on domestic regulatory sovereignty, multilateral negotiations become ever-more-complex affairs. This is especially so because during the Uruguay Round, GATT members agreed to adopt the "single undertaking" provision, which required all parties to adopt all agreements as a package.³⁶ In other words, WTO negotiations are underpinned by an "all or nothing" rationale, which precludes the possibility of cherry-picking. This approach proved problematic in the Doha Round wherein disagreements concerning the expansion of global trade rules led to the outright exclusion of many proposals from the negotiating table. Developing countries, already disappointed by the unbalanced outcome of the Uruguay Round,³⁷ were never likely to embrace the regulatory disciplines proposed by developed countries (e.g., Singapore Issues), and used the single undertaking to exclude them from negotiations.

The outcome of contested multilateralism will vary from one case to another. If the regime in question is unable to adapt and meet the demands of the dissatisfied actors, the latter can challenge it by switching their custom

³³ Zaki Laidi, *How Trade Became Geopolitics*, 25(2) *WORLD POL'Y J.* 56 (2008).

³⁴ Debra Steger, *The Culture of the WTO: Why it Needs to Change?*, 10(3) *J. INT'L ECON. L.* 493, 493 (2007); Kenneth Heydon & Stephen Woolcock, *The Evolution of the International Trading System*, in *THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL TRADE POLICY* 53 (2013).

³⁵ John Peterson & Alasdair Young, *The EU and the New Trade Politics*, 13(6) *J. EUR. PUB. POL'Y* 797, 797 (2006).

³⁶ Brian Hindley, *What Subjects are Suitable for WTO Agreements?*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW* 159 (Daniel Kennedy & James Southwick eds., 2006).

³⁷ Joseph M. Finger, *Developing Countries in the WTO System: Applying Robert Hudec's Analysis to the Doha Round*, 31(7) *THE WORLD ECONOMY* 887, 895-98 (2008); Cho, *supra* note 2, at 577-78.

to: (1) an already existing forum (regime shifting), or (2) a new regime that more accurately reflects their interests and/or is designed to influence the rules and goals of the contested multilateral regime (competitive regime creation).³⁸ In certain cases, strategic inconsistency (that is, the incompatibility of the regimes) will lead the contested regime to modify its practices and rules to accommodate the demands of the contesting coalitions; in other cases, the authority of the contested institutions will be undermined to such an extent that the competing institutions become the dominant regime.³⁹ However, Morse and Keohane find that, more often than not, the end result of contested multilateralism is the creation of regime complexes rather than the establishment of an integrated regime.⁴⁰ Such international regime complexes are said to exist where a specific subject area is governed by multiple international legal regimes that functionally overlap but have no hierarchy of rules to solve conflicts between such rules.⁴¹ As explained by Karen Alter and Sophie Meunier, the emergence of complex and fragmented legal systems typically leads to the exercise of “chessboard politics” insofar as the availability of multiple fora provides international actors various options to pursue their varied interests in a specific policy area.⁴² One such option is forum shopping, which allows international actors to pick and choose the legal regime that best suits their interests.

Complexity in global governance also creates winners and losers. In this respect, Daniel Drezner notes that a key attribute of multilateral rule-based orders is that, by creating common constraints that apply to all states, they can “shift arenas of international relations from power-based outcomes to rule-based outcomes.”⁴³ Regime complexes, however, generate an environment conducive to power-based politics, as major powers are better placed to successfully implement the strategies (or “chessboard politics”) that lead to the contestation of multilateral institutions. This advantage is manifested in a number of ways. First, the availability of different fora

³⁸ Bart Kerremans, *What Went Wrong in Cancun? A Principal-Agent View on the EU's Rationale Towards the Doha Development Round*, 9(3) EURO. FOREIGN AFF. REV. 363, 372-73 (2004); see also *supra* note 4.

³⁹ Morse, *supra* note 30, at 409.

⁴⁰ *Id.*

⁴¹ Kal Raustiala & David Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG., 279 (2008).

⁴² Karen Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7(1) PERSP. ON POL. 13, 13-16 (2009).

⁴³ Daniel Drezner, *The Power and Peril of International Regime Complexity*, 7 PERSP. ON POL. 65, 65-66 (2009).

increases the bargaining power of major powers because they can easily withdraw support from institutions that do not suit their agendas.⁴⁴ This allows them to either force an agenda in a multilateral setting or shift the discussion to other fora. Second, by weakening existing rules-based systems, regime complexes reduce the legal constraints applicable to powerful states.⁴⁵ Third, more powerful states have greater resources and expertise to navigate the foggy world of fragmented legal systems, often leaving smaller states marginalized from the rule-making process.⁴⁶

Forum shifting has generally been the instrument of choice for those seeking to contest the WTO.⁴⁷ As the likelihood of negotiating regulatory disciplines within the remit of the WTO has receded further into the distance, demanders of deep integration have increasingly resorted to bilateral, regional, and plurilateral trade agreements to achieve their trade policy objectives. There are two legal avenues available for WTO Members who wish to pursue trade agreements outside the auspices of WTO law. The first option is to pursue “variable geometry” by negotiating—in accordance with Article X:9 of the WTO Agreement—a plurilateral agreement whose benefits may not be applied multilaterally but rather only to the participants to the agreement. Examples of such agreements are the WTO Agreement on Civil Aircraft and the Agreement on Government Procurement. Such agreements remove the issue of free-riding, as Article X:9 permits discrimination while leaving the door open for WTO Members to accede, and allowing the members of the plurilateral agreement to benefit from the WTO’s dispute settlement mechanism. However, WTO Members wishing to follow this path face a considerable obstacle in the shape of Article X:9 of the WTO agreement that requires a consensus decision approving non-MFN plurilateral agreements.⁴⁸ In other words, every single WTO Member has the power to veto the creation of a discriminatory plurilateral agreement

⁴⁴ *Id.* at 67.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Gregory Shaffer, *Power, Governance and the WTO: A Comparative Institutional Approach*, in *POWER IN GLOBAL GOVERNANCE* 130-160 (2005).

⁴⁸ Claus-Dieter Ehlerman & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?*, 8(1) *J. OF INT’L ECON. L.* 51, 51-75 (2005); Hunter Nottage & Thomas Sebastian, *Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law*, 9(4) *J. OF INT’L ECON. L.* 989, 989-1016 (2006); Bernard Hoekman & Petros C. Mavroidis, *WTO ‘à la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements*, 26 *EUR. J. OF INT’L L.* 319 (2015).

within the WTO framework.

In light of the known objections to the introduction of new issues within WTO law by developing and emerging economies, this consensus requirement has effectively ruled out the prospect of negotiating plurilateral agreements under WTO law. As a result, WTO Members wishing to go it alone usually have little option but to plump for the second option: the negotiation of a PTA (whether bilateral, regional or plurilateral) in accordance with Article XXIV of GATT 1947 and V of the General Agreement on Trade in Services (GATS).⁴⁹ Like plurilateral agreements concluded under Article X:9, PTAs address concerns regarding free-riding by giving parties the right to decide not to extend the commitments included in such agreements on a MFN basis. PTAs had already become ubiquitous in the world trading system by the time the Uruguay Round negotiations were initiated. In fact, the United States had paved the way towards their successful completion by concluding a number of bilateral trade agreements in advance, which secured liberalization reforms and created a groundswell of support for the imminent multilateral trade liberalization.⁵⁰ The United States was the first to make the jump away from multilateralism towards bilateralism. This move was embodied by the US policy of “competitive liberalization,” which favored the negotiation of bilateral PTAs.⁵¹ One of the underlying rationales behind this policy was that the United States could use its higher bargaining power in the context of bilateral PTA negotiations to push through a US-style approach to economic liberalization.⁵² The term “competitive” reflected two fundamental aspects of the policy. First, the United States was competing against other major trading powers also engaged in bilateral trade negotiations and was seeking to re-establish its leadership in the international trading system; the more PTAs the United States signed, the more support would be gathered for its positions at the WTO level.⁵³ Second, trading partners would have to compete against each

⁴⁹ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867, U.N.T.S. 154.

⁵⁰ Brian Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM 218 (Lorand Bartels & Federico Ortino eds., 2006).

⁵¹ Alvin Hilaire & Yongzheng Yang, *The United States and the New Regionalism/Bilateralism*, 38 J. WORLD TRADE 603 (2005).

⁵² Alberta Sbragia, *The EU, the US and Trade Policy: Competitive Interdependence in the Management of Globalization* 17(3) J. EUR. PUB. POL'Y 368, 376-377 (2010).

⁵³ Simon J. Evenett & Michael Meier, *An Interim Assessment of the U.S. Trade Policy of “Competitive Liberalization,”* Discussion Paper no. 2007-18, UNIVERSITAT ST. GALLEN, 1 (2007).

other to gain access to the US market. Indeed, the US approach to competitive liberalization was that the United States would only negotiate with countries that were willing to make substantial market opening concessions. By making it clear that those countries that were not willing to play by the rules would be left behind, the United States sought to further increase its leverage in negotiations.⁵⁴

The US policy of competitive liberalization acted as a trigger for other economic powers to follow suit. For example, once it became clear that the Doha Round was faltering, and in a bid to make up ground lost to the United States, the European Union was forced to reconsider its approach towards the negotiation of PTAs. The shift in policy was crystallized in the 2006 Global Europe strategy, which outlined a new EU strategy with regard to its trade agreements.⁵⁵ The policy notes that while the European Union has focused on the Doha Round, its “main trading partners and priority targets have been negotiating PTAs with [the EU’s] competitors”⁵⁶ and bemoans the fact that “[t]he current geography of FTAs mainly covers our geography and development objectives well but our trade interests less well.”⁵⁷ Therefore, much like the competitive liberalization policy of the United States, the European Union seeks to enhance its position in comparison to its competitors. The Global Europe strategy is also similar to US competitive liberalization in terms of the ambitious levels of harmonization being pursued, as it clearly maintains the European Union’s focus on deeper integration. The EU position is that, in the absence of any real progress in the Doha Round negotiations, they should look to enter into PTAs promoting “deep integration,”⁵⁸ which it defines as “WTO-plus in terms of width and depth.” Recent studies of PTAs concluded by both the European Union and the United States confirm that they typically include the new deep disciplines that were rejected in the Doha Round.⁵⁹ These bilateral PTAs are used to expand the regulatory standards favored by these two trade powers and, in doing so, incrementally ratchet up the regulatory standards of the

⁵⁴ *Id.* at 20.

⁵⁵ EUROPEAN COMMISSION, GLOBAL EUROPE COMPETING IN THE WORLD: A CONTRIBUTION TO THE EU’S GROWTH AND JOBS STRATEGY 567 (2006).

⁵⁶ EUROPEAN COMMISSION, ANNEX TO COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS 1, 14 (2006).

⁵⁷ *Id.*

⁵⁸ *Id.* at 19.

⁵⁹ HENRIK HORN, PETROS MAVROIDIS, & ANDRE SAPIR, BEYOND THE WTO? AN ANATOMY OF EU AND US PREFERENTIAL TRADE AGREEMENTS 53 (2009).

international trading system.⁶⁰

More recently, the European Union and the United States have upped the ante by pursuing larger trade deals such as plurilateral PTAs and so-called mega-regional PTAs. Recent plurilateral PTAs have been global in scope, insofar as membership is not limited to a particular geographic region and as they have been used by the European Union and the United States to secure economic integration and liberalization goals that could not be attained at the WTO level in specific areas. The two most notable examples are the Anti-Counterfeiting Trade Agreement (ACTA)⁶¹ and the Trade in Services Agreement (TiSA).⁶² In both instances, the decision to negotiate these agreements was driven by the frustration emanating from their proponents' repeated failure to increase liberalization commitments and standards at the WTO level.

The ACTA arose as a response to multiple failed attempts by the United States and Japan to increase the minimum standards of intellectual property (IP) protection enforcement under the WTO Agreement on Trade Related Aspects of Intellectual Property (TRIPS⁶³). The agreement—which includes rules on civil and criminal enforcement, customs control procedures, and digital copyright infringement—was therefore negotiated mostly by advanced industrialized nations that have historically supported calls for higher standards of IP protection in TRIPS. However, ACTA was a hugely controversial endeavor from its inception, and was the subject of heavy criticism focusing on the lack of transparency of negotiations and the potential of the agreement to undermine fundamental human rights.⁶⁴ Although an agreement was signed in 2011, following the refusal of the European Parliament to ratify it, only one participant has ratified it to date,

⁶⁰ Simmons, *supra* note 11, at 445.

⁶¹ *Proposal for a Council Decision on the conclusion of the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America*, COM (2011) 380 final (June 24, 2011).

⁶² European Commission Memo/13/107, *Negotiations for a Plurilateral Agreement on Trade in Services* (Feb. 15, 2013) [hereinafter EU Memo].

⁶³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)

⁶⁴ Alberto J. Cerda Silva, *Enforcing Intellectual Property Rights by Diminishing Privacy: How the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy*, 26 AM. U. INT'L L. REV. 600, 601-636 (2011).

and the agreement is now largely considered to no longer be viable.⁶⁵

The idea of a plurilateral trade in services agreement (TiSA) was first mooted by the United States and Australia in 2011 in response to the inability to pursue negotiations on services in the context of the Doha Round.⁶⁶ The objective was to gather like-minded WTO Members (so-called “Really Good Friends” or “RGFs”⁶⁷) keen to push forward negotiations on trade in services in order to develop a trade agreement outside the auspices of the GATS with the aim of addressing its deficiencies.⁶⁸ This plurilateral agreement would not only further existing market access commitments but also address new service areas thus far untouched by GATS, lock in domestic liberalization policies, and establish additional regulatory disciplines. Four years on, the group of RGFs has increased from 16 to 25 members, and while negotiations remain very much alive, they also remain very much a work in progress. However, the ultimate goal pursued by the proponents of the TiSA could not be clearer. As the European Union puts it, the objective of the TiSA is to “negotiate an ambitious agreement that is compatible with the General Agreement on Trade in Services, (GATS), which would attract broad participation and that could be multi-lateralized at a later stage.”⁶⁹

Mega-regional PTAs differ from the above plurilateral PTAs both in terms of their geographic and substantive coverage. First, mega-regional PTAs are closed agreements that are intended to secure economic integration between specific countries or regions that hold a significant share of global trade and investment. Second, mega-regionals are not single-issue

⁶⁵ Duncan Matthews & Petra Zikovská, *The Rise and Fall of the Anti-Counterfeiting Trade Agreement (ACTA): Lessons for the European Union*, 44 INT’L REV. INTELL. PROP. & COMPETITION L. 626 (2013).

⁶⁶ See Shin Yi Peng, *Is the Trade in Services Agreement (TiSA) a Stepping Stone for the Next Version of GATS*, 43 H.K. L. J. 611, 614 (2013); Juan A. Marchetti and Martin Roy, *The TISA initiative: an overview of market access issues*, 48(4) Journal of World Trade 683, 694 (2014); Pierre Sauvé, *Towards a plurilateral Trade in Services Agreement (TISA): Challenges and prospects*, 50(1) Journal of International Commerce, 1440006-1, 1440006-4 (2014).

⁶⁷ The coalition of Really Good Friends currently includes the following members: Australia, Canada, Chile, Chinese Taipei, Colombia, Costa Rica, European Union, Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey, the United States, and Uruguay.

⁶⁸ Pierre Sauvé, *Directorate-General for External Policies, Workshop, The Plurilateral Agreement on Services*, EUR. PARLIAMENT 14 (July 1, 2013), available at [http://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/433722/EXPO-INTA_AT\(2013\)433722_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/workshop/join/2013/433722/EXPO-INTA_AT(2013)433722_EN.pdf) [<http://perma.cc/R6DM-FAVq>].

⁶⁹ EU Memo, *supra* note 62.

agreements. Instead, they generally follow the template set in bilateral PTAs in that they are comprehensive in their scope, both in terms of the breadth and depth of commitments and regulatory standards included. A third and final distinction between plurilateral PTAs and mega-regional PTAs rests in their rationales. Mega-regional PTAs are not solely fueled by the paralysis of the multilateral process and the desire to address the rise of global value chains. These deals are viewed as tools not only to pursue economic interests but also to pursue important geopolitical concerns. This is certainly the case of the recently-concluded Trans Pacific Partnership (TPP), a trade agreement that includes countries such as Australia, Canada, Malaysia, Mexico, Singapore, and Japan, and that was born out of the United States' decision to pivot its foreign policy towards the Asia-Pacific region in order to counteract the growing influence of China.⁷⁰

For the United States, the TPP offered an opportunity to access the growing and lucrative Asia-Pacific market and to alter the power dynamics in Asia by displacing China as the central actor in economic governance in the region. As is often the case in trade matters, where the United States goes, the European Union follows. The negotiation of the TPP left the European Union in the unenviable position of being outside looking in on what could be not only one of the most lucrative trade arrangements in the world, but also—as the TPP sought to achieve deep liberalization—one that would set the template for future deep trade disciplines. The European Union has recently launched PTA negotiations with Japan and the United States (TTIP) in order to mitigate the potential for the TPP to divert trade away from the European Union and to ensure that it also has a hand in setting the new disciplines of the international trading system. In the context of these negotiations, the European Union has made it clear that dismantling non-tariff barriers is its primary objective. With regard to the negotiations with Japan, the European Union has stated its intention to address disciplines in areas such as “services, investment, procurement, intellectual property rights and regulatory issues”⁷¹ and has demanded the harmonization of Japan's notoriously *sui generis* technical, safety, and environmental

⁷⁰ Gabriel Feylbermayr & Rahel Aichele, *How to make TTIP inclusive for all? Potential economic impacts of the Transatlantic Trade and Investment Partnership (TTIP) on developing countries*, IFO INST. 25-27 (Aug. 30, 2015), http://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/How_to_make_TTIP_inclusive.pdf [<http://perma.cc/YT7D-Z6NLJ>]; Winters, *supra* note 7, at 10.

⁷¹ Karel De Gucht, *Challenge and Opportunity: Starting the negotiations for Free Trade Agreement between the EU and Japan*, EUR. COMMISSION 1, 2 (Mar. 25, 2013), http://europa.eu/rapid/press-release_SPEECH-13-256_en.htm [<http://perma.cc/6Q7N-8Z9R>].

regulations with existing international standards.⁷²

Whether in the context of the TPP or the TTIP, the discourse adopted by the European Union and, until very recently, the United States clearly suggests that these agreements were about much more than bypassing the multilateral process and furthering trade liberalization. Both saw the conclusion of these agreements as part of a race with emerging economies, particularly China, to define the future rules of international trade.⁷³ In this light, the former United States Trade Representative, Michael Froman, stated that, through agreements such as the TPP, the United States intends to set the “economic rules of the road before others will”⁷³ so that these rules reflect US economic interests and values. Similarly, the European Union’s Trade Commissioner acknowledged that TTIP was about “who sets “global standards for the regulation of goods and services in the twenty-first century”⁷⁴ TTIP sought to strengthen “the hand of Europe and America in that process”⁷⁵, by consolidating “shared Atlantic values, from the fundamentals of democracy and the rule of law to key areas such as the environment and social standards.”⁷⁶

The shift by the European Union and the United States towards bilateralism, regionalism, and plurilateralism in the area of trade policy is an apt illustration of Drezner’s point that regime complexes generally favor powerful states. The rules-based system of the WTO, based on decision-making by consensus, empowered developing nations and allowed them to oppose reform proposals that did not address their concerns. Faced with a brick wall, major economies have resorted to PTAs, which offer the path of least resistance. Developed countries are able to use their higher bargaining power in PTA negotiations to impose the adoption of their own regulatory preferences and to progressively create a groundswell of support for their positions at the multilateral level. In other words, the objective is to

⁷² Cecilia Malmström, *EU-Japan FTA: Crafting an Ambitious Deal*, EUR. COMMISSION 3 (May 29, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153488.pdf [<https://perma.cc/VTV2-X2ME>].

⁷³ Glen S. Fukushima, *The political economy of the Trans-Pacific Partnership: a US perspective*, 28(4) JAPAN F. 549, 549 (2016).

⁷³ Michael Froman, *If We Don’t Write The Rules Of The Global Economy, Others Will*, GE REPORTS (Nov. 6, 2015), <http://www.gereports.com/amb-michael-froman-if-we-dont-write-the-rules-of-the-global-economy-others-will/> [<http://perma.cc/TC79-97GE>].

⁷⁴ Cecilia Malmström & Jonathan Hill, Don’t believe the anti-TTIP hype – increasing trade is a no-brainer, THE GUARDIAN (Feb. 16, 2015).

⁷⁵ Ibid

⁷⁶ Ibid. <http://www.theguardian.com/commentisfree/2015/feb/16/ttip-transatlantic-trade-deal-businesses> [<http://perma.cc/ZM8D-ZL8C>].

establish global rules by increments.

II. SETTING THE RULES OF THE INTERNATIONAL TRADING SYSTEM – WHAT'S ON THE MENU?

A. *Competing Visions of the International Trading System*

As we have seen, both the European Union and the United States have recently affirmed their desire to set the rules of global commerce before others, notably BRICs, do it for them. At one stage, it looked as though the United States in particular was pulling ahead of its competitors by successfully completing the negotiations on the TPP. Should a finalized TTIP be added to the mix, the United States could reasonably claim to have set the rules of the road for economic governance in three major economic blocs (the Americas, Europe, and Asia Pacific). However, any assumption that these rules would inevitably set global benchmarks has now been proven to be premature. First, it seems unlikely that either the TPP or the TTIP will be ratified. For all the zeal of the European Union and United States in pushing through these agreements, their domestic constituents remain far from convinced about the supposed benefits of these trade deals. The concerns that were previously expressed in relation to the WTO regarding the loss of policy autonomy and the lowering of social, environmental, and consumer protection standards are now being levelled at mega-PTAs.⁷⁷ The recent presidential election in the United States, in which both candidates adopted a clear anti-trade rhetoric, has thrown these concerns into sharp relief. The eventual winner of the election, Donald Trump, routinely linked free trade and trade agreements with the loss of manufacturing jobs—a message that played very well with a significant portion of the US electorate—and vowed to radically change the United States' approach to negotiating trade agreements. Indeed, one of Donald Trump's main campaign pledges was to not ratify the TPP, which was portrayed as “a

⁷⁷ FERDI DE VILLE & GABRIEL SILES-BRÜGGE, *TTIP: THE TRUTH ABOUT THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP* (2015); Alasdair Young, *Not your parents' trade politics: the Transatlantic Trade and Investment Partnership negotiations*, 23(3) *REV. INT'L POL. ECON.* 345 (2016); S. Donnan, *And Now the Other TPP Battle Begins*, *FINANCIAL TIMES* (Oct. 5, 2015), <https://www.ft.com/content/69f94d26-6af5-11e5-8171-ba1968cf791a> [http://perma.cc/TR2J-BXPF]; *The Trans-Pacific Partnership – Weighing Anchor*, *THE ECONOMIST* (Oct. 10, 2015), <http://www.economist.com/news/finance-and-economics/21672330-negotiators-agree-ambitious-trade-deal-opposition-its-ratification> [http://perma.cc/U8R5-28Ja].

potential disaster”⁷⁸ that would lead to job losses in the United States. On January 23, President Trump made good on his promise by signing an executive order formally ending the United States’ participation in the TPP.⁷⁹ Second, even if the TTP and the TTIP were to eventually be signed by the United States, it is unclear whether agreements that do not include any of the BRIC countries in their membership can truly be seen as an event that could jumpstart WTO negotiations.⁸⁰ The absence from the TPP of India, one of Asia’s economic powerhouses and one of the ringleaders in the opposition against WTO reforms proposed by the European Union and the United States in the Doha Round, is very significant in this respect in that it runs counter to the notion that the agreement will come to define the rules of trade in the Asia-Pacific region. Indeed, China’s response to the TPP was to spearhead efforts to conclude its very own mega-PTA in Asia, the Regional Comprehensive Economic Partnership (RCEP), which would overshadow the TPP in terms of membership numbers by including all Association of Southeast Asian Nations (ASEAN) countries, as well as Japan, South Korea, India, Australia, and New Zealand. Early indications suggest that this agreement, should it be completed, would replicate the Chinese approach to negotiating PTAs, which, as will be seen, focuses essentially on tariff

⁷⁸ Nicky Woolf, Justin McCurry & Benjamin Haas, *Trump to withdraw from Trans-Pacific Partnership on first day in office*, THE GUARDIAN (Nov. 22, 2016), <https://www.theguardian.com/us-news/2016/nov/21/donald-trump-100-days-plans-video-trans-pacific-partnership-withdraw> [<http://perma.cc/AR3Q-PATQ>].

⁷⁹ See Y. Mui, *President Trump Signs Order to Withdraw from Trans-Pacific Partnership*, THE WASHINGTON POST (Jan. 23, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/01/23/president-trump-signs-order-to-withdraw-from-transpacific-partnership/?utm_term=.1439d7fde412 [<https://perma.cc/X4AJ-GNAT>].

It should be noted that the United States’s refusal to sign the Trans-Pacific Partnership (TPP) will not necessarily spell the end of the agreement, as Australia and Japan have recently signaled their intention to pursue its ratification. See Konrad Yakabuski, *Why Japan is hell-bent on saving the Trans-Pacific Partnership*, THE GLOBE AND MAIL (Dec. 23 2016), <http://www.theglobeandmail.com/report-on-business/rob-commentary/why-japan-is-hell-bent-on-saving-the-tpp/article33413016/> [<http://perma.cc/GE6K-GRSW>]; Harry Pearl, *Japan, Australia to strengthen defense ties, stress importance of TPP*, REUTERS (Jan. 15, 2017), <http://uk.reuters.com/article/uk-australia-japan-security-idUKKBN14Y0AL> [<http://perma.cc/GRQ2-WZXD>].

⁸⁰ Ann Capling & John Ravenhill, *The TPP: multilateralizing regionalism or the securitization of trade policy*, in THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT 274, 279 (C. Lim, D. Elms & P. Low eds., Cambridge University Press 2012).

reductions rather than non-tariff barriers and regulatory divergence.⁸¹ This would raise questions about the idea that the United States (and the European Union) are pulling others along and suggest that rather than ensuring that their regulatory preferences are seen as global rules and standards, mega-PTAs are merely consolidating the fragmentation of the international trading system. And, of course, a US decision to definitely pull away from the TPP would arguably cement China's position of leadership in the Asia-Pacific region and strengthen its role as a rule-maker in the global trading system.⁸² In short, the idea that the mega-PTAs backed by the European Union and the United States will provide a basis for a new multilateral trade regime should not be taken for granted.

The following Subsections examine the types of regulatory disciplines generally included in PTAs concluded by the European Union and the United States on the one hand, and emerging economies (with a particular focus on China) on the other hand.

B. *The EU and U.S. Model for Twenty-First Century Trade Agreements*

1. Exporting Regulatory Preferences

To the extent that bilateral, regional, and plurilateral trade deals have been pursued in large part to address the Doha Round stalemate, it should come as no surprise that the vast majority of these agreements have included provisions enhancing liberalization commitments and regulating issues that were rejected during WTO negotiations. Barring a few exceptions, there is broad agreement that these PTAs either include WTO plus rules (that is, obligations that go beyond what is currently provided under WTO law) or WTO-X rules (obligations relating to topics currently not covered by WTO law).⁸³ The European Union and the United States, in particular, have consistently negotiated deep PTAs that reflect their own regulatory preferences, from high standards of intellectual property protection to the promotion of regulatory frameworks that support transparent and

⁸¹ Jack Kim, *China-backed trade pact playing catch-up after U.S.-led TPP deal*, REUTERS (Oct. 10, 2015), <http://www.reuters.com/article/us-trade-tpp-rcep-idUSKCN0S500220151011> [<http://perma.cc/EMA7-CTWU>].

⁸² See Byung-Il Choi, *Whither the TPP? Political Economy of Ratification and Effect on Trade Architecture in East Asia*, 20(3) EAST ASIAN ECON. REV. 311, 323 (2016); Douglas Irwin, *The truth about trade: What critics get wrong about the global economy*, FOREIGN AFF. (2016); Fukushima, *supra* note **Error! Bookmark not defined.**, at 552.

⁸³ HORN, MAVROIDIS & SAPIR, *supra* note 59.

competitive business environments.⁸⁴

The manner in which such WTO-plus and WTO-X agendas are pursued in PTAs varies significantly from one agreement to another, depending on the identity of the parties and the subject matter at hand. In some cases, PTAs are used to disseminate plurilateral rules agreed upon within the framework of the WTO. This is the case with respect to the telecommunications sector where the WTO has developed the Reference Paper on Telecommunications Services (the Reference Paper),⁸⁵ a GATS instrument that includes a number of regulatory principles that go beyond non-discriminatory concerns.⁸⁶ It includes requirements concerning the adoption of anti-competitive safeguards⁸⁷ and transparent procedures for the granting of licenses,⁸⁸ as well as the establishment and maintenance of independent regulatory authorities.⁸⁹ It also recognizes the right of WTO Members to adopt universal service obligations⁹⁰ and imposes minimum standards regarding interconnection in order to ensure that new entrants to domestic telecommunications markets are able to access existing infrastructure networks.⁹¹

The Reference Paper promotes a regulatory framework for telecommunications services based on principles of openness and competition, and reflects in particular the experiences of developed nations in liberalizing the telecommunications sector in the final two decades of the

⁸⁴ See Pascal Lamy, *Stepping stones or stumbling blocks? The EU's approach towards the problem of multilateralism vs regionalism in trade policy*, 25(10) THE WORLD ECON. 1399 (2002); Razeen Sally, *Free trade agreements and the prospects for regional integration in East Asia*, 1(2) ASIAN ECON. POL'Y REV. 306 (2006); Cintia Quiliconi & Carol Wise, *The US as a Bilateral Player: The Impetus for Asymmetric Free Trade Agreements*, in COMPETITIVE REGIONALISM: FTA DIFFUSION IN THE PACIFIC RIM 97-117 (Mireya Solis, Barbara Stallings, & Saori n. Katada eds., 2009); BILLY A. MELO ARAUJO, *THE EU DEEP TRADE AGENDA – LAW AND POLICY* (2016).

⁸⁵ Negotiating Group on Basic Telecommunications, *Reference Paper on Telecommunications Services*, WTO (Apr. 24, 1996), 36 I.L.M. 367 [hereinafter Reference Paper].

⁸⁶ Billy Melo Araujo, *Regulating Services through Trade Agreements-A Comparative Analysis of Regulatory Disciplines Included in EU and US Free Trade Agreements*, 6 TRADE L. & DEV. 392, 393 (2014).

⁸⁷ Reference Paper, *supra* note 84, at para. 1.

⁸⁸ *Id.* at para. 2(4).

⁸⁹ *Id.* at para. 5.

⁹⁰ *Id.* at para. 3.

⁹¹ *Id.* at para. 2.

twentieth century.⁹² However, the impact of the Reference Paper is lessened by the fact that it is a plurilateral instrument and that the regulatory disciplines included therein only bind WTO Members to the extent that they are included as part of their scheduled commitments. Both EU and US PTAs have tended to include regulatory disciplines on telecommunications services that are largely based on the GATS Reference Paper on Telecommunications.⁹³ The same practice is found in the area of public procurement. Faced with stiff opposition, proponents of public procurement liberalization at the WTO level have resorted to signing plurilateral procurement-related agreements, first under the auspices of GATT 1947 and then under that of the WTO's Government Procurement Agreement (GPA). The successive versions of the GPA—the latest of which was signed in 2011—go beyond the mere requirement of non-discrimination by providing an over-arching regulatory framework for public procurement that covers the principal aspects of the procurement bidding process and the enforcement of procurement rules. Again, both EU and US PTAs include language taken from the plurilateral WTO Government Procurement Agreement.⁹⁴ By requiring their trading partners to sign on to these rules, the European Union and the United States hope to incrementally increase support for plurilateral WTO instruments and pave the way for their future multilateralization.

In the absence of WTO-sanctioned plurilateral rules, proponents of PTAs can pursue other avenues to advance their regulatory preferences. One such option is to use PTAs to promote international rules concluded outside of the framework of the WTO. In the area of intellectual property, for example, the EU and the US PTAs have historically tended to require parties to sign on to and comply with various agreements concluded under the auspices of the World Intellectual Property Organization, which impose requirements that go beyond TRIPS.⁹⁵ In the same vein, PTAs regulating

⁹² Andrew Lang, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING GLOBAL ECONOMIC GOVERNANCE* 285 (2011).

⁹³ B. Melo Araujo, *Regulating Services Through Trade Agreements*, *supra* note 85, at 408-09.

⁹⁴ B. Melo Araujo, *The EU's Deep Trade Agenda: Stumbling Block or Stepping Stone Towards Multilateral Liberalisation?*, in *EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW* 280-81 (Christoph Hermann, Markus Karjewski, & Jorg Philipp Terhechte eds., 2013).

⁹⁵ Meir P. Pugatch, *The international regulation of IPRs in a TRIPs and TRIPs-plus world*, in *TRADE AND INVESTMENT RULE-MAKING: THE ROLE OF REGIONAL AND BILATERAL AGREEMENTS* 177, 187-88 (S Woolcock ed., 2006); Susan K. Sell, *TRIPs was never enough: vertical forum shifting, FTAs, ACTA, and TPP*, 18 *J. INTELL. PROP. L.* 448 (2010); B. Melo Araujo, *Intellectual Property and the EU's Deep Trade Agenda* 16(2) *J. INT'L ECON. L.* 439 (2013).

labor and environmental issues will usually require compliance with various International Labor Organization conventions and multilateral environmental agreements.⁹⁶ In the area of technical standards, recent PTAs, like the CETA, the EU-Korea FTA, and the Canada-Korea FTA, have also included provisions mandating regulatory approximation in line with existing international standards issued by the International Organization for Standardization and the United Nations Economic Commission for Europe.⁹⁷

Where international rules do not exist or where such international rules are not deemed to reflect the offensive interests of the proponents of the PTAs, the latter have also included provisions replicating standards required under their own domestic laws. This is evidenced by PTA practice in areas such as competition law and intellectual property rights regulation. In the area of competition law, the European Union had in 1996 proposed the negotiation of a multilateral agreement on competition under the auspices of the WTO.⁹⁸ Since it became clear that there was no appetite within the WTO membership for such an agreement, the European Union has since systematically included competition law chapters in its PTAs that not only require parties to adopt and maintain domestic competition laws, but also replicate the three basic prohibitions on private restraints addressed by EU competition law: anti-competitive agreements and concerted practices, abuses of dominant position between one or more enterprises, and mergers that significantly impede effective competition.⁹⁹ With respect to intellectual property, the United States has long adopted the practice of including provisions in its PTAs that require signatories to implement domestic intellectual property regulatory systems in line with the standards ensured under US law.¹⁰⁰ Similarly, the European Union is increasingly including provisions in its PTAs that either replicate the content of, or go

⁹⁶ Roman Grynberg & Veniana Quelo, *Labour standards in US and EU preferential trading arrangements* 40(4) J. WORLD TRADE 619 (2006); Lorre Van den Putte, *Involving civil society in the implementation of social provisions in trade agreements: comparing the US and EU approach in the case of South Korea*, 6(2) GLOBAL LAB. J. 221 (2015).

⁹⁷ Boris Rigod, *TBT-Plus Rules in Preferential Trade Agreements*, 40(3) LEGAL ISSUES OF ECON. INTEGRATION 247 (2013); Araujo, *The EU's Deep Trade Agenda*, *supra* note 93, at 278.

⁹⁸ Anestis Papadopoulos, "The International Dimension of EU Competition Law and Policy" (Cambridge University Press, 2010), 225.

⁹⁹ Araujo, *The EU's Deep Trade Agenda*, *supra* note 93, at 280.

¹⁰⁰ Pugatch, *supra* note 94.

beyond what is currently provided under EU law.¹⁰¹

A defining feature of EU and US policies for using PTAs to disseminate rules is that each agreement is used to incrementally ratchet up regulatory standards. The general pattern is that each new PTA will consolidate the regulatory disciplines recognized by the PTAs that preceded it and, if possible, raise the bar further. The ratcheting-up process has been amply demonstrated in the context of intellectual property. Brian Mercurio describes it as a “never-ending cycle of multilateral standard setting which leads to increased standards via bilateralism/regionalism followed by consolidation in the form of more multilateralism.”¹⁰² Susan Sell has also demonstrated how the United States has made use of bilateral PTAs, ACTA, and the TPP to sequentially impose ever-increasing standards of intellectual property protection.¹⁰³ The process is also evident in other regulatory areas. For instance, in the area of investment, the United States has developed model provisions for bilateral investment treaties (US Model BIT), which have been successfully spread through an extensive network of bilateral investment treaties and have served as a source of inspiration for multiple international investment agreements.¹⁰⁴ In addition, the United States is now using mega-regionals to negotiate new standards of investment protection. In this respect, a recent study showed that, barring a few notable exceptions, the investment protection chapter included in the TPP is fundamentally based on the text of the US Model BIT.¹⁰⁵

Finally, with respect to services, we have seen how both the European Union and the United States use PTAs to spread the reach of plurilateral WTO disciplines on telecommunications services. However, these PTAs go beyond these plurilateral WTO rules by: (1) including additional regulatory disciplines that are not found in WTO instruments (e.g., procedural guarantees, transparency, data protection requirements, rules on electronic

¹⁰¹ Araujo, *Intellectual Property*, *supra* note 94, at 439-474.

¹⁰² Brian Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in *REGIONAL TRADE AGREEMENTS AND THE WTO LEGAL SYSTEM* 236 (Lorand Bartels & Federico Ortino eds., 2006).

¹⁰³ Susan K. Sell, *TRIPS was never enough: vertical forum shifting, FTAs, ACTA, and TPP*, 18 *J. INTELL. PROP. L.* 447 (2010).

¹⁰⁴ Nikos Lavranos, *The New EU Investment Treaties: Convergence Towards the NAFTA Model as the New Plurilateral Model BIT text?* (Mar. 29, 2013) (unpublished policy brief) (accessible at <http://ssrn.com/abstract=2241455>).

¹⁰⁵ See Wolfgang Alschner & Dmitriy Skougarevskiy, *The New Gold Standard? Empirically Situating the TPP in the Investment Treaty Universe* (Ctr. for Trade Econ. Integration, Working Paper No. IHEIDCTEI2015-08, 2015).

communications, and services, etc.); and (2) applying similar regulatory disciplines to services sectors that are regulated at the WTO level (e.g., postal and courier services and tourism services).¹⁰⁶ Finally, the TiSA is now being envisaged as an opportunity to disseminate the types of disciplines typically included in EU and US PTAs. The European Union has already stated that it intends to include disciplines on issues such as “independence of regulators, fair authorization processes or non-discriminatory access to [. . .] networks”¹⁰⁷ in the context of services sectors such as telecommunications, financial services, or postal and courier services. The agreement would seek to replicate the type of sector-specific disciplines typically found in the most recent EU and US PTAs and expand their application to other services sectors.¹⁰⁸ This approach appears to be confirmed by the EU proposal for an annex on financial services, which follows the template set in its PTAs by copy-pasting large swathes of the Reference Paper and the Financial Services Understanding, with a few deviations and additions in certain areas (e.g., new financial services, transparency requirements, etc.).¹⁰⁹ The objectives pursued by the TiSA are, therefore, not too dissimilar to those currently pursued by the European Union and the United States in their deep PTAs confirming the suspicion that these trade powers are simultaneously using bilateral and plurilateral initiatives to impose rules for which there is no consensus at the multilateral level.

2. Disciplines Targeting Emerging Economies

The foregoing Subsection highlighted how trade deals have been used to regulate issues that were rejected within the framework of WTO negotiations. The new generation of trade deals is also putting forward rules on emerging trade topics that had not previously been discussed at the WTO level. Some of these new regulatory issues are intended to address particular challenges raised by the practices of emerging economies, notably China, which are considered to provide such countries with an unfair competitive

¹⁰⁶ Araujo, *Regulating Services Through Trade Agreements*, *supra* note 85, at 409-10.

¹⁰⁷ European Commission, *Memo: Negotiations for a Plurilateral Agreement on Trade in Services 2* (Feb. 15, 2013) (accessible at http://europa.eu/rapid/press-release_MEMO-13-107_en.htm).

¹⁰⁸ See Pierre Sauvé, *A Plurilateral Agenda for Services? Assessing the Case for a Trade in Services Agreement* (Swiss Nat'l Ctr. of Competence in Research, Working Paper No. 2013/29, 2013).

¹⁰⁹ See European Commission, *Proposal for an Annex on Financial Services* (accessible at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1133>).

advantage.

First, there is the highly contentious issue of exchange rate manipulation. In the aftermath of the financial crisis, there has been an increasing disquiet on the part of the United States concerning the perceived propensity of certain countries in East Asia to devalue their currencies for protectionist purposes; by preventing national currencies from appreciating, governments are able to improve exports and inhibit imports.¹¹⁰ China has been identified as the main culprit, accused of systematically devaluing its currency to gain a competitive advantage in international trade and achieve a trade surplus.¹¹¹ However, disciplining exchange rate manipulation is a delicate task, as monetary policy has been historically recognized as a matter within the exclusive remit of national sovereignty. Furthermore, not all devaluations of exchange rates can be said to pursue protectionist goals. In many cases, devaluations are a perfectly valid policy for the pursuit of legitimate macro-economic and development objectives.¹¹² Consequently, attempts to regulate exchange rate manipulation have been limited. At the WTO level, it is generally acknowledged that currency devaluations are unlikely to run afoul of WTO law.¹¹³ In the context of the International Monetary Fund (IMF), there is an obligation to “avoid manipulating exchange rates [. . .] in order to gain an unfair competitive advantage.”¹¹⁴ However, the specification that only manipulations undertaken with the goal of gaining a competitive advantage are covered by this obligation means that it is necessary to demonstrate the protectionist intent underpinning such actions – something that is very difficult to achieve.¹¹⁵

Given the composition of its membership, the TPP was seen as the perfect opportunity to address exchange rate manipulation. However, because of the reluctance of TPP states to subject themselves to stringent

¹¹⁰ See Paul F. Cwik, *The New Neo-Mercantilism: Currency Manipulation as a Form Of Protectionism*, 31(3) *ECO. AFFAIRS* 7 (2011).

¹¹¹ See Geoffrey Garrett, *G2 in G20: China, the United States and the World After the Global Financial Crisis*, 1(1) *GLOBAL POL'Y* 29 (2010); C. Fred Bergsten & Joseph E. Gagnon, *Currency Manipulation, the US Economy and the Global Economic Order* 5 (Peterson Inst. for Int'l Econ., Policy Brief No. PB12-25, 2012).

¹¹² See Robert W. Staiger & Alan O. Sykes, *Currency Manipulation and World Trade*, 9 *WORLD TRADE REV.* 583, 585 (2010).

¹¹³ See *id.* at 606-16.

¹¹⁴ International Monetary Fund, Articles of Agreement art. 4, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39 (as amended Mar. 3, 2011).

¹¹⁵ See Michael Waibel, *Retaliating Against Exchange-Rate Manipulation*, *VOX EU* (Apr. 16, 2010), <http://voxeu.org/article/retaliating-against-exchange-rate-manipulation-under-wto-rules> [<https://perma.cc/FJN9-Z7UL>].

rules on monetary policy, the best that could be achieved was a side agreement between the treasury departments of TPP parties to “refrain from competitive devaluation and [to] not target [the] country’s exchange rate for competitive purposes.”¹¹⁶ This provision is limited on two fronts. First, it maintains the same subjective element found under IMF rules whereby devaluations are only prohibited if it can be established that they were designed to provide a competitive advantage. Second, although the provision is phrased in legally binding language, it lacks a mechanism of enforcement: the side agreement is not subject to the dispute settlement mechanism established under the TPP, and no mention is made of any sanctions that could be applied if a party is found to manipulate its currency for protectionist purposes. Nevertheless, the agreement also includes extensive disclosure obligations that should enable the parties to monitor each other’s monetary policies and the impact of such policies on trade, and will therefore serve as a disincentive for parties to engage in currency manipulation.¹¹⁷

An additional issue coming increasingly to the foreground of international trade politics is the regulation of state-owned enterprises (SOEs). Of particular concern is China’s state-owned sector, which has historically benefited from government assistance and practices that are designed to provide them with a competitive advantage in global trade.¹¹⁸ In recent years, a number of challenges have been brought before the WTO dispute settlement mechanism against China for such practices. WTO litigation has centered on the granting of preferential treatment in violation of national treatment obligations under GATT or GATS and subsidies that violate the obligations under the Agreement on Subsidies and Countervailing Measures. However, there are other means employed by countries to ensure that SOEs have a competitive advantage compared to private enterprises, such as government practices that turn a blind eye to the anti-competitive behavior of SOEs.¹¹⁹

To try to address some of these issues, certain deep PTAs have

¹¹⁶ Joint Declaration of the Macroeconomic Authorities of the Trans-Pacific Partnership Countries, ¶ I, Nov. 5, 2015 (accessible at https://www.treasury.gov/initiatives/Documents/TPP_Currency_November%202015.pdf).

¹¹⁷ *Id.* at ¶ II.

¹¹⁸ See generally Julia Ya Qin, *WTO Regulation of Subsidies to State-Owned Enterprises (SOEs)-A Critical Appraisal of the China Accession Protocol*, 7(4) J. INT’L ECON. L. 863 (2004).

¹¹⁹ See Ming Du, *China’s State Capitalism and World Trade Law*, 63(2) INT’L & COMP. L. Q. 409, 421-426 (2014).

tentatively sought to impose disciplines on SOEs. For example, the EU-Korea FTA includes provisions prohibiting the parties from adopting measures with respect to public enterprises that violate non-discrimination obligations, and requiring that public enterprises be subject to competition laws.¹²⁰ Similarly, US PTAs typically prohibit SOEs from acting in a manner inconsistent with the obligations of the parties under the agreement and ensure non-discriminatory treatment in the sale of goods and services.¹²¹ The TPP, however, goes further by including a 36-page chapter that imposes rules on SOEs ranging from the usual non-discrimination requirements (e.g., SOEs are required to sell products on a non-discriminatory basis and cannot enjoy preferential treatment from governments) to mandates that parties ensure that foreign SOEs do not benefit from jurisdictional immunity abroad and that designated monopolies do not engage in anti-competitive practices.¹²²

3. Regulatory Cooperation

Another emerging trend in more recent PTAs is the incorporation of the type of soft-law mechanisms that are increasingly prevalent in global economic governance.¹²³ The complexities of the various areas of economic regulation, the oft-detailed nature of the issues covered, and the cultural sensitivities attached to regulation mean that traditional forms of international cooperation based on state-led diplomatic negotiations and judicial dispute settlement mechanisms are being complemented by less formal, process-based methods of international cooperation.¹²⁴ International

¹²⁰ Free Trade Agreement, E.U.-S. Kor., arts. 11.4-11.5, Oct. 6, 2010 (accessible at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/>).

¹²¹ Free Trade Agreement, U.S.-Sing., arts. 16.3-16.4, May 6, 2003 (accessible at https://ustr.gov/sites/default/files/uploads/agreements/fta/singapore/asset_upload_file708_4036.pdf).

¹²² Trans-Pacific Partnership chap. 17, Feb. 4, 2016 (accessible at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>).

¹²³ *Id.*; John J. Kirton & Michael J. Trebilcock, *Introduction: Hard Choices and Soft Law in Sustainable Global Governance*, in *HARD CHOICES, SOFT LAW: VOLUNTARIST STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 3, 4 (John J. Kirton & Michael J. Trebilcock eds., 2004).

¹²⁴ Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOV'T & OPPOSITION 159 (2004); Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663 (2005); KERN ALEXANDER, RAHUL DHUMALE, & JOHN EATWELL, *GLOBAL GOVERNANCE*

regulation is increasingly being conducted by “transnational systems of regulatory and administrative measures [...] established through international treaties and more informal networks of cooperation,”¹²⁵ including specialized bodies and committees established by international organizations in order to administer and implement international agreements, transnational networks of national regulatory authorities, international standard-setting bodies, and hybrid public-private organizations.¹²⁶ These developments are now being reflected in PTAs—especially those concluded by developed countries—that envisage the incorporation of administrative governance systems that are intended to promote regulatory dialogue and pave the way for the removal of regulatory divergences that hinder trade.¹²⁷ This is the case with the TTIP, which is due to include a horizontal cooperation chapter that would, *inter alia*, require parties to adopt good regulatory practices (e.g., publication of regulatory agendas and sharing of ex ante and ex post analyses), establish bodies that are specifically tasked with the duty of exchanging information on regulatory activity, and create cooperation frameworks to explore avenues towards mutual recognition or convergence.¹²⁸ In addition, the TTIP envisages the creation of a Regulatory Cooperation Body (RCB) that would publish an annual report reflecting common priorities of the parties and the outcome of past regulatory cooperation activities, monitor implementation of the provisions of the regulatory cooperation chapter, consider new initiatives for regulatory cooperation, prepare joint initiatives for international regulatory instruments, and ensure transparency of regulatory cooperation between parties. The RCB will likely be composed of senior officials and regulators who would work alongside ad hoc working-groups focusing on sector-specific

OF FINANCIAL SYSTEMS: THE INTERNATIONAL REGULATION OF SYSTEMIC RISK 135 (2005).

¹²⁵ Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 16 (2005).

¹²⁶ *Id.*

¹²⁷ For an overview of regulatory cooperation mechanism included in preferential trade agreements (PTAs) see Debra P. Steger, *Institutions for Regulatory Cooperation in New Generation Economic and Trade Agreements*, 39 LEGAL ISSUES OF ECON. INTEGRATION 109 (2012); Tracey Epps, *Regulatory Cooperation and Free Trade Agreements*, in TRADE AGREEMENTS AT THE CROSSROADS 141 (Susy Frankel & Meredith Kolsky Lewis eds., 2014).

¹²⁸ For in-depth analyses of the EU-US Transatlantic Trade and Investment Partnership (TTIP) regulatory cooperation chapter see Alberto Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences*, 18 J. INT'L ECON. L. 625 (2015); Jonathan B. Wiener & Alberto Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory*, 78 LAW & CONTEMP. PROBS. 101 (2015).

regulatory issues. The establishment of specialized bodies consisting of committees of experts meets the need for sector-specific regulation in areas such as chemicals, cosmetics, engineering, medical devices, car safety standards, and services.¹²⁹

A key aim of the regulatory cooperation mechanisms currently envisaged in the TTIP is to create a living agreement to address regulatory trade barriers on an ongoing basis.¹³⁰ The parties intend to use the TTIP to explore possible areas of regulatory convergence and to address extraterritorial effects of regulation. Broadly speaking, the institutional and cooperation frameworks established by the agreement should provide an environment for the development of mutual trust and long-term regulatory dialogue that is an essential prerequisite of regulatory convergence.¹³¹ More specifically, the TTIP will develop cooperation mechanisms in specific sectors to ensure that regulators address the extraterritorial effects of regulation adopted by both sides. Others have also contended that the RCB could serve as a “transatlantic policy laboratory,” enabling parties to learn from each other’s regulatory divergences and experiences and to develop better regulatory approaches.¹³² This is consistent with the idea that regulatory cooperation between advanced economies is beneficial, not just because countries stand to gain more from the removal of regulatory barriers, but also because increased interaction between sophisticated regulatory systems can have a positive effect on regulatory outcomes. The argument goes that, when faced with better regulatory processes, countries will be induced to “improve [their] own regulations in order to face the challenges raised by the partner’s better regulations.”¹³³

While the ambitions of regulatory cooperation mechanisms tend to be substantial, it must be noted that the reality rarely matches these grand ambitions. History suggests that regulatory cooperation within the framework of PTAs is no easy task, even between countries sharing similar

¹²⁹ European Commission, TTIP and Regulation: An Overview (Feb. 10, 2015).

¹³⁰ Karel De Gucht, *Transatlantic Trade and Investment Partnership (TTIP) – Solving the Regulatory Puzzle*, EUR. COMMISSION (Oct. 10, 2013), http://europa.eu/rapid/press-release_SPEECH-13-801_en.htm.

¹³¹ Ioannis Lianos & Johannes Le Blanc, *The ‘trust’ theory of integration, in REGULATING TRADE IN SERVICES IN THE EU AND THE WTO* 15, 46-52 (Ioannis Lianos & Okeoghene Odudu eds., 2012).

¹³² Wiener & Alemanno, *supra* note 126, at 133.

¹³³ Patrick A. Messerlin, *The Much Needed EU Pivoting to East Asia*, 10 ASIA-PAC. J. EU STUD. 1, 5-6 (2012).

levels of economic development.¹³⁴ The European Union and the United States have previously established regulatory cooperation frameworks with modest outcomes at best.¹³⁵ Likewise, although proponents of the TPP originally intended to include numerous sector-specific regulatory cooperation mechanisms in the agreement, these plans were abandoned as a result of irreconcilable differences between the negotiating parties.

C. Emerging Economy PTAs – Maintaining the Status Quo

The emerging economies that acted as leaders of the opposition against developed country reform proposals in the Doha Round have maintained their reluctance to embrace WTO-plus issues and deep integration in their PTAs.¹³⁶ For example, Mercosur—the customs union to which Brazil belongs—has historically adopted a conservative stance towards free trade.¹³⁷ Similarly, although India has signed a number of trade agreements, it is generally limited to market access issues in the area of goods and services sectors in which it holds offensive interests.¹³⁸

The conservatism of emerging market economies was evidenced by the European Union's recent failed attempts to negotiate deep and comprehensive trade deals with these countries. The European Union launched negotiations on a PTA with Mercosur back in 2010. However, despite nine negotiation rounds, the parties have failed to make much headway as Mercosur remains unwilling to make substantial concessions in areas such as services, investment, procurement, and intellectual property. Likewise, the EU-India PTA negotiations launched in June 2007 have stuttered along with no seeming end in sight. India's long list of concerns include fears that the EU TRIPS-plus agenda may constrict its ability to manufacture and sell generic drugs and that the enactment of EU-inspired competition laws would undermine developmental objectives as well as

¹³⁴ Steger, *supra* note 125, at 125.

¹³⁵ See RAYMOND J. AHEARN, *TRANSATLANTIC REGULATORY COOPERATION: BACKGROUND AND ANALYSIS* 16-17 (2009).

¹³⁶ See Razeen Sally, *The Political Economy of Trade Policy Reform: Lessons from Developing Countries*, 2 J. INT'L TRADE & DIPL. 55, 84-85 (2008).

¹³⁷ Renato G. Flores, Jr., *In Search of a Feasible EU-Mercosul Free Trade Agreement*, CTR. EUR. POL'Y STUD. 3-4 (Feb. 25, 2013), <https://www.ceps.eu/system/files/WD%20378%20Flores%20EU-Mercosul%20FTA.pdf>.

¹³⁸ Idesbald Goddeeris & Kalyani Unkule, *The European Union – India Free Trade Negotiations*, in *INDIA IN THE CONTEMPORARY WORLD: POLITY, ECONOMY, and INTERNATIONAL RELATIONS* 231 (Jakub Zajczkowski, Jivanta Schottli, Manish Thapa eds., 2013).

objections to the liberalization of a government procurement market that accounts for a huge chunk of its national GDP.¹³⁹

China's approach somewhat differs. While it does not share the propensity of advanced industrialized nations towards deep integration, it has, since its accession to the WTO, increasingly made use of PTAs as a tool to expand its sphere of influence.¹⁴⁰ Indeed, since its accession to the WTO, China has been very keen to "reshape" the rules of international trade in a manner that best reflects its interests.¹⁴¹ According to data provided by the Chinese Ministry of Commerce, China has concluded fourteen PTAs with neighboring countries and Western European countries (Switzerland and Iceland). China is also currently negotiating or exploring the possibility of negotiating twelve additional agreements, including two mega-regional PTAs: (1) a regional trade agreement with the ASEAN, and (2) a tripartite agreement with Japan and South Korea.¹⁴² The negotiation of such agreements is underpinned by various foreign policy objectives beyond the desire to boost trade. For example, PTAs concluded with ASEAN countries were intended to counter the growing influence of the United States in the region and—in light of South China Sea disputes—to provide some assurance to those countries that China did not represent a military threat.¹⁴³ Other PTAs have aimed to secure access to mineral resources.¹⁴⁴ In such politically-motivated PTAs, it is not uncommon for China to sacrifice its own economic interests by agreeing to terms that are more favorable to its trading partners.¹⁴⁵

¹³⁹ Suman Modwel & Surendra Singh, *The EU-India FTA Negotiations: leading to an Agreement or Disagreement?*, Group d'Economic Mondiale Policy Brief (Jan. 30, 2012).

¹⁴⁰ Rafael Leal-Arcas, *China's Attitude to Multilateralism in International Economic Law and Governance: Challenges for the World Trading System*, 11 J. WORLD INV. & TRADE 266 (2010).

¹⁴¹ Guiguo Wang, *China's FTAs: Legal Characteristics and Implications*, 105 AM. J. OF INT'L L. 508, 508-510 (2011).

¹⁴² *FTA News Release*, CHINA FTA NETWORK, <http://fta.mofcom.gov.cn/english/index.shtml> (last visited Feb. 13, 2017) [<https://perma.cc/3XW3-D6A6>].

¹⁴³ John Ravenhill & Yang Jiang, *China's Move to Preferential Trading: a new direction in China's diplomacy*, 18 J. OF CONT. CHINA 32 (2009).

¹⁴⁴ *Id.* at 33.

¹⁴⁵ For example, the China-Association of Southeast Asian Nations (ASEAN) Free Trade Agreement (FTA) was largely motivated by China's desire to expand its political influence in the region. In order to facilitate that agreement, China agreed to remove obstacles to ASEAN agricultural exports despite the potential for such exports to harm domestic farmers. See John Ravenhill, *supra* note 141, at 31.

The multiplicity of goals pursued by China explains why it has adopted a flexible approach to the negotiation of PTAs, tailoring the content of agreements to the identity and demands of its counterparts.¹⁴⁶ As such, there is no one-size-fits-all policy, but rather a hodgepodge of trade agreements containing provisions that vary significantly from one case to another.

However, Chinese PTAs do bear certain common features. First, they focus on the removal of tariff barriers. In this respect, Chinese PTAs have included WTO plus liberalization commitments, especially in trade sectors such as agriculture, which have proved difficult to liberalize at the WTO level.¹⁴⁷ Conversely, trade liberalization commitments in services are harder to come by, as China is reluctant to expose its nascent services industry to global competition.¹⁴⁸

Second, Chinese PTAs shy away from attempts to include deep regulatory disciplines. Chinese PTAs typically do not contain provisions dealing with public procurement, competition, or free movement of capital, and references to intellectual property regulation are limited to reaffirmations of the parties' commitments to comply with TRIPS. Labor and environmental issues are also typically eschewed, and the few PTAs that do touch on these issues merely refer to the need to comply with existing multilateral agreements.¹⁴⁹ With respect to investment protection, China adopts a flexible approach that is open to incorporating provisions used by partners in international investment agreements in their PTAs. However, China still falls short of the standards set in US PTAs and shies away from making significant liberalization commitments.¹⁵⁰

In short, China's PTAs are generally characterized by a reluctance to go beyond the current regulatory framework provided by the WTO. Although China is willing to make WTO-plus liberalization commitments, these are mostly limited to the area of trade in goods. China's PTAs also tend to be characterized by shallowness. Deep integration is generally avoided, and on

¹⁴⁶ Wang, *supra* note 139, at 498; Nargiza Salisdjanova, US-China Economic and Security Review Commission, *China's Trade Ambitions: Strategy and Objectives behind China's Pursuit of Free Trade Agreements* 15-23 (2015).

¹⁴⁷ Ravenhill, *supra* note 141, at 31.

¹⁴⁸ *Id.* at 34.

¹⁴⁹ Nargiza Salisdjanova, *supra* note 144, at 19.

¹⁵⁰ Axel Berger, German Dev. Inst., *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China following global trends towards comprehensive agreements?* 17-20 (Research Paper, 2013); Fred Bergsten, *A Bilateral Investment Treaty and Economic Relations between China and the US*, in *Towards a US-China Investment Treaty*, PIIE Briefing Paper 15-1, 13 (2015).

the rare occasions that regulatory disciplines are referenced, they are usually either general in nature (e.g., commitments to comply with existing international agreements) or replicate disciplines already developed in PTAs signed by Western economies. There is no attempt to develop new rules and disciplines that would deviate significantly from the PTA models developed by the likes of the European Union and the United States. China's preference for shallow agreements is seemingly being adopted by mega-regional agreements involving China. For example, the RCEP maintains China's emphasis on the enhancement of market access for goods while ignoring most regulatory issues.¹⁵¹

However, despite its apparent distaste for deep integration, the flexibility and pragmatism displayed by China in negotiating PTAs suggests that the country's attachment to shallow integration is by no means set in stone. Where there has been demand from its trading partners, China has opened itself up to the prospect of deep integration.¹⁵² Moreover, there are signs that China is willing to participate in the negotiation of more ambitious and comprehensive trade deals. For example, China has signed PTAs with New Zealand and Korea that address issues such as investment, competition policy, and e-commerce.¹⁵³ China has also signaled its desire to be involved in talks relating to TiSA,¹⁵⁴ and at one point openly considered the prospect of joining the TPP.¹⁵⁵ Such moves can be explained by a number of factors, including China's desire to avoid discrimination by the countries involved in those agreements, China's ambition to contribute to the development of international trade rules, and the need for a spur to China's ongoing reforms in order to make the transition to a market-based economy. However, the United States put a brake on China's ambitions by ruling out the possibility of China joining TPP talks prior to their conclusion, mostly out of fear that China would adversely affect the progress of negotiations and oppose many

¹⁵¹ Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN+6) as Potential Paths Towards Deeper Asian Economic Integration*, 8 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 359, 359-378 (2013); Ming Du, *TPP Agreement – China's Tripartite Strategy*, 18 J. OF INT'L ECON. L. 426 (2015).

¹⁵² Heng Wang, *Features of China's Recent FTA and Their Implications: An Anatomy of the China-Korea FTA*, 11 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 115 (2016).

¹⁵³ Longhyue Zhao, *China Trade Strategy: FTAs, Mega-Regionals and the WTO*, EUR. UNIV. INST. RSCAS POL'Y PAPERS, RSCAS PP 2015/11 at 4 (2015).

¹⁵⁴ *Trade in Services Agreement*, EUROPEAN COMMISSION, http://ec.europa.eu/trade/policy/in-focus/tisa/index_en.htm (last visited Feb. 13, 2017), [<https://perma.cc/7C8G-PFSP>].

¹⁵⁵ Kolsky-Lewis, *supra* note 149, at 372.

of the high regulatory standards typically proposed by the United States.¹⁵⁶

III. EMERGING POINTS OF TENSION IN A FRAGMENTED SYSTEM

A. *Building Blocks or Stumbling Blocks?*

The idea that PTAs represent a threat or a stumbling block to multilateral trade liberalization is based on Jacob Viner's work on the effects of tariff preferences. Viner posited that although PTAs have the effect of increasing trade between parties, they also generally lead to trade diversion, meaning an overall decrease in trade flows.¹⁵⁷ This is because the tariff advantages resulting from the PTA may divert trade to a party to the agreement, even if a non-party is a more efficient producer. The proliferation of PTAs may thus disincentivize efforts to engage in multilateral liberalization. Recognizing the proliferation of PTAs, economists such as Jagdish Bhagwati have argued that the discriminatory liberalization that results from PTAs would discourage countries from engaging in multilateral trade liberalization in order to ensure that the preferential treatment secured by PTAs is not eroded.¹⁵⁸

But the view that PTAs constitute stumbling blocks rather than building blocks to multilateral liberalization is not one that is universally shared amongst economists. Empirical studies indicate that multilateralism and regionalism are endogenous processes insofar as involvement in multilateral trade liberalization tends to encourage countries to enter into PTAs and vice versa.¹⁵⁹ Furthermore, most countries have unilaterally engaged in significant tariff-cutting since the 1980s, making the possibility of trade

¹⁵⁶ Du, *supra* note 149, at 417.

¹⁵⁷ Jacob Viner, *The Customs Union Issue*, in *TRADING BLOCS: ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS* 105 (J. Bhagwati, P. Krishna & A. Panagarya eds., 1999).

¹⁵⁸ Jagdish Bhagwati, *Regionalism and Multilateralism*, in *TRADING BLOCS: ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS* 3-32 (J. Bhagwati, P. Krishna & A. Panagarya eds., 1999); World Trade Report, *The WTO and Preferential Trade Agreements: From co-existence to coherence*, WTO Doc. (2011), at 166-168.

¹⁵⁹ Caroline Freund, *Multilateralism and endogenous formation of preferential trade agreements*, 52(2) *J. INT'L ECON.* 359 (2000); Edward D. Mansfield & Eric Reinhardt, *Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements*, 57(4) *INT'L ORG.* 829 (2003); Kamal Saggi & Halis M. Yildiz, *Bilateralism, multilateralism and the quest for global free trade*, 81(1) *J. INT'L ECON.* 26 (2010).

diversion resulting from tariff-cutting less of a concern.¹⁶⁰ It is also argued that the “stumbling block” approach is based on the outdated assumption that tariff measures remain the biggest barrier to international trade. Research has demonstrated that deep PTAs have, by and large, not lead to trade diversion, and that most have had a largely positive impact on trade exchanges with third-party countries.¹⁶¹

One of the main factors underlying the absence of trade diversion in deep PTAs is that the regulatory discipline of services, competition, and intellectual property protection tend to engender less—if any—discriminatory treatment. The regulatory reforms triggered by deep PTAs are generally adopted in order to establish a more attractive regulatory environment for business. Any regulatory convergence mandated by means of a PTA will presumably be of benefit to both nationals of the contracting parties and to nationals of non-party countries.¹⁶² In fact, some have argued that the promotion of global rules in mega-regionals will produce positive spillovers for third parties and facilitate global trade. For example, with respect to technical standards, the adoption of common standards by countries involved in the TTIP and the TPP means that third parties can subscribe to a single set of standards that will ensure access to the largest economies in the world.¹⁶³

However, this is not to say that the regulatory disciplines included in mega-regionals do not present discriminatory elements. If mega-regional PTAs were to generate mutual recognition agreements between parties instead of pursuing harmonization, this would lead to discrimination and trade diversion, since such arrangements are exclusionary by nature. In addition, the spread of different regulatory preferences through trade agreements holds the potential for discrimination.¹⁶⁴ As major economies

¹⁶⁰ Richard Baldwin, *21st Century Regionalism: Filling the gap between 21st century trade and 20th century trade rules*, WTO Staff Working Paper, No. ERSD-2011-08, 21.

¹⁶¹ Petros Mavroidis, *Always Look at the Bright Side of Non-Delivery: WTO and Preferential Trade Agreements, Yesterday and Today*, 10(3) WORLD TRADE REV. 375, 378-79 (2011).

¹⁶² Jayant Menon, *From Spaghetti Bowl to Jigsaw Puzzle? Fixing the Mess in Regional and Global Trade*, 1(3) ASIAN & THE PACIFIC POL'Y STUDIES 470, 482 (2014); R. Baldwin, *supra* note 20, at 21; B. Hoekman & Petros Mavroidis, *Regulatory Spillovers and the Trading System: Cooperation to Coherence* 8, E15 INITIATIVE (Apr. 2015).

¹⁶³ Jim Rollo, et al., *Potential Effects of the Proposed Transatlantic Trade and Investment Partnership on Selected Developing Countries*, CENTRE FOR THE ANALYSIS OF REGIONAL INTEGRATION AT SUSSEX (2013), <http://r4d.dfid.gov.uk/Output/193679/Default.aspx>.

¹⁶⁴ CHRIS BRUMMER, *MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW AND FINANCIAL ENGINEERING ARE REDEFINING ECONOMIC STATECRAFT* 82 (2014).

increasingly require that PTAs adopt their own regulatory positions, there is a danger that competing regulatory blocs are created. This can have the effect of further entrenching divergent regulatory positions, leading to discriminatory treatment and the undermining of efforts to negotiate solutions at the multilateral level.¹⁶⁵

The materialization of an international trading system divided along the lines of the interests and preferences of major economic powers fits neatly with Burke-White's contention that the international legal system is veering towards a "multi-hub" structure.¹⁶⁶ In this structure, various states can exercise leadership and shape the development of international legal rules by putting forward distinct views of international law, which reflect their national preferences.¹⁶⁷ As less powerful states naturally gravitate towards hubs that best address their own interests, a new form of substantive pluralism will develop, which enhances flexibility and contests the unitary vision of international law based on the preferences of the United States and the European Union.¹⁶⁸ Applied to the context of the international trading system, the multi-hub system suggests the development of—at the very least—two hubs representing differing views of what international trade law should look like in the twenty-first century: (1) the EU and US-backed vision of a trading system that protects assets and facilitates the movement of goods, services, capital, and persons in global value chains; and (2) the BRIC-backed vision of a trading system that echoes GATT 1947 by placing emphasis on state sovereignty and regulatory autonomy.

However, the multi-hub system fails to fully capture recent developments in international trade relations because the competing normative visions being offered by the different hubs are not necessarily exclusive. Subscribing to the rules of one particular hub does not impair one's ability to participate in a separate hub. It is indeed perfectly possible for a state to simultaneously participate in both hub systems, as demonstrated by the fact that many parties to the TPP are also willing partakers in the negotiations of the RCEP. Additionally, China itself has expressed a desire to be involved in the negotiations of plurilateral agreements such as the TiSA and has even countenanced the possibility of

¹⁶⁵ G. Prada & A. Rossi, *The Regulatory Framework of Regional Trade Agreements*, in *MULTILATERAL AND REGIONAL FRAMEWORKS FOR GLOBALIZATION: WTO AND FREE TRADE AGREEMENTS* 175-200 (Wonhyuk Lim & Ramon Torrent eds., 2005).

¹⁶⁶ William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 *HARV. INT'L L. J.* 1 (2015).

¹⁶⁷ *Id.* at 37.

¹⁶⁸ *Id.*

joining the TPP in the past.¹⁶⁹

The long-term ramifications of these developments for the international trading system remain to be seen. One possible scenario is that the hubs provided by the large emerging economies will be unable to shield weaker states from the push towards deeper integration. Because of their bargaining power, the European Union and the United States—as well as other advanced economies—could gradually impose their regulatory preferences on such countries. Instead of the emergence of competing regulatory blocs that undermine multilateralism, what we may see is a trend towards global convergence in line with the EU/US model, except for those countries whose economies are large enough to resist it.¹⁷⁰ This process towards global convergence would accelerate should countries like China choose to join the TPP. Another scenario is the emergence of a more fragmented international trading system where countries select hubs depending on the model of economic integration that best reflects their interests. Developed countries and developing countries seeking to participate higher up the global supply chains may wish to attach themselves to deep and comprehensive mega-PTAs, while those lower down the chain may be tempted to stick to shallow trade agreements that enable them to maintain policy autonomy.

B. Deep Integration and the Loss of Regulatory Autonomy

The incremental diffusion of global regulatory disciplines found in EU and US trade deals may smooth the path for future multilateralization, but it also means that the regulatory agenda in the sphere of international trade law will be set by just a handful of international actors. Here, there is a sense of history repeating itself. As discussed above, one of the main obstacles impeding WTO domestic regulatory reform was the conviction shared by most developing countries that domestic reforms triggered by the conclusion of the various WTO agreements in the Uruguay Round were not necessarily welfare-enhancing.¹⁷¹ Beyond the costs involved in ensuring compliance with WTO law and the lack of resources to effectively carry out such reforms, many of these reforms also seemed purely intended to protect the offensive interests of developed countries. Today, the regulatory disciplines that are being promoted in trade agreements (e.g., intellectual property,

¹⁶⁹ S. Tiezzi, *Will China Join the Trans-Pacific Partnership?*, THE DIPLOMAT (Oct. 10, 2016), <http://thediplomat.com/2014/10/will-china-join-the-trans-pacific-partnership/> [https://perma.cc/KUB3-TTYX].

¹⁷⁰ Baldwin, *WTO 2.0: Governance of 21st Trade*, *supra* note 24, at 281.

¹⁷¹ See, e.g., Finger, *supra* note 37; Gallagher, *supra* note 38.

investment, labor, environment, and competition) are mainly those that were rejected by developing countries in the context of the Doha Round. In the Doha Round, actors like the European Union presented the adoption of deep disciplines as beneficial to developing countries, the idea being that trade liberalization should be underpinned by an overarching regulatory framework that would allow countries to better realize gains from trade liberalization while simultaneously taking into account other non-trade objectives, such as the promotion of environmental and social standards.¹⁷² Similarly, the current wave of trade deals is also being packaged in pro-development language. For example, the former US Trade Representative, Michael Froman, recently put forward the idea that the high level of standards enshrined in the TPP not only reflected the country's interests and values but also underlies a broader reform agenda promoting sustainable development and competitive market reforms."¹⁷³ On the other side of the pond, some have described the TTIP as a "unique chance to structure globalization more fairly [by setting] minimum ecological and economic standards for the entire world."¹⁷⁴

Yet the idea that the uniform regulatory disciplines required under these trade agreements are beneficial to all has long been disputed. When the WTO was still in its infancy, observers such as Roessler were keen to stress that it would be wrong to assume that the harmonization of domestic policies and rules on a global scale would increase efficiency, not least because regulatory divergences between states reflected "differences in values, tastes and circumstances."¹⁷⁵ More recently, the New Development Economics movement has rejected the one-size-fits-all approach adopted in trade politics and called for policies to be tailored towards the particular contexts

¹⁷² *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Towards a global partnership for sustainable development*, at 7, COM(2002) 82 final (Feb. 13, 2002). With respect to the US see Evenett & Meier, *supra* note 53.

¹⁷³ Michael Froman, *U.S. Trade Negotiations Aim to Raise Labor and Environmental Standards - A Conversation on the President's Trade Agenda with Michael Froman*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/trade/us-trade-negotiations-aim-raise-labor-environmental-standards/p35681>.

¹⁷⁴ Dario Sarmadi, *TTIP is 'big bonanza' for developing countries, EU claims*, EURACTIV (Jan. 23, 2016) (Erika Korner trans.), <http://www.euractiv.com/sections/development-policy/ttip-big-bonanza-developing-countries-eu-claims-311507> [<https://perma.cc/5DP4-5YLA>].

¹⁷⁵ Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in *FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE* 22, 46 (Jagdish Bhagwati & Robert E. Hudec eds., 1996).

and needs of developing nations.¹⁷⁶ The experience of developing countries in the implementation of TRIPS serves as a perfect illustration of the need for this more tailored approach. To the extent that technologies protected by intellectual property rights originate mostly from developed countries, TRIPS had the effect of generating revenues for the latter while creating a cost for developing nations who had to pay to access technologies developed elsewhere.¹⁷⁷ In addition, high levels of intellectual property protection have been shown to stunt economic development by impeding the transfer of technologies.¹⁷⁸ Another example concerns the linking of international trade rules and labor rights, which is often suggested by human rights advocates keen to raise global labor standards as well as exporters (mostly from developed countries) wishing to remove the competitive advantages enjoyed by firms who operate in countries where the cost of labor is low.¹⁷⁹

However, the rationale for the imposition of global labor standards in international trade rules is very much disputed. First, from a political economy perspective, requiring an increase in labor standards abroad seems at odds with the idea that trade liberalization is intended to allow countries to exploit their respective comparative advantages. Rather than leveling the playing field, the incorporation of labor standards in international trade rules can be construed as a protectionist move designed to remove one of the very few competitive advantages developing countries have over their developed counterparts.¹⁸⁰ Second, it is not a given that raising minimum labor standards will produce optimal results in developing countries. Developed countries adopt high standards because there is a demand from their constituents to do so and because they can absorb the ensuing costs. In contrast, developing countries are in no position to demand or achieve the

¹⁷⁶ For an overview of literature on New Development Economics, see Michael Trebilock, *Between Theories of Trade and Development: The Future of the World Trading System*, 16 J. WORLD INV. & TRADE 122 (2015). See also Donatella Alessandrini, *WTO at a crossroads: The Crisis of Multilateral Trade and the Political Economy of the Flexibility Debate*, 5 TRADE L. AND DEV. 256 (2013).

¹⁷⁷ SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 9 (2003); Dilip K. Das, *Intellectual Property Rights and the Doha Round*, 8 J. WORLD INTELL. PROP. 33 (2005); Raphael Kaplinsky, *Spreading the gains from globalization: what can be learned from value-chain analysis?* 47 PROBL. OF ECON. TRANSITION 74 (2004).

¹⁷⁸ SELL, *supra* note 175, at 9.

¹⁷⁹ Robert E. Hudec, *Introduction*, in FAIR TRADE AND HARMONIZATION: PRE-REQUISITES FOR FREE TRADE? 1 (Robert E. Hudec & Jagdish Bhagwati eds., 1996).

¹⁸⁰ Göte Hansson, *Trade and Labour Standards*, THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL TRADE POLICY 279, 285 (Kenneth Heydon & Stephen Woolcock eds., 2012).

“trade-off between monetary and non-monetary wealth.”¹⁸¹ These examples illustrate the most problematic aspect of the drive to diffuse ever-increasing standards in trade agreements globally: they are based on the assumption that the policies that worked for advanced economies will necessarily work in different environments. By increasing policy constraints, these standards actually undermine the ability of developing countries to experiment with policies that may better suit their particular circumstances, thus inhibiting their ability to enhance their growth and immersion into the global economy.

It would be wrong to present the loss of policy autonomy resulting from trade agreements as a problem that only affects developing countries. Advanced economies are also adversely affected, and increasingly question the judiciousness of subscribing to international trade agreements that limit their ability to regulate autonomously. Two very clear examples of this can be found in the context of the ongoing TTIP negotiations, first in regulatory cooperation and second in investment protection. The European Union has earmarked financial services as a key area in which it would like to pursue regulatory cooperation with the United States. The goal would be to establish an institutional process through which the parties would work to ensure the implementation of international standards, conduct mutual consultations in advance of new financial measures that may impact the supply of financial services, examine where existing rules may constitute unnecessary barriers to trade, and assess the extent to which their respective rules on financial services are equivalent in outcomes.¹⁸² The main objective of cooperation in this area would be to secure the recognition of equivalence in financial standards. This is of particular importance for EU financial services providers who would like to access the lucrative US market without having to comply with more stringent US prudential rules embodied in the Dodd-Frank Act.¹⁸³ Predictably, however, US trade officials have given such proposals short shrift, namely because of concerns that cooperation may lead to a lowering of existing standards. Recent reports also indicate that negotiations on regulatory cooperation in other

¹⁸¹ GARY BURTLESS ET AL., *GLOBAPHOBIA: CONFRONTING FEARS ABOUT OPEN TRADE* 122 (1998).

¹⁸² *EU - US Transatlantic Trade and Investment Partnership (TTIP): Cooperation on Financial Services Regulation*, EUROPEAN COMMISSION, Jan. 27, 2014, at 5, http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152101.pdf [<https://perma.cc/85JN-XBDF>].

¹⁸³ S. Johnson and J. Schott, *Financial Services in the Transatlantic Trade and Investment Partnership* 4, 5 (Peterson Institute for International Economics Policy Briefs PB13-26, 2013).

sectors (e.g., car safety, chemicals, and pharmaceuticals) have been beset by similar disagreements, and that the parties are currently considering leaving them out of the agreement altogether.¹⁸⁴ The experience of the European Union and the United States in negotiating the TTIP illustrates that even in the context of negotiations between like-minded trade powers, the regulatory mistrust that persists between nations renders any proposal for regulatory convergence or significant cooperation a difficult sell.

Another example of the difficulties in agreeing converging regulatory disciplines in PTAs between advanced industrialized nations can be found in the TTIP and the CETA investment protection chapters. The European Union has faced criticism from the public, non-governmental organizations (NGOs), and politicians, with many arguing that the investment protection standards and the investor-state dispute settlement (ISDS) mechanism will undermine the ability of member states to legislate in pursuit of public interest objectives. Such skepticism fits with the general criticism leveled at bilateral investment treaties in the post-colonial era, which were viewed as being too geared towards liberalization and foreign investment protection enhancement, with no thought given to how the rights of investors may have impacted the ability of host countries to regulate in the public interest. The issue recently arose when the federal government of Wallonia in Belgium threatened to block the signing of the CETA because of concerns associated with the potential impact of ISDS on regulatory autonomy.¹⁸⁵

In sum, the rationale for deep integration through trade agreements is contested both by developed and developing countries. Developed country governments promoting mega-PTAs are increasingly being forced to fend off accusations that these agreements lower regulatory standards and reduce the ability of governments to pursue public interest objectives. At the same time, the experience of developing countries in the WTO has shown that the implementation of certain rules can not only be prohibitively expensive and time-consuming, but can also run counter to the economic and social interests of such countries. With respect to developing countries, the

¹⁸⁴ Bernd Riegert, *Is TTIP in Crisis?*, DEUTSCHE WELLE (Feb. 24, 2016), <http://www.dw.com/en/is-ttip-in-crisis/a-19070989> [<https://perma.cc/3MTH-Y3KC>].

¹⁸⁵ *Wallonia is Adamantly Blocking the CETA*, THE ECONOMIST, 46 (Oct. 22, 2016), <http://www.economist.com/news/europe/21709060-tiny-region-belgium-opposes-trade-reasons-are-hard-understand-wallonia> [<https://perma.cc/C5VF-PZCK>]; Natalia Drozdziak et al., *EU Sets Belgium an Ultimatum on CETA*, WALL STREET JOURNAL (Oct. 23, 2016); Arthur Beesley, *EU and Canada Sign Deal Amid Fears About Future of Trade Policy*, FINANCIAL TIMES (Oct. 30, 2016), <https://www.ft.com/content/450bea68-9d9f-11e6-86d5-4e36b35c3550> [<https://perma.cc/W587-RMYR>].

fragmentation of the international trading system may lessen concerns regarding the loss of policy autonomy. Bilateralism, plurilateralism, and regionalism make sense, not just because of the paralysis currently affecting the WTO, but also because the brand of deep integration being pursued by the likes of the European Union and the United States is better suited to “small group” negotiations between countries that share common interests and preferences.¹⁸⁶ By contrast, developing countries that do not wish to subject themselves to constraining regulatory disciplines can choose not to participate and thus maintain their policy autonomy to develop competitive advantages in certain areas. For example, this could conceivably be achieved by adopting a soft-touch approach to intellectual property protection and enforcement to facilitate the growth of technology intensive industries, or by subsidizing national industries until such time as they can become competitive on the global stage.¹⁸⁷ The downside to fragmentation is that, by effectively circumventing low-income countries from the process, there is a danger that global rules and standards are being set that neither fulfill the needs of third-party countries or the global trading system at large.

C. *What’s Next for the International Trading System?*

Reports of the WTO’s impending demise are, of course, greatly exaggerated. It is true that the multilateral trading system is being contested, but the relative success of the 2015 WTO Nairobi Ministerial Conference¹⁸⁸ shows that it is still an organization with much to offer in the development of international trade rules. For all its flaws and limitations, the WTO remains the centerpiece of global trade governance.¹⁸⁹ The WTO imposes legally binding liberalization commitments and global disciplines in a wide number of key trade related issues, from subsidies and dumping to investment and intellectual property. Moreover, the size of the WTO’s membership and its ability to issue binding rulings means that as a venue for trade regulation, the

¹⁸⁶ Brummer, *supra* note 162, at 81.

¹⁸⁷ Dan Ciuriak & Hasha Varfhana Singh, *Mega-regional Trade Agreements: How Excluded Countries Can Meet the Challenge*, IISD Report 9 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2680215 [<https://perma.cc/VT6L-MFPX>].

¹⁸⁸ World Trade Organization, *Nairobi Ministerial Declaration*, WTO Doc. WT/MIN(15)/DEC, (adopted Dec. 19, 2015).

¹⁸⁹ Simon Lester, *The WTO vs. the TPP*, HUFFINGTON POST (Feb. 5, 2014), http://www.huffingtonpost.com/simon-lester/the-wto-versus-the-tpp_b_5252810.html [<https://perma.cc/HLY2-WBBY>]; Petros Mavroidis, *Dealing with PTAs in the WTO: Falling Through the Cracks Between ‘Judicialization’ and ‘Legalization’*, 14 WORLD TRADE REV., 2015, at s107, s120.

WTO offers certain advantages with which PTAs cannot compete. Any rule negotiated under the WTO will have a wider reach and a bigger impact than those included in PTAs.

But while the WTO remains relevant, one must also recognize that in a world where domestic regulation is becoming a primary focus in trade politics, countries wishing to pursue deep integration will inevitably shift to different and smaller venues. The idea that the WTO, in its current form, could replicate what was achieved in the Uruguay Round is neither realistic nor desirable. It makes sense that advanced economies boasting similar levels of economic development and sharing historical, cultural, and social preferences should pursue deeper forms of integration through PTAs. However, there is no point in corraling poorer countries into signing agreements that they lack the capability, resources, and political drive to implement, given that such regulatory reforms could undermine key public interest objectives and developmental goals. All this is not to say that the WTO should not continue to play an important role in tackling regulatory trade barriers. Indeed, while it seems that the regulatory disciplines included in deep PTAs will not, for the most part, lead to trade diversion, the WTO can help minimize the risk of market segmentation that could potentially result from the entrenchment of clashing regulatory preferences in PTAs. An obvious reform proposal would be for the WTO to fully embrace variable geometry by letting go of the consensus rule under Article X:9 of the WTO Agreement so as to facilitate the conclusion of plurilateral agreements within the WTO.¹⁹⁰ Bernard Hoekman suggests in this regard that the requirement of a two-thirds majority for the opening of negotiations on plurilateral agreements would remove the ability of a small number of WTO members to block negotiations, while at the same time ensuring that issues viewed as problematic by a substantial pool of members would not make their way into WTO law.¹⁹¹ The advantage of plurilateral agreements compared to PTAs is that the former are open to the entire WTO

¹⁹⁰ Andrew Cornford, *Variable Geometry for the WTO: Concepts and Precedents*, UNCTAD Discussion Paper No. 171 (2004), http://unctad.org/en/docs/osgdp20045_en.pdf [<http://perma.cc/F7UM-YMLF>]; Frederick M. Abbott, *Toward a New Era of Objective Assessment in the Field of Trips and Variable Geometry for the Preservation of Multilateralism*, 8 J. INT'L ECON. L. 77, 80 (2005); Craig Van Grassek & Pierre Sauvé, *The Consistency of WTO Rules: Can the Single Undertaking be Squared with Variable Geometry?*, 9(4) J. INT'L ECON. L., 837 (2006); Bernard Hoekman & Petros Mavroidis, *WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements*, 26 EUR. J. INT'L L. 319, 336 (2015).

¹⁹¹ Bernard Hoekman, *Sustaining Multilateral Trade Cooperation in a Multipolar World Economy*, 9 REV. INT'L ORG. 241, 257-58 (2014).

membership, meaning that all WTO Members (irrespective of geographical location and level of development) could potentially participate and contribute to the shaping of rules.

In addition to variable geometry, a number of proposals have been put forward concerning the possibility of developing regulatory cooperation and transparency mechanisms within the WTO framework.¹⁹² As seen in the context of PTAs, by enabling the identification of best regulatory practices through the mutual exchange of information and experiences between regulators, regulatory cooperation mechanisms could help illuminate areas where deep integration could realistically be envisaged at the multilateral or plurilateral level. It could also enhance the capacity of WTO Members to efficiently implement such rules domestically.¹⁹³ Aaditya Mattoo and Hoekman have proposed setting up “Knowledge Platforms” aimed at “fostering a substantive, evidence/analysis of sector

-based discussion of the impact of sector-specific regulatory policies

understanding of where there are large potential gains from opening markets to greater competition, the preconditions for realizing such gains, and options to address possible negative distributional consequences of policy reforms.”¹⁹⁴ Hoekman has also called for the creation of WTO “Supply Chain Councils” that would be tasked with examining supply chains associated with key products and the regulatory policies that could help reduce trade costs.

Finally, it has been suggested that the WTO should use the experience of PTAs in addressing regulatory trade barriers to spot rules and practices that could be exported to the WTO. This could be achieved by increasing the transparency of PTAs at the WTO level. Currently, the WTO’s Transparency Mechanism for Regional Trade Agreements merely requires that the WTO Committee on Regional Trade Agreements (CRTA) receives notification of PTAs. The Committee then delivers a factual description of the content of such agreements to WTO Members, who are permitted to submit questions to the PTA parties who they are obligated to answer. This

¹⁹² See Robert Wolfe, *Regulatory Transparency, Developing Countries and the WTO*, 2 *WORLD TRADE REV.* 157-172 (2003); Bernard Hoekman & Aaditya Mattoo, *Regulatory Cooperation, Aid for Trade and the GATS*, 12 *PAC. ECON. REV.* 399 (2007); Bernard Hoekman et al., *The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation*, 23 *OXFORD REV. ECON. POL’Y* 367 (2007).

¹⁹³ Epps, *supra* note 125, at 149-151.

¹⁹⁴ Bernard Hoekman & Aaditya Mattoo, *Services Trade Liberalization and Regulatory Reform: Re-invigorating International Cooperation*, *THE WORLD BANK, Policy Research Working Paper 5517* at 14 (2011).

process culminates with a formal meeting at which the PTA is discussed, but no assessment is made as to the consistency of the PTA with WTO law.¹⁹⁵ Petros Mavroidis has proposed reforming the transparency mechanism to allow the CRTA to conduct comparative and in-depth analyses of the rules and the impact of PTAs of which it is notified.¹⁹⁶

These proposals are all intended to ensure that the WTO maintains a role in the development of the rules of international trade by addressing regulatory trade barriers in a manner that reflects the interests of the entire WTO membership rather than just those of a few. In the quest to iron out problematic regulatory divergences, the WTO must also develop mechanisms that take into account the need for flexibility when imposing common regulatory frameworks at a global level. Variable geometry, by way of plurilateral agreements, allows reluctant WTO Members to avoid further integration. In all likelihood, however, the rules negotiated in these agreements will be held as global standards to which the reluctant Members will at some point be compelled to subscribe.¹⁹⁷ In light of the problems associated with the one-size-fits-all approach to prescriptive regulation and the high costs of implementing regulatory reforms en masse, it may also be worth considering introducing an element of differentiation within WTO plurilateral agreements. Differentiation would facilitate the integration of developing countries into regulatory frameworks by allowing for their gradual subscription to WTO rules depending on their level of economic development. One fairly straightforward solution would be to draw inspiration from the Reference Paper, which gives WTO members the option to select which specific regulatory principles they wish to be bound by, or even to modify the Reference Paper in their commitments so as to reflect their particular interests and needs.¹⁹⁸

Thomas Cottier has proposed an alternative (or complementary) solution based upon the concept of “graduation,” which allows for the “differential and progressive application of suitable norms commensurable with the level of competitiveness of industries and sector concerned” within

¹⁹⁵ Mavroidis, *supra* note 159, at 377.

¹⁹⁶ Mavroidis, *supra* note 189, at 118-120.

¹⁹⁷ Robert Z. Lawrence, *When the Immovable Object Meets the Unstoppable Force: Multilateralism, Regionalism and Deeper Integration* 3, ICTSD, World Economic Forum (December 2013).

¹⁹⁸ Peter Cowhey & Mikhail Klimenko, *Telecommunications Reform in Developing Countries After the WTO Agreement on Basic Telecommunications Services*, 12 J. INT'L DEV. 265, 275 (2002).

individual WTO members.¹⁹⁹ Graduation would permit countries to progressively sign up to various WTO regulatory principles, rules, and standards, depending on whether they meet a series of predetermined economic thresholds that would take into account the country's level of economic development as well as the state of the industry impacted by the WTO rules in that particular country.²⁰⁰ This may result, for example, in the delayed application of WTO rules by a country determined to not have the capability to implement those rules, or exemptions for certain industries that are not deemed sufficiently competitive within the country.²⁰¹

At the time of writing, there is little to suggest that the WTO is considering any of the aforementioned proposals, or that it is even set to change its modus operandi in a significant way. Nevertheless, the mechanisms explored in this Article could be implemented and incorporated into PTAs. A case in point is the TiSA, whose proponents may wish to consider incorporating flexibility and assistance instruments in favor of developing countries in order to command wider support from the WTO membership. Though broad, many of the pro-competitive regulatory disciplines that are to be included in the TiSA have the potential to significantly undermine regulatory autonomy.²⁰² Providing for differentiation within the TiSA by allowing developing countries to reflect in their schedules the rules to which they wish to be bound provides them with the flexibility to tailor regulatory disciplines to national circumstances and priorities.

An additional factor that has played a key role in undermining efforts towards multilateral trade liberalization in services is the fear harbored by governments that opening domestic markets could prove detrimental to the national economy if not accompanied by the adoption of appropriate regulatory standards to ensure that countries are able to reap the rewards of liberalization and that equity concerns are addressed.²⁰³ In this context, domestic regulatory reform to improve the contestability of markets and

¹⁹⁹ Thomas Cottier, *From Progressive Liberalization to Progressive Regulation in WTO Law*, 9 J. INT'L ECON. L. 779, 810-822 (2006).

²⁰⁰ *Id.* at 807.

²⁰¹ *Id.* at 803-805.

²⁰² B. Melo Araujo, *The Trade in Services Agreement (TiSA): State of Play and Potential Pitfalls*, 7 EUR. Y.B. INT'L ECON. L. 627, 634 (2016).

²⁰³ Bernard Hoekman & Aaditya Mattoo, *supra* note 192, at 10; Bernard Hoekman & Patrick Messerlin, *Liberalising Trade in Services: Reciprocal Negotiations and Regulatory Reform*, World Bank and CEPR, (July 5, 1999); Bernard Hoekman et al., *supra* note 190, at 367.

address equity concerns is a prerequisite for the opening of services markets. The TiSA could accommodate these concerns by establishing legal and institutional frameworks that would ensure that regulatory reforms undertaken by developing countries in compliance with the agreement are facilitated and supported by the membership through technical assistance and capacity building mechanisms.

CONCLUSION

This Article has focused on how the international trading system has struggled to address demands to negotiate regulatory barriers, and the fragmentation of the system that has thus resulted. But this is not the only issue currently undermining multilateral trade governance. The WTO membership is also divided on a number of “traditional” trade issues, from disagreements on farm subsidies between the European Union and China²⁰⁴ to schisms between developing countries on market access issues.²⁰⁵

However, recent events have given supporters of the WTO some cause for optimism. In December 2013, the WTO Members agreed on the so-called Bali Package, which includes deals on key trade-facilitation issues for developing countries such as duty-free and quota-free treatment for all goods originating from the least developed countries. This was followed by an additional package agreed upon in early December 2015 at the WTO’s Tenth Ministerial Conference held in Nairobi, which included a commitment to end export subsidies and expand the plurilateral International Technology Agreement (ITA). WTO Director General Roberto Azevedo claimed that these were historic agreements that demonstrated the organization’s ability to deliver “major, multilaterally-negotiated outcomes.” The chair of the conference, Kenya’s Cabinet Secretary for Foreign Affairs and International Trade, Amina Mohamed, went further, boasting that these agreements had “reaffirmed the central role of the WTO in international trade governance.” However, while the Bali and Nairobi packages are of some significance, especially for developing countries, they do fall short of achieving the grand ambitions of the Doha Round. The packages ignore key issues such as agricultural markets access, domestic subsidies, and anti-dumping measures,

²⁰⁴ Shawn Donnan, *Doha Is Stuck but WTO No Longer Paralysed, Says Roberto Azevedo*, FINANCIAL TIMES (Sept. 28, 2015), <http://www.ft.com/cms/s/0/591f4894-65d6-11e5-a28b-50226830d644.html#axzz3xgxMHEMH> [https://perma.cc/XC4Q-B75R]

²⁰⁵ Greg Rushford, *The WTO Struggles in Nairobi*, WALL STREET JOURNAL (Dec. 21, 2015), <http://www.wsj.com/articles/the-wto-struggles-in-nairobi-1450720701> [https://perma.cc/E49U-TCY7].

and they do little to address demands from developed countries. In fact, US Trade Representative Michael Froman set the prevailing narrative for the Nairobi Ministerial Conference when he called for the membership to move beyond the strictures of Doha.²⁰⁶ It was a message that was reflected in the Nairobi Ministerial Declaration, which recognized that although many members reaffirmed the Doha Development Agenda, others were keen to explore different approaches and issues.²⁰⁷

Whether these new approaches entail a shift away from the single undertaking fixation and towards variable geometry within the WTO remains to be seen. What seems increasingly clear, however, is that a significant portion of the WTO's membership has moved on. Regulatory issues have replaced traditional market access barriers as the main focus of developed-country trade policy, and these countries are perfectly happy to pursue such interests through PTAs. At this stage, it is hard to determine how this "contestation" of the multilateral trade regime will affect the future of the international trading system, for several reasons. First, it is by no means a certainty that these agreements will enter into effect. Mega-PTAs may be used to contest the multilateral trade regime, but mega-PTAs are also being challenged domestically, with trade policy moving to the center of the political debate and trade agreements increasingly blamed—rightly or wrongly—for all types of ills including unemployment and the lowering of regulatory standards.²⁰⁸ Certainly, the growing popularity of anti-trade

²⁰⁶ Michael Froman, *We Are At the End of the Line on the Doha Round of Trade Talks*, FINANCIAL TIMES (Dec. 13, 2015), <https://www.ft.com/content/4ccf5356-9eaa-11e5-8ce1-f6219b685d74> [<https://perma.cc/WB6F-AXMJ>]. See also Shawn Donnan, *World Trade Organisation Moves on from Stalled Doha Round*, FINANCIAL TIMES (Dec. 19, 2015), <https://www.ft.com/content/08968f4e-a682-11e5-9700-2b669a5aeb83> [<https://perma.cc/KD89-5ZRP>]; Biraj Patnaik & Timothy Wise, *Don't Buy the Spin. The WTO Talks in Nairobi Ended Badly and India Will Pay a Price*, GLOBAL DEVELOPMENT AND ENVIRONMENT INSTITUTE AT TUFTS UNIVERSITY (Dec. 24, 2015), <https://scroll.in/article/777647/dont-buy-the-spin-the-wto-talks-in-nairobi-ended-badly-and-india-will-pay-a-price> [<https://perma.cc/GFZ3-MCVT>]; Gary Hufbauer, *The WTO Lives On, the Doha Round Does Not*, VOX (Dec. 29, 2015), <http://www.voxeu.org/article/wto-lives-doha-round-does-not> [<https://perma.cc/BPX9-Y4HP>]; Editorial Board, *Global Trade After the Failure of the Doha Round*, NEW YORK TIMES (Jan. 1, 2016), https://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html?_r=0 [<https://perma.cc/J3XB-4AR2>]; R. Anuradha, *The Many Must Resist the Some*, THE HINDU (Jan. 5, 2016), <http://www.thehindu.com/opinion/op-ed/The-many-must-resist-the-some/article13982576.ece> [<https://perma.cc/4TKE-PH2E>].

²⁰⁷ Nairobi Ministerial Declaration, *supra* note 186, at ¶ 30.

²⁰⁸ Larry H. Summers, *Global Trade Should Be Remade from the Bottom Up*, FINANCIAL TIMES (Apr. 10, 2016), <https://www.ft.com/content/5e9f4a5e-ff09-11e5-99cb-83242733f755>

rhetoric in the European Union and the United States suggests that the likelihood of mega-regionals such as the TTIP being ratified in the short to medium term is remote.²⁰⁹ That being said, the rejection of the TPP and apparent stalling of the TTIP is unlikely to stop the use of PTAs as tools to promote regulatory disciplines that go beyond WTO law. For example, in the EU, whilst the TTIP has faced heavy criticism, the negotiation of similar (in terms of content) but less-publicized agreements such as the EU-Japan PTA, are proceeding without much in the way of public opposition.²¹⁰ Another important mega-PTA, the CETA, has faced some obstruction within the European Union²¹¹ but has since been ratified by the European Parliament and is currently awaiting ratification by Canada before it can be provisionally applied.²¹² With respect to the United States, much of the criticism levelled by the Trump administration against the TPP is based on

[<https://perma.cc/CU92-88XH>]; Dani Rodrik, *A Progressive Logic Trade*, PROJECT SYNDICATE (Apr. 13, 2016), <https://www.project-syndicate.org/commentary/progressive-trade-logic-by-dani-rodrik-2016-04?barrier=accessreg> [<https://perma.cc/B39A-NE5H>].

²⁰⁹ Alan Yuhas, *Congress Will Abandon Trans-Pacific Partnership Deal, White House Concedes*, THE GUARDIAN (Nov. 13, 2016), <https://www.theguardian.com/business/2016/nov/12/tpp-trade-deal-congress-obama> [<https://perma.cc/7Z2T-N4LU>]; Julia Borger, *Transatlantic Trade Deal 'Not Realistic' Under Trump, German Official Says*, THE GUARDIAN (Nov. 15, 2016), <https://www.theguardian.com/world/2016/nov/15/germany-trump-ttip-trade-deal> [<https://perma.cc/ZZ68-36DB>]; Samuel Osbourne, *Angela Merkel Suggests TTIP Trade Deal Won't Be Concluded Under Barack Obama's Presidency*, THE INDEPENDENT (Nov. 17, 2016), <http://www.independent.co.uk/news/world/politics/ttip-on-hold-angela-merkel-barack-obama-trade-deal-latest-a7423446.html> [<https://perma.cc/Z5YL-89YD>]; Demetri Sevastopoulo, *Trump Vows to Renounce Pacific Trade Deal on First Day of Office*, FINANCIAL TIMES, (Nov. 22, 2016), <https://www.ft.com/content/dd98598a-b044-11e6-a37c-f4a01f1b0fa1> [<https://perma.cc/G5QU-Q2C5>].

²¹⁰ Alan Beattie, *Globalization by Stealth: The Quiet Success of EU-Japan Trade Talks*, FINANCIAL TIMES (Nov. 29, 2016), <http://blogs.ft.com/brusselsblog/2016/11/29/globalisation-by-stealth-the-quiet-success-of-eu-japan-trade-talks> [<https://perma.cc/5WMQ-SYKZ>].

²¹¹ Guillaume Van der Loo & Jacques Pelkmans, *Does Wallonia's Veto of CETA Spell the Beginning of the End of EU Trade Policy?*, CEPS COMMENTARY (Oct. 20, 2016), <https://www.ceps.eu/publications/does-wallonia%E2%80%99s-veto-ceta-spell-beginning-end-eu-trade-policy> [<https://perma.cc/E8UJ-73Y4>].

²¹² See European Commission, "European Commission welcomes Parliament's support of trade deal with Canada", 15 February 2017 [<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1624>]. Under EU law only those parts that fall under the exclusive competence of the EU can be applied following ratification by the European Parliament. The Provisions of the Comprehensive and Economic Trade Agreement (CETA) which fall under the EU's exclusive competence must be ratified by each individual Member State before they can enter into force. See Opinion of AG Sharpston in Opinion procedure 2/15, EU-Singapore FTA [2016] ECLI:EU:C:2016:992, para 570.

misgivings concerning traditional market access issues,²¹³ rather than the regulatory component of the agreement. Therefore, as the United States moves towards a bilateral approach to trade agreements, it is fairly likely that future US FTAs will continue to replicate the TPP's approach as far as regulatory issues are concerned. In other words, the venue for the contestation of the multilateral trading system may change, but the substance of that contestation will remain the same.

Second, the outcome of this fragmentation of international trade law and the return to power-based politics is hard to predict. The trade rules proposed by developed countries may eventually be embraced by the large emerging economies and lead to the establishment of a WTO 2.0.²¹⁴ However, they could just as easily further cement existing divisions between developed nations and the countries that feel compelled to align their regulatory standards to developed nation rules, and large emerging economies that are unwilling to subscribe to such rules and low income countries that do not participate in global value chains. In either scenario, the most likely losers from the contestation of the multilateral trade regime will be weaker developing economies, who will not only be excluded from the rule-making process, but will also find themselves with no choice but to adopt regulatory standards that may not address their specific circumstances and needs.

²¹³ John Lyons & William Mauldin, *Trump Places Tall Order on Trade*, WALL STREET JOURNAL (Jan. 24, 2017), <https://www.wsj.com/articles/trump-places-tall-order-on-trade-1485279458> [<https://perma.cc/JDL8-P38H>].

²¹⁴ Baldwin, *WTO 2.0: Governance of 21st Century Trade*, *supra* note 24, at 270–79.