SETTING THE RULES OF THE GAME: DEEP INTEGRATION IN MEGA-REGIONAL AND PLURILATERAL TRADE AGREEMENTS AND THE ROLE OF THE WTO

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1. INTRODUCTION

Since the launch of its Doha Development Round of negotiations (Doha round), the WTO has not had the easiest of times. The 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. But 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. Whilst developing countries remained adamant that the Doha round should focus exclusively on 'development' issues, advanced industrialized economies such as the EU and the US demanded comprehensive reforms on a number of topics. 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 internationalisation 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. However, developing countries have, in the main,

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

These conflicting views go some way to explaining 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 being used to promote the regulatory disciplines rejected by developing countries at the multilateral level. These so-called 'deep' or '21st 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, concluded between developed and developing countries where the former could use their superior bargaining power to push through their regulatory agendas[1]. By using the carrot of enhanced market access, developed countries have been able to commit developing countries to regulatory issues[2]. More recently, however, developed countries have sought to negotiate PTAs which are large in scale, both in terms of economic size and geographical reach, including the so-called '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). These mega-regional PTAs are distinctive not just in terms of their sheer size and the breadth and depth of issues addressed, but also because

[1] P. Drahos, "Weaving Webs of Influence: The United States, Free Trade Agreements and Dispute Resolution" (2007) 41(1*) Journal of World Trade*, 200.

[2] L. Winters, "The WTO and Regional Trade Agreements: Is it all over for Multilateralism?" EUI Working Papers, RSCAS 2015/94, 10.

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) – are being conceived as alternatives to multilateral rule making at the WTO level. The proliferation of 21st 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 paper aims to map 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.

Section 2 provides a descriptive overview of the evolution of the international trading system. It first 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. However, their attempts to introduce regulatory disciplines within the realm of international trade law were not well received by developing country WTO Members, leading 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 section makes use of theoretical frameworks such as 'contested multilateralism' and 'regime complexity' to make sense of this trajectory from an integrated to a fragmented legal system.

Section 3 explores two competing visions for the international trade system – one that would go beyond what is provided in the WTO by disciplining domestic regulation, and another which seeks to maintain the status quo. In particular, this section examines

the type of regulatory disciplines that are being included in PTAs. It first looks at the type of rules that are being included in PTAs concluded by the EU and the US, the main proponents of deep integration at WTO level, and contrasts this with the approach adopted by emerging economies, such as China, which opposed reform proposals submitted by developed countries in the Doha Round. Section 4 then discusses some of the main challenges faced by the international trading system as a consequence of these changes. It 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. Secondly, it looks at an example 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 a number of steps that could be considered 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.

2. EVOLUTION OF THE INTERNATIONAL TRADING SYSTEM

2.1 From shallow to deep integration

The international trading system designed in the aftermath of the Second World War was intended to avoid the national trade restrictive measures of the interwar period, which were widely believed to have been one of the main contributing factors behind the

conflict[3]. The foundation of this international trading system, GATT 1947, was based on the principle of non-discrimination, as embodied by both the most favoured nation (MFN) rule and its complement, the national treatment rule. Although GATT 1947 urged its members to keep trade restrictive measures to reasonably low levels, there was no obligation to reduce them. Instead, it obliged parties to remove measures discriminating between products of the members of the organisation and between domestic products and foreign products. Primarily aiming to promote free trade in goods by focusing on the removal of border measures constituting barriers to trade, such as tariffs and import quotas, it did not concern itself with the content of domestic measures, so long as they did not discriminate against imported products[4]. This model for economic integration – where countries enter into international cooperation arrangements to remove exclusively discriminatory barriers to trade - has been referred to alternatively as 'negative integration') or 'shallow integration'[5].

Negative integration remained the predominant model for the regulation of international trade relations for the next two decades,, with successive rounds of GATT negotiations (Dillon Round and Kennedy Round) focusing essentially on the reduction of tariffs worldwide[6]. However, by the 1970s it had become apparent that trade liberalisation could no longer be seen purely in terms of removing trade barriers at borders, but should also encompass those domestic non-tariff regulatory measures that affect trade. Thanks to the GATT's success in removing tariff barriers, previously overlooked barriers resulting from domestic regulatory measures were exposed. Whilst these behind-the-border measures often sought to achieve legitimate public policy goals,

[3] B. Simmons, "Bilateral Challenges for Multilateral Trade", in E. Newman, R. Thakur, R. and J. Tirman (eds), *Multilateralism under Challenge? Power, International Order and Structural Change* (United Nations University Press 2006), 442-443.

[4] V. Heiskanen, (2004), "The Regulatory Philosophy of International Trade Law" *Journal of World Trade* (2014) 38(1), 1 - 36.

[5] Lawrence, R., A. Bressand and T. Ito*, A Vision for the World Economy: Openness, Diversity and Cohesion*, The Brookings Institution, 1996), 5.

[6] J. Evans J. (2007), *The Kennedy Round in American Trade Policy, The Twilight of the GATT?* (Harvard University Press. 2007).

the use of domestic regulations such as technical barriers to trade (TBTs) – rules regulating the production of products to achieve health, safety and environmental goals - for protectionist purposes[7] was not uncommon. As a result, more recent attempts to liberalize international trade have increasingly moved away from the negative integration approach associated with GATT 1947, focusing instead on 'positive integration' (or 'deep integration') models, where greater emphasis is placed on disciplining domestic regulation, particularly through the development of common or harmonised market rules and policies, from the Tokyo Round negotiations in the 1970s, which introduced minimal and voluntary disciplines in areas such as TBTs, subsidies and public procurement, and culminating with regional and multilateral economic integration arrangements such as the EU's internal market and the WTO agreements[8]This change in approach towards trade liberalisation also reflects a fundamental change in the international trading system from the 1980s onwards, resulting from the advances in transport, logistics and information technology which have increased the global mobility of firms[9]. This "internationalisation of supply chains"[10] has become an increasingly prevalent concern in international trade politics, as a country's ability to attract foreign investment can be negatively impacted by domestic regulation which limits market access. For instance, market access may be impeded by cumbersome establishment or incorporation requirements, by the absence of a fully operational antitrust or competition law system, or even by the lax enforcement of intellectual property laws. Even the existence of regulatory divergence may increase the costs of market access for foreign

[7] WTO, World Trade Report, "Trade and public policies: A closer look at non-tariff measures in the 21st century" (2012), PRESS/667, 41-42.

[8] M. Jovanovic, *International Economic Integration* Second Edition, (Routledge. 1998), p.5.10; V. Heiskanen, supra footnote 4, 5-6.

[9] P. Welfens, "Globalization of the Economy and International Organizations: Developments, Issues and Policy Options for Reform", in R. Tilly and P. Welfens. (eds.) (2000), *Economic Globalization, International Organizations and Crisis Management* (Springer-Verlag. 2000), 13-33.

[10] R. Baldwin R., "WTO 2.0: Global Governance of supply chain trade" CEPR, Policy Insight (2012) No. 64, 5. See also R. Baldwin. "WTO 2.0: Governance of 21st century trade" *The Rev. Int. Organ.*(2014) 9(2), 261-283.

firms and thus place them at a competitive disadvantage compared to domestic market operators[11]. 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"[12]. 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 and a favourable business climate[13] .

The push for deep integration was most potently materialised in the form of the WTO which, as Dymond and Hart explained, "shifted the centre of gravity of international trade rules from negative prescription to positive rule-making [...] The WTO not only requires governments to live up to their GATT commitments, but also to implement specific policies, practices, and procedures"[14] (. The best illustration of the WTO's efforts towards regulatory harmonisation can be found in the Agreement on the Trade Related Aspects of Intellectual Property (TRIPS), which includes minimum standards of protection and enforcement for an extensive list of intellectual property rights (e.g., copyrights, trademarks, patents and geographical indications) that must be incorporated into the domestic legislation of WTO Members[15]. In other words, TRIPS effectively obliges WTO Members to enact a comprehensive IP regulatory system.

There have been subsequent efforts to introduce common regulatory frameworks within the sphere of WTO law. One such example concerns the EU's proposals to negotiate multilateral rules on investment, procurement, competition and trade

[11] R. Lawrence, A Brassard and T. Ito, supra footnote 5, 49-52.

[12] B. Hoekman and M. Kostecki, M. (2001), "Towards Deeper Integration? The 'Trade and' Agenda" in B. Hoekman and M. Kostecki, M. (eds) *The Political Economy of the World Trading System: WTO and Beyond* (Oxford University Press, 2008), 414-414.

[13] R. Baldwin, "WTO 2.0: Governance of the 21st Century" (2014) 9 *Rev. Int. Organ.*, 266.

[14]W. Dymond and M. Hart M. (2000), "Post-Modern Trade Policy, Reflections on the Challenges to Multilateral Trade Negotiations After Seattle", (2000) 34(3) *Journal of World Trade* 22

[15] J. Reichman and D. Lange, "Bargaining around the TRIPS agreement: the case for ongoing public-private initiatives to facilitate worldwide intellectual property transactions"(1998) 9 *Duke J. Comp. & Int'l L.*, 21

facilitation (the Singapore Issues)[16]. Although these issues were initially included in the negotiating agenda of the Doha round in 2001, all but trade facilitation would eventually be removed at the demand of developing countries, most of which were hostile to the idea of being bound by a new set of disciplines which they believed would further undermine their ability to pursue public policy goals and impose onerous implementation costs. Attempts to pursue deep integration at WTO level have thus been consistently frustrated, either by developing country members who see this as an unhelpful distraction from the development agenda, or by a significant portion of the membership at all levels of economic development, who hold concerns about the potential impact of such disciplines on regulatory autonomy.

2.2 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. Morse and Keohane recently devised 'contested multilateralism' as a conceptual framework to make sense of the global trend away from unitary international legal regimes and towards fragmented and diffuse regimes[17]. The concept relates to the practice of using different international institutions to "challenge the rules and practices, or missions of existing multilateral institutions"[18]. The framework posits that where coalitions are dissatisfied with the operation of a particular multilateral regime, these 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

[16] WTO, Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/DEC, para. 20-22.

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 which have together led to the current paralysis affecting the WTO. The first such factor is the diffusion of power in international relations, which results from 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 regime, which allowed the US, flanked by the EU, to push through the establishment of a truly multilateral trading system[19]. However , the subsequent rise of large emerging economies, and in particular the powerful BRIC countries, has caused a fundamental change in the dynamics of international trade relations, insofar as these can no longer be delivered by a duopoly of the EU and the US[20], but must instead accommodate a diverse group of interests[21]. 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 US and the EU, and to mobilise developing country opposition.[22].

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

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[17] J. Morse and R. Keohane, *Contested Multilateralism* (2014)9(4) *Review of international organizations*, 385-412.

[18] Ibid, 387.

[19] S. Ostry, 'The Uruguay Round North-South Grand Bargain: Implications for future negotiations', in D. Kennedy and J. Southwick (eds), *The Political Economy of International Trade Law, Essays in Honor of Robert E. Hudec* (Cambridge University Press, 2002) 299–300.

[20] Z. Laidi, "How Trade became geopolitics" (2008) 25(2) World Policy Journal 56

[21] D. Steger, "The Culture of the WTO: Why it needs to Change?" (2007) 10(3) *Journal of International Economic Law*, 493.

[22] J. Peterson and A. Young, (2006), "The EU and the new trade politics" (2006) (13(6) *Journal of European Public Policy*, 797.

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[23]. 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, where 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[24], 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 to: (i) an already existing forum (regime shifting), or (ii) 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)[25]. 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 others, the authority of the contested institutions will be undermined to such an extent that the competing

[23] B. Hindley, "What subjects are suitable for WTO agreements", in D. Kennedy & J. D. Southwick (eds.), *The Political Economy of International Trade Law* (Cambridge University Press, 2006), 159-159.

[24] J. M. Finger, "Developing Countries in the WTO System: Applying Robert Hudec's Analysis to the Doha Round" (2008) 31(7) *The World Economy* 895-898; S. Cho, "The Demise of Development in the Doha Round Negotiations" (2010) 31 *Texas International Law Journal*, 577-578

[25] B. Kerremans, "What went wrong in Cancun? A principal-agent view on the EU's rationale towards the Doha development round", (2004) 9(3) *European Foreign Affairs Review* 372-373; Kevin P. Gallagher, Understanding developing country resistance to the Doha Round, (2007) 15(1) *Review of International Political Economy*, 62-85; S. Evenett, "Five hypotheses concerning the fate of the Singapore issues in the Doha Round" (2007) 23(3) Oxford Review of Economic Policy, 392-414; V. Aggarwal and S. Evenett, "A Fragmenting Global Economy: A Weakened WTO, Mega FTAs and Murky Protectionism" (2013) 19(4) *Swiss Political Science Review* 562.

institutions become the dominant regime[26]. 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[27]. Such international regime complexes are said to exist where a specific subject area is governed by multiple international legal regimes, which functionally overlap but have no hierarchical rules to solve conflicts between such rules[28]. As explained by Alter and 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[29]. One such option is forum shopping, which allows international actors to pick and choose the legal regime that best suits their interests. Finally, complexity in global governance also creates winners and losers. In this respect, Drezner notes that a key attribute of multilateral rules 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"[30]. 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. Firstly, the availability of different fora increases the bargaining power of major powers, as they can easily withdraw support from institutions that do not suit their agendas[31]. This allows them to either force an agenda in a multilateral setting or to shift the discussion to other fora. Secondly, by weakening existing rules-based systems, regime complexes reduce the legal constraints

[26] Morse and R. Keohane, supra footnote 18, 409.

[27] Ibid.

[28] K. Raustiala and D. Victor, *The Regime Complex for Plant Genetic Resources* 58 (2008) International Organisation 279

[29] K. Alter, and S. Meunier, "The politics of international regime complexity" (2009) 7(1) *Perspectives on politics* 16.

[30] D. Drezner, The Power and Peril of International Regime (2009) 7(1) *Complexity Perspectives on Politics*, 66.

[31] Ibid, 67.

applicable to powerful states[32]. Thirdly, 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[33].

Forum shifting has generally been the instrument of choice for those seeking to contest the WTO. As the likelihood of negotiating regulatory disciplines within the remit of the WTO has receded further into the distance, demandeurs 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 that wish to pursue trade agreements outside the auspices of WTO law. The first option is to pursue "variable geometry" - that is, to negotiate, 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, whilst 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, which requires a consensus decision approving non-MFN plurilateral agreements[34]. In other words, every single WTO Member has the power to veto the creation of a discriminatory plurilateral agreement 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

[32] Ibid.

[33] Ibid.

[34] C. D. Ehlerman and L. 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?" (2005) 8(1) *Journal of International Economic Law*, 60

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 GATT and V of GATS. 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 that the Uruguay Round negotiations were initiated – in fact, the US had paved the way towards their successful completion by concluding a number of bilateral trade agreements in advance, which secured liberalisation reforms and created a groundswell of support for the imminent multilateral trade liberalisation[35]. The US was the first to make the jump away from multilateralism towards bilateralism. This move was embodied by the US's so-called policy of 'competitive liberalisation', which favoured the negotiation of bilateral PTAs[36]. One of the underlying rationales behind this policy was that the US could use its higher bargaining power in the context of bilateral PTA negotiations to push through a US-style approach to economic liberalisation[37]). The term 'competitive' reflected two fundamental aspects of the policy. Firstly, that the US 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 US signed, the more support would be gathered for its positions at WTO level[38]. Secondly, that trading partners would have to compete against each other to gain access to the US market. Indeed, the US's approach to competitive liberalisation was that it would only negotiate

[35] B, Mercurio "TRIPS-Plus Provisions in FTAs: Recent Trends" in L. Bartels and F. Ortino, (eds.) *Regional Trade Agreements and the WTO Legal System*, (Oxford University Press, 2006), 218.

[36] A. Hilaire and Y. Yang,), "The United States and the New Regionalism/Bilateralism" (2005) 38(4) *Journal of World Trade* 603-625.

[37] A. Sbragia, "The EU, the US and trade policy: competitive interdependence management globalisation" (2010) 17(3*) Journal of European Public Policy* 376-377..

[38]S. Evennet and M. Meier, "An Interim Assessment of the U.S. Trade Policy of 'Competitive Liberalization", Universitat St. Gallen, Discussion Paper no. 2007-18, 5.

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 US sought to further increase its leverage in negotiations[39] .

The US's policy of competitive liberalisation 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 US, the EU was forced to reconsider its approach towards the negotiation of PTAs. The shift in policy was crystallised in the 2006 Global Europe strategy, which outlined a new EU strategy with regard to its trade agreements[40]. The policy notes that whilst the EU has focused on the Doha Round, its "main trading partners and priority targets have been negotiating PTAs with [the EU's] competitors"[41] 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"[42]. Therefore, much like the US's competitive liberalisation policy, the EU seeks to enhance its position in comparison to its competitors. The Global Europe strategy is also similar to the US's competitive liberalisation in terms of the ambitious levels of harmonisation being pursued, as it clearly maintains the EU's focus on deeper integration. The EU's position is that, in the absence of any real progress in the Doha Round negotiations, the EU should look to enter into PTAs promoting "deep integration"[43] , which it defines as "WTO-plus in terms of width and depth". Recent studies of PTAs concluded by both the EU and US confirm that they typically include the new deep disciplines which were rejected in the Doha Round[44] . These bilateral PTAs

[39] Ibid, 20.

[40] European Commission, "Global Europe Competing in the World - A contribution to the EU's Growth and Jobs Strategy" COM (2006) 567 final.

[41] European Commission, "Staff Working Document, Annex to Communication from the Commission to the Council: Global Europe: Competing in the World, A contribution to the EU's Growth and Jobs Strategy", Brussels 4 October 2006, COM (2006) final SEC (2006) 1230. 14.

[42] Ibid.

[43] Ibid, 19.

[44] H. Horn, P. Mavroidis, and A. Sapir. "Beyond the WTO? An anatomy of EU and US preferential trade agreements" (2009) Bruegel Blueprint Series 53

are used to expand the regulatory standards favoured by these two trade powers and, in doing so, incrementally ratchet up the regulatory standards of the international trading system[45].

More recently, the EU and the US 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 have been used by the EU and the US 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)[46] and the Trade in Services Agreement (TiSA)[47]. 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 the US and Japan's repeated failed attempts to increase the minimum standards of IP enforcement under TRIPS. 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 endeavour from its inception, and was the subject of heavy criticisms focusing on the lack of transparency of negotiations and the potential of the agreement to undermine fundamental human rights[48]. Although

[45] B. Simmons, supra footnote 3, 445.

[46] European Commission, "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/2011/0380 final - 2011/0167.

[47] European Commission, "Negotiations for a Plurilateral Agreement on Trade in services" 15 February 2013. Available at: http://europa.eu/rapid/press-release_MEMO-13-107_en.htm.

[48] A. Cerda Silva, "Enforcing intellectual property rights by diminishing privacy: how the Anti-Counterfeiting Trade Agreement Jeopardizes the Right to Privacy" (2010) 26 *Am. U. Int'l L. Rev.* 601-636.

an agreement was signed in 2011, only one participant has ratified it to date and, following the refusal of the European Parliament to ratify it, it is now largely considered to no longer be a viable agreement[49].

The idea of a plurilateral trade in services agreement (TiSA) was first mooted by the US and Australia in 2011, in response to the inability to pursue negotiations on services in the context of the Doha Round[50]. The objective was to gather like-minded WTO Members (so-called "Really Good Friends" or "RGFs"[51]) 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[52]. This plurilateral agreement would not only further existing market access commitments but also address new services areas hitherto 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 whilst 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 EU put 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 which could be multilateralised at a later stage"[53].

Mega-regional PTAs differ from the above plurilateral PTAs both in terms of their geographic and substantive coverage. Firstly, mega-regional PTAs are closed

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[49] D. Matthews and P. Žikovská, "The rise and fall of the Anti-Counterfeiting Trade Agreement (ACTA): lessons for the European Union" (2013) 44(6) *International Review of Intellectual Property and Competition Law* 626-655.

[50] S. Y. Peng, "Is the Trade in Services Agreement (TiSA) a Stepping Stone for the Next Version of GATS" (2013) 43 *Hong Kong Law Journal* 614.

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

[52] P. Sauve, "Dr. Jekyll or Mr. Hyde? Reflections on the Trade in Services Agreement (TISA)", Directorate-General for External Policies, 1 July 2013, p.14. Available at: ww.europarl.europa.eu/.../EXPO-INTA_AT(2013)433722_EN.pdf

[53] Supra footnote 47..

agreements that are intended to secure economic integration between specific countries or regions that hold a significant share of global trade and investment. Secondly, mega-regionals are not single issue 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 fuelled by the paralysis of the multilateral process and the desire to address the rise of global value chains. These deals are viewed not just as tools 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 is borne out of the US's decision to pivot its foreign policy towards the Asia-Pacific region in order to counteract the growing influence of China[54].

For the US, the TPP offered not just an opportunity to access the growing and lucrative Asia-Pacific market, but also to alter the power dynamics in Asia by displacing China as the central actor in economic governance in the region. And, as is often the case in trade matters, where US goes, the EU follows. The negotiation of the TPP left the EU 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 seeks to achieve deep liberalisation - one that would set the template for future deep trade disciplines. The EU has recently launched PTA negotiations with Japan and the US (TTIP) in order to mitigate the potential for the TPP to divert trade away from the EU and to ensure that it also has a hand in setting the new disciplines of the international trading system. In the

[54] G. Feylbermayr and R. Aichele, "How to make TTIP inclusive for all? Potential economic impacts of the Transatlantic Trade and investment Partnership", Study for the IFO Institute, 30 August 2015, 25-27; L. Winters, "The WTO and Regional Trade Agreements: Is it all over for Multilateralism?" EUI Working Papers, RSCAS 2015/94, 10.

context of these negotiations, the EU has made it clear that dismantling non-tariff barriers is its primary objective. With regard to the negotiations with Japan, the EU has stated its intention to address disciplines in areas such as "services, investment, procurement, intellectual property rights and regulatory issues"[55] and has demanded the harmonisation of Japan's notoriously sui generis technical, safety and environmental regulations with existing international standards[56]. Whether in the context of the TPP or the TTIP, the discourse adopted by the EU and the US clearly suggests that these agreements are about much more than bypassing the multilateral process and furthering trade liberalisation. Both see the conclusion of these agreements as part of a race with emerging economies, particularly China, to define the future rules of international trade. In this light, the US Trade Representative, Michael Froman, recently stated that through agreements such as the TPP, the US intends to set the "economic rules of the road before others will"[57] so that these rules reflect both the US's economic interests and values. Similarly, the EU's Trade Commissioner acknowledged that "TTIP is about more than that economic boost, though. It is also about who will set global standards for the regulation of goods and services in the 21st century. TTIP would strengthen the hand of Europe and America in that process. And that means strengthening our shared Atlantic values, from the fundamentals of democracy and the rule of law, to key areas such as the environment and social standards"[58].

The EU and US shift towards bilateralism, regionalism and plurilateralism in the area of trade policy is an apt illustration of Drezner's point that regime complexes

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[55] K. De Gucht, "Challenge and Opportunity: Starting the negotiations for Free Trade Agreement between the EU and Japan", 25 March 2013, 2. Available at: http://europa.eu/rapid/press-release_SPEECH-13-256_en.htm.

[56] C. Malmstrom, "EU-Japan FTA: Crafting an Ambitious Deal", 29 May 2015, 3. Available at: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153488.pdf.

[57] M. Froman, "If We Don't Write The Rules Of The Global Economy, Others Will", GE Reports, 6 November 2015. Available at: http://www.gereports.com/amb-michael-froman-if-we-dont-write-the-rules-of-the-global-economy-others-will/.

[58] C. Malmstrom and J. Hill, "Don't believe the anti-TTIP hype – increasing trade is a no-brainer", The Guardian, 16 February 2015. Available at: http://www.theguardian.com/commentisfree/2015/feb/16/ttip-transatlantic-trade-deal-businesses.

generally favour 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 establish global rules by increments.

3. SETTING THE RULES OF GLOBAL TRADE – WHAT'S ON THE MENU?

3.1 Competing visions of the international trading system

As we have seen, both the EU and the US wish to set the rules of global commerce before others, notably BRICs, do it for them. At this stage, it looks as though the US in particular has stolen a march on its competitors by successfully completing the negotiations on the TPP. Should a finalised TTIP be added to the mix, the US could reasonably claim to have set the rules of the road for economic governance in three major economic blocs (Americas, Europe and Asia Pacific). However, it should not necessarily be assumed that these rules will set global benchmarks. Firstly, there is no guarantee that either the TPP or the TTIP will be ratified. For all the zeal of the EU and US 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. Secondly, despite the size of the global share in trade of the TPP's membership, it is unclear whether an agreement that does not include any of the BRIC countries in its membership can truly be seen as the event that may jumpstart WTO negotiations. 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 EU and the US 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 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 reductions, rather than non-tariff barriers and regulatory divergence. This would raise questions about the idea that the US (and the EU) are pulling others along, and that rather than ensuring that their regulatory preferences are seen as global rules and standards, the mega-PTAs are merely consolidating the fragmentation of the international trading system. The following sub-sections examine the types of regulatory disciplines generally included in PTAs concluded by the EU and the US on the one hand, and emerging economies (with a particular focus on China) on the other hand.

3.2 The EU/US model for 21st century trade agreements

3.2.1 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 rejected in the context of 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) and WTO-X rules (obligations relating to topics currently not covered by WTO law)[59]. The EU and the US, 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 promoting transparent and competitive business environments.

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 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 ("Reference Paper") – a GATS instrument that includes a number of regulatory principles that go beyond non-discriminatory concerns. It includes requirements to adopt anti-competitive safeguards and transparent procedures for the granting of licenses, and to establish and maintain independent regulatory authorities. It also recognizes the right of WTO Members to adopt universal service

[59] H. Horn, P. Mavroidis and A. Sapir, supra footnote 44.

obligations and imposes minimum standards regarding interconnection in order to ensure that new entrants to domestic telecommunications markets are able to access existing infrastructure networks. In other words, 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 twentieth century[60]. 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 the EU and US PTAs have tended to include regulatory disciplines on telecommunications services that are largely based on the GATS Reference Paper on Telecommunications[61]. The same practice is found in the area of public procurement. Faced with stiff opposition, proponents of public procurement liberalization at 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 – of which the latest was signed in 2011 – go beyond the mere requirement of non-discrimination, providing an over-arching regulatory framework for public procurement which 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[62]. By requiring their trading partners to sign up to these rules,

[60] A. Lang, *World Trade Law After Neoliberalism: Reimagining Global Economic Governance* (Oxford University Press, 2011), 285.

[61] B. Melo Araujo, "Regulating Services Through Trade Agreements - A Comparative Analysis of Regulatory Disciplines Included in EU and US Free Trade Agreements" (2014) VI(2) *Trade Law & Development* 408-409.

[62] B. Melo Araujo, "The EU's Deep Trade Agenda: Stumbling Block or Stepping Stone Towards Multilateral Liberalisation?" (2013) *European Yearbook of International Economic Law,* 280-281.

the EU and the US hope to incrementally increase support for plurilateral WTO instruments and pave the way for their future multilateralisation.

In the absence of WTO-sanctioned plurilateral rules, proponents of PTAs can pursue other avenues to push through 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 US PTAs have historically tended to require parties to sign up to and comply with various agreements concluded under the auspices of the World Intellectual Property Organisation and which impose requirements that go beyond TRIPS[63]. In the same vein, PTAs regulating labour and environmental issues will usually require compliance with various International Labour Organization conventions and multilateral environmental agreements[64]. 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 Organisation for Standardisation and the United Nations Economic Commission for Europe[65]. 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 EU had proposed the negotiation of a multilateral agreement on competition under the auspices of the WTO. Since it became

[63] M Pugatch, "The international regulation of IPRs in a TRIPs and TRIPs-plus world" in S. Woolcock, (ed.) *Trade and investment rule-making: The role of regional and bilateral agreements* (Tokyo: United Nations University (2006) 177, 187-188; S. Sell, "TRIPS was never enough: vertical forum shifting, FTAS, ACTA, and TPP" (2010) 18 *J. Intell. Prop. L.* 448-475; B. Melo Araujo, "Intellectual Property and the EU's Deep Trade Agenda" (2013) 16(2) *Journal of International Economic Law* 439-474.

[64] R. Grynberg and Q. Veniana, "Labour standards in US and EU preferential trading arrangements" (2006) 40(4) *Journal of World Trade* 619-654.; L. 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" (2015) 6(2) *Global Labour Journal* 221-235.

[65] B. Rigod, "TBT-Plus Rules in Preferential Trade Agreements" (2013) 40(3) *Legal Issues of Economic Integration*, 247-270.; B. Melo Araujo, supra footnote 62, 278.

clear that there was no appetite with the WTO membership for such an agreement, the EU has systematically included competition law chapters in its PTAs which not only require parties to adopt and maintain domestic competition laws but also to 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[66]. With respect to intellectual property, the US has long adopted the practice of including provisions in its PTAs that require signatories to implement extensive reforms of domestic IP regulatory systems in line with the standards ensured under US law[67]. Similarly, the EU is increasingly including provisions in its PTAs that either replicate the content of, or go beyond what is currently provided under EU law[68].

A defining feature of the EU and the US's policy in 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 recognised by the PTAs that preceded it and, if possible, will raise the bar further. The ratcheting up process has been amply demonstrated in the context of intellectual property. 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"[69]. Sell has also demonstrated how the US has made use of bilateral PTAs, ACTA and the TPP to sequentially impose ever increasing standards of intellectual property protection[70]. The process is also evident in other regulatory areas. For instance, in the area of investment, the US has developed model

[66] B. Melo Araujo, supra footnote 62 , 280.

[67] M Pugatch, supra footnote 63.

[68] B. Melo Araujo, supra footnote 63, 439-474.

[69] B. Mercurio, "TRIPS-Plus Provisions in FTAs: Recent Trends" in Bartels, L. and Ortino, F. (eds.) *Regional Trade Agreements and the WTO Legal System* (Oxford University Press, 2006), 236.

[70] S. K. Sell, "TRIPS was never enough: vertical forum shifting, FTAS, ACTA, and TPP" (2010) 18 *J. Intell. Prop. L.*, 447.

provisions for bilateral investment treaties (US Model BIT) which it has successfully spread through an extensive network of bilateral investment treaties and which has also served as a source of inspiration for multiple international investment agreements[71]. In addition, the US is now using mega-regionals to negotiate new high 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[72].

Finally, with respect to services, we have seen how both the EU and the US use PTAs to spread the reach of plurilateral WTO disciplines on telecommunications services. However, these PTAs go beyond these plurilateral WTO rules by: (i) including additional regulatory disciplines that are not found in WTO instruments (e.g., procedural guarantees, transparency, data protection requirements, rules on electronic communications and services, etc); (ii) and by applying similar regulatory disciplines to services sectors which are regulated at WTO level (e.g., postal and courier services and tourism services)[73]. Finally, the TISA is now being envisaged as an opportunity to disseminate the types of disciplines typically included in EU and US PTAs. The EU has already stated that it intends to include disciplines on issues such as "independence of regulators, fair authorisation processes or non-discriminatory access to […] networks"[74] 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 deep PTAs and expand their

[71] N. Lavranos, "The new EU Investment Treaties: Convergence towards the NAFTA model as the new Plurilateral Model BIT text?", (March 29, 2013). Available at SSRN: http://ssrn.com/abstract=2241455.

[72] W. Alschner and D. Skougarevski "The new gold standard? Empirically situating the TPP in the investment treaty universe" CTEI Working Paper 2015-08. Available at: http://graduateinstitute.ch/home/research/centresandprogrammes/ctei/working_papers.html

[73] B. Melo Araujo, supra footnote 61, 409-410.

[74] European Commission, "Memo: Negotiations for a Plurilateral Agreement on Trade in services", 15 February 2013. Available at: http://europa.eu/rapid/press-release_MEMO-13-107_en.htm .

application to other services sectors[75]. This approach appears to be confirmed by the EU's 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)[76]. The objectives pursued by the TISA are, therefore, not too dissimilar to those currently pursued by the EU and the US 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.

3.2.2 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 WTO level. Some of these new regulatory issues are intended to address particular challenges raised by practices adopted by emerging economies, notably China, which are considered to provide such countries with an unfair competitive advantage.

Firstly, 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 US concerning the perceived propensity of certain countries in East Asia to devalue their currencies for protectionist purposes; by preventing national currencies from

[75] P. Sauvé, "A Plurilateral Agenda for Services? Assessing the case for a Trade in Services Agreement", 20 November 2015, NCCR Trade regulation, Working Paper No 2013/29, May 2013.

[76] EU Proposal for an Annex on Financial Services. Available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1133

appreciating, governments are able to improve exports and inhibit imports[77]. China has been identified as the main culprit, with accusations of systematic devaluations of its currency to gain a competitive advantage in international trade and achieve a trade surplus[78]. However, disciplining exchange rate manipulation is a delicate task, as monetary policy has historically been recognized as a matter coming 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 designed to pursue legitimate macro-economic and development objectives[79]. As a result, attempts to regulate exchange rate manipulation have been limited. At WTO level, it is generally acknowledged that currency devaluations are unlikely to fall foul of WTO law[80]. 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"[81]. However, specifying 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 that decision - something which is very difficult to achieve[82].

Given the composition of its membership, the TPP was seen as the perfect opportunity to address exchange rate manipulation. However, the reluctance of TPP states to subject themselves to stringent rules on monetary policy mean that the best that could be achieved was a side agreement between the treasury departments of the TPP

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[77] P. Cwik, "The New Neo-Mercantilism: Currency Manipulation As A Form Of Protectionism" (2011) 31(3) *Economic Affairs* 7-11.

[78] G. Garrett, "G2 in G20: China, the United States and the world after the global financial crisis" (2010) 1(1) *Global Policy* 29-39.; C. F. Bergsten and J. E. Gagnon, "Currency Manipulation, the US Economy and the Global Economic Order" Peterson Institute for International Economics, December 2012, PB12-25, 5.

[79] R. Steiger and A. O. Sykes, "Currency Manipulation and World Trade", (2010) 9 *World Trade Review*, 9, 585.

[80] Ibid, 606-616;

[81] Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39, as amended March 3, 2011, Article 4.

[82] M. Waibel, Retaliating against exchange-rate manipulation" 16 April 2010, VOX, CEPR Policy Portal.

parties whereby these agreed to "refrain from competitive devaluation and [to] not target [the] country's exchange rate for competitive purposes"[83]. This provision is limited on two fronts. Firstly, it maintains the subjective element that is found under IMF rules – that is, devaluations are only prohibited if they seek to provide a competitive advantage. Secondly, although the statement is phrased in legally binding language, 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 manipulates its currency for protectionist purposes. In other words, the commitment to refrain from currency manipulation, whilst seemingly legally binding, remains unenforceable. 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, as a result, serve as a disincentive for the parties to engage in currency manipulation[84].

A further issue coming increasingly to the fore in international trade politics is that of the regulation of state-owned enterprises (SOEs) - in particular, 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[85]. In recent years, a number of challenges have been brought against China for such practices before the WTO dispute settlement mechanism. WTO litigation has centred on the granting of preferential treatment which violates national treatment obligations under GATT or GATS, or subsidies that violate the obligations under the Agreement on Subsidies and Countervailing Measures. However, there are other means employed by

[83] Joint Declaration of the Macroeconomic Authorities of the Trans-Pacific Partnership Countries, paragraph I.
Available at: https://www.treasury.gov/initiatives/Documents/TPP_Currency_November%202015.pdf.

[84] Joint Declaration of the Macroeconomic Authorities of the Trans-Pacific Partnership Countries, paragraph II.

[85] J. Y. Qin, "WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol" (2004) 7(4*) Journal of International Economic Law* 863-919.

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[86]. To try to address some of these issues, certain deep PTAs have 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[87]. Similarly, US PTAs typically require that SOEs do not act 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[88]. The TPP, however, goes further by including a thirty six page chapter that imposes rules on SOEs, which range 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 requirements that parties ensure that foreign SOEs do not benefit from jurisdictional immunity abroad and that designated monopolies do not engage in anti-competitive practices[89].

3.2.3 Regulatory cooperation

A further emerging trend in more recent PTAs is the incorporation of the type of soft law mechanisms that are increasingly prevalent in global economic governance[90]. 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

[86] M. Du, "China's State Capitalism and World Trade Law" (2014) 63 (2) *International and Comparative Law Quarterly* 421-426.

[87] Articles 11.4-11.5 EU-Korea FTA.

[88] See Article 16.3-16.4 US-Singapore FTA

[89] Chapter 17 TPP. Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=eng.

[90] Ibid; J. J. Kirton and M. J. Trebilock, "Introduction: Hard Choices and Soft Law in Sustainable Global Governance", in J. J. Kirton & M. J. Trebilock (eds), *Hard Choices, Soft Law, Voluntarist Stanadards in Global Trade, Environment and Social Governance* (Ashgate, 2004), 4.

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 [91]. International regulation is progressively being conducted by "transnational systems of regulatory and administrative measures [...] established through international treaties and more informal networks of cooperation" [92], which include specialised bodies and committees established by international organisations in order to administer and implement international agreements, transnational networks of national regulatory authorities, international standard-setting bodies and hybrid public-private organisations[93].

These developments are now being reflected in PTAs – especially those concluded by developed countries – which are envisaging 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[94]. This is the case of the TTIP, which is due to include a horizontal regulatory 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

[91] K. Raustala, "The Architecture of International Cooperation: Transgovernmental Networks & The Future of International Law, (2002) *Virginia Journal of International Law*, 43; A.-M. Slaughter, Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks" (2004) *Gov't & Opp.*, 159; S. Casese, "Administrative Law without the State? The Challenge of Global Regulation", *N.Y.U.J. Int'l L. & Pol.*, Vol. 37., 663; K. Alexander, R. Dhumale, & J. Eatwel, *Global Governance of Financial Systems: The International Regulation of Systemic Risk* (Oxford University Press, 2005), 135.

[92] B. Kingsbury, Nico Krisch & R. B Stewart (2005), "The Emergence of Global Administrative Law", (2005) 68(15) *Law and Contemporary Problems*, 16.

[93] Ibid.

[94] For an overview of regulatory cooperation mechanism included in PTAs see: D. Steger, "Institutions for Regulatory Cooperation in New Generation Economic and Trade Agreements" (2012) 39(1) *Legal Issues of Economic Integration* 109-126; T. Epps, "Regulatory Cooperation in Free Trade Agreements: in S. Frankel and M. Kolsky Lewis (eds.) Trade Agreements at the Crossroads (Routledge, 2014) 141-166.

convergence[95]. 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 the 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 the parties. The RCB will likely be composed of senior officials and regulators who will work alongside ad hoc working groups focusing on sector specific regulatory issues. The establishment of specialized bodies working through committees of experts meets the need for specialization in sector-specific regulation in areas such as chemicals, cosmetics, engineering, medical devices, car safety standards and services[96].

A key aim of the regulatory cooperation mechanisms currently envisaged in the TTIP is to create a living agreement through which regulatory trade barriers are addressed on an ongoing basis[97]. The parties intend to use the TTIP to explore possible areas of regulatory convergence and 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 are essential pre-requisites of regulatory convergence[98]. More specifically, the TTIP will develop cooperation mechanisms in specific sectors to ensure that regulators address the extra-territorial effects of regulation adopted by both sides.

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[95] For in-depth analyses of the TTIP regulatory cooperation chapter see: A. Alemanno, "The regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership" Institutional Structures and Democratic Consequences" (2015) 18 *Journal of International Economic Law,* 425-640; J. Wiener and A. Alemanno, The Future of International Regulatory Cooperation: TTIP as a Learning Process Toward a Global Policy Laboratory (December 16, 2015) *Law & Contemporary Problems*, Forthcoming. Available at SSRN: http://ssrn.com/abstract=2704400.

[96] European Commission, "TTIP and Regulation: An Overview" 10 February 2015.

[97] K. De Gucht, "Transatlantic Trade and Investment Partnership (TTIP) – Solving the Regulatory Puzzle", 10 October 2013. Available at: http://europa.eu/rapid/press-release_SPEECH-13-801_en.htm.

[98] I. Lianos and J. Le Blanc, "The 'trust theory of integration', in I. Lianos and O. Odudu. (eds), *Regulating Trade in Services in the EU and the WTO* (Cambridge University Press, 2012), 46-52.

Others have also contended that the RCB could serve as a "transatlantic policy laboratory", enabling the parties to learn from each other's regulatory divergences and experiences and to develop better regulatory approaches[99]. This fits 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 a better quality of regulatory processes and regulation, countries will be induced to "improve [their] own regulations in order to face the challenges raised by the partner's better regulations"[100].

Whilst the ambitions of regulatory cooperation mechanisms tend to be substantial, it must be noted that the reality rarely matches these grand ambitions. Past history suggests that regulatory cooperation within the framework of PTAs is no easy task, even between countries sharing similar levels of economic development[101]. The EU and the US have previously established regulatory cooperation frameworks with modest outcomes at best[102]. Likewise, the proponents of the TPP originally intended to include numerous sector-specific regulatory cooperation mechanisms in the agreement, but the plans were abandoned because of irreconcilable differences between the wide and disparate negotiating parties.

3.3 Emerging economy PTAs – maintaining the status quo

The emerging economies that acted as the leaders of the opposition against developed country reform proposals in the Doha Round have maintained their

[99] J. Wiener and A. Alemanno, supra footnote 95, 133.

[100] P. Messerlin, "The Much Needed EU Pivoting to East Asia", (2012) 10(2*) Asia-Pacific Journal of EU Studies*, 5-6.

[101] D. Steger, supra footnote 94, 125.

[102] See R, Ahearn, "Transatlantic Regulatory Cooperation: Background and Analysis" Congressional Research Service 7-5700, 24 August 2009, 16-17.

reluctance to embrace WTO plus issues and deep integration in their PTAs[103]. Mercosur – the customs union to which Brazil belongs – has historically adopted a conservative stance towards free trade[104]. India has signed a number of trade agreements, but in general these are limited to market access issues in the area of goods and those services sectors in which it holds offensive interests[105]. Such conservatism was laid bare in the EU's recent failed attempts to negotiate deep and comprehensive trade deals with these countries. The EU launched negotiations on a PTA with Mercosur back in 2010, yet despite nine negotiation rounds, the parties have failed to make much headway, with Mercosur unwilling to make substantial concessions in areas such as services, investment, procurement and intellectual property. Likewise, the EU-India PTA negotiations, which were launched in June 2007, have stuttered along with no seeming end in sight. India's long list of concerns include fears that the EU's TRIPS plus agenda may constrict its ability to manufacture and sell generic drugs, concerns that the enactment of EU-inspired competition laws would undermine developmental objectives and objections to the liberalisation of a government procurement market that accounts for a huge chunk of the national GDP[106].

China's approach differs somewhat in that whilst it does not share the attachment 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

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[103] See R. Sally, "The Political Economy of Trade Policy Reform: Lessons from Developing Countries" (2008) 2(2) *The Journal of International Trade and Diplomacy* 84-85.

[104] R. G . Flores, "In search of a feasible EU-Mercosul Free Trade Agreement" CEPS Working Document No. 378/ February 2013 3-4.

[105] I. Goddeeris and K. Unkule, "The European Union – India Free Trade Negotiations" in J. Zajączkowski, J. Schottli, M. Thapa (eds.) *India in the Contemporary World Polity, Economy and International Relations* (Routledge (2013), 231.

[106] S. Modwel and S. Singh, "The EU-India FTA Negotiations: leading to an Agreement or Disagreement?" GEM Policy Brief, 30 January 2012.
Available at: http://www.ecipe.org/publications/eu-india-fta-negotiations-leading-agreement-or-disagreement/.

influence[107]. 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[108]. In accordance with data provided by the Chinese Ministry of Commerce, China has concluded 14 PTAs - with neighboring countries or Western European countries (Switzerland and Iceland) - and is currently negotiating or exploring the possibility of negotiating a further 12 agreements, including two mega regional PTAs: a regional trade agreement with the Association of Southeast Asian Nations (ASEAN) and a tripartite agreement with Japan and South Korea[109]. 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 US's growing influence in the region and, in light of South China Sea disputes, to provide some comfort to those countries that China did not represent a military threat[110]. Other PTAs have been concluded purely to secure access to mineral resources[111]. 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.

The multiplicity of goals pursued by China explains why it has adopted a flexible approach to the negotiation of PTAs, tailoring the content of these agreements depending on the identity and demands of its counterparts[112]. As such, there is no one-size-fits-all policy, but rather a hotchpotch of trade agreements whose provisions may vary significantly from one case to another. However, Chinese PTAs all bear certain

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[107] R. Leal-Arcas, "China's Attitude to Multilateralism in International Economic Law and Governance: Challenges for the World Trading System" (2010) 11(2) *Journal of World Investment and Trade*, 266.

[108] G. Wang, "China's FTAs: Legal Characteristics and Implications", (2011) 105(2) *The American Journal of International Law* 508-510.

[109] See http://fta.mofcom.gov.cn/english/index.shtml.

[110] J. Ravenhill and Y. Jiang, "China's Move to Preferential Trading: a new direction in China's diplomacy" (2009) 18(8) *Journal of Contemporary China* , 32.

[111] Ibid, 33.

[112] G. Wang, "Chinese FTAs: legal characteristics and implications", *American Journal of International Law* (2011) 105(3) 498; N. Salisdjanova, "China's Trade Ambitions: Strategy and Objectives behind China's Pursuit of Free Trade Agreements", US-China Economic and Security Review Commission, 28 May 2015, 15-23.

common features. Firstly, the main focus of these agreements is on the removal of tariff barriers. In this respect, Chinese PTAs have included WTO plus liberalization commitments, especially in the area of goods, including areas such as agriculture, which have proved difficult to liberalize at the WTO level[113]. Liberalization commitments in trade in services are, however, harder to come by, as China is reluctant to expose its nascent services industry to global competition[114]. Secondly, the Chinese PTAs typically shy away from attempts to include deep regulatory disciplines. There are no provisions dealing with public procurement, competition or free movement of capital, whilst references to intellectual property regulation are limited to a reaffirmation of the parties' commitment to comply with TRIPS. Equally, labour and environmental issues are typically eschewed and the few PTAs that do touch on these issues merely refer back to the need to comply with existing multilateral agreements[115]. With respect to investment protection, China adopts a flexible approach, whereby it is open to incorporating provisions that are used by its partners in their international investment agreements in its PTAs, but falls short of the standards set in US PTAs, and shies away from making significant liberalization commitments[116].

In short, China's PTAs are generally characterized by a reluctance to go beyond the current regulatory framework provided by the WTO. Although it is willing to commit to WTO plus liberalization commitments, these are mostly limited to the area of trade in goods. China's PTAs also tend to be characterized by their shallowness. Deep integration is generally avoided and on the rare occasions where regulatory disciplines are referenced, these are either general in nature (e.g., commitments to comply with existing

[113] J. Ravenhill and J. Yiang, supra footnote 110, 31.
[114] Ibid, 34.
[115] N. Salisdjanova, supra footnote 108, 19.
[116] A. Berger, "Investment Rules in Chinese Preferential Trade and Investment Agreements - Is China following global trends towards comprehensive agreements?" German Development Institute, Discussion Paper 7/2013, 17-20; C. Bergsten, "A Bilateral Investment Treaty and Economic Relations between China and the US" in *Towards a US-China Investment Treaty*, February 2015, PIIE Briefing Paper 15-1, 13. Available at: http://www.piie.com/publications/briefings/piieb15-1.pdf.

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 EU and the US. This preference for shallow agreements is seemingly being followed in relation to the mega regionals involving China. By all accounts, the RCEP maintains China's emphasis on the enhancement of market access in goods, whilst ignoring most regulatory issues[117].

However, despite its apparent distaste for deep integration, the flexibility and pragmatism displayed by China in negotiating its 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 to the prospect of deep integration. Moreover, there are signs that China is willing to participate in the negotiation of more ambitious and comprehensive trade deals. It has, for example, signed PTAs with New Zealand and Korea that address issues such as investment, competition policy and e-commerce[118]. It has also signaled its desire to be involved in talks relating to TiSA[119], and at one point openly considered the prospect of joining the TPP[120]. Such moves can be explained by a number of factors, from China's desire to avoid discrimination by countries involved in those agreements and to contribute to the development of international trade rules, to the need for a spur to China's ongoing reforms to make the transition to a market-based economy. In both cases, however, it has been the US that has reportedly put a brake on China's ambitions by ruling out the possibility of it joining talks prior to their conclusion - mostly because of fears that China

[117] M. Kolsky-Lewis, "The TPP and the RCEP (ASEAN+6 as Potential Paths Towards Deeper Asian Economic Integration" *Asian Journal of WTO & International Health Law and Policy* 8.2 (2013) 359-378; M. Du, "TPP Agreement – China's Tripartite Strategy" *Journal of International Economic Law* (2015) 18:2 407 at 426.

[118] L Zhao, "China Trade Strategy: FTAs, Mega-Regionals and the WTO" EUI RSCAS Policy Paper 2015/11 4.

[119] See http://ec.europa.eu/trade/policy/in-focus/tisa/index_en.htm.

[120] M. Kolsky-Lewis, supra footnote 117, 372.

would adversely affect the progress of negotiations and oppose many of the high regulatory standards typically proposed by the US[121].

4. EMERGING POINTS OF TENSION IN A FRAGMENTED SYSTEM

4.1 Building blocks or stumbling blocks?

The idea that PTAs represent a threat or a stumbling block to multilateral trade liberalisation 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 – that is, an overall decrease in trade flows[122]. This is because even if a non-party is a more efficient producer, trade may be diverted to a party because of the tariff advantage resulting from the PTA. The proliferation of PTAs can thus act as a disincentive to efforts to engage in multilateral liberalisation. Noting the proliferation of PTAs, economists such as Jagdhish Bhagwatti have argued that the discriminatory liberalisation that results from PTAs would discourage countries from engaging in multilateral trade liberalisation to ensure that the preferential treatment secured in PTAs are not eroded[123]. But the view that PTAs constitute stumbling blocks rather than building blocks to multilateral liberalisation 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

[121] M. Du, supra footnote 117, 417.

[122] J. Viner, The Customs Union Issue, reprinted in J. Bhagwati, P. Krishna and A. Panagaryia (eds.), *Trading Blocs: Alternative Approaches to Analysing Preferential Trade Agreements*, (MIT Press, 1999). 105.

[123] J. Bhagwati, Regionalism and Multilateralism, in. Bhagwati, P. Krishna and A. Panagaryia (eds.), supra footnote 122, 3–32; WTO, World Trade Report: The WTO and preferential trade agreements: From co-existence to coherence (2011) 166–168

liberalisation tends to encourage countries to enter into PTAs and vice versa[124]. Furthermore, trade diversion through tariff cutting is not so much of a concern given that, in general, most countries have unilaterally engaged in significant tariff cutting since the 1980s[125]. 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 a generally positive impact on trade exchanges with third countries[126]. One of the main factors underlying the absence of trade diversion in deep PTAs is that the regulatory disciplines such as services, competition and IP 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 nationals of third countries[127]. In light of the non-discriminatory features of preferential liberalisation in deep trade disciplines, deep PTAs do not seem to present a particularly significant threat to multilateral liberalisation[128]. Instead, the biggest threat posed by deep

[124] C. Freund, "Multilateralism and endogenous formation of preferential trade agreements", (2000) *Journal of International Economics*, 359; E. D. Mansfield and E. Reinhardt, "Multilateral Determinants of Regionalism: The Effects of GATT/WTO on the Formation of Preferential Trading Arrangements" (2003) *International Organization*, 829; K. Saggi and H. M. Yildiz, "Bilateralism, multilateralism and the quest for global free trade", (2010) *Journal of International Economics,* 26.

[125] R. 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.

[126] P. Mavroidis, P. (2011), "Always Look at the Bright Side of Non-Delivery: WTO and Preferential Trade Agreements, Yesterday and Today" (2011) 10(3) *World Trade Review* 378-379.

[127] J. Menon, "From Spaghetti Bowl to Jigsaw Puzzle? Fixing the Mess in Regional and Global Trade" (2014) 1(3) *Asian and The Pacific Policy Studies* 482; B. Hoekman and P. Mavroidis, "Regulatory Spillovers and the Trading System: Cooperation to Coherence", ICTSD. World Economic Forum, E15 Initiative, .April 2015, 8.

[128] C. Fink and M. Jansen, "Services Provisions in Regional Trade Agreements: stumbling blocks or building blocks for multilateralisation", in R. Baldwin and P. Low (eds.), *Multilateralising Regionalism: Challenges for the Global Trading System* (Cambridge University Press, 2009), 258; P. Mavroisis, "WTO and PTAs: A Preference for Multilateralism (or, the Dog That Tried to Stop the Bus) (2010) 44(5) Journal of World Trade, 1152

PTAs is their potential to spread different regulatory preferences[129]. As major economies increasingly require the adoption by trading partners of their own regulatory positions in PTAs, there is a danger that competing regulatory blocs are created, further entrenching divergent regulatory positions, and undermining efforts to negotiate solutions at the multilateral level[130].

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[131]. 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[132]. 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 US and the EU[133]. Applied to the context of the international trading system, the multi-hub system suggests the development of - at the very least - two hubs articulating differing views of what international trade law should look like in the twenty-first century. On the one hand, 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, on the other hand, the BRIC-backed vision of a trading system which echoes GATT 1947 by placing the emphasis on state sovereignty and regulatory autonomy. However, where the multi-hub system fails to capture recent developments in international trade relations is that the competing

[129] C. Brummer, *Minilateralism: How Trade Alliances, Soft Law and Financial Engineering are Redefining Economic Statecraft* (Cambridge University Press, 2014) 82.

[130] G. Prada and A. Rossi, "The Regulatory Framework of Regional Trade Agreements" in R. Torrent (eds) *Multilateral and Regional Frameworks for Globalization: WTO and Free Trade Agreements,* Korea Development Institute (2005),183.

[131] W. W. Burke-White, "Power Shifts in International Law: Structural Realignment and Substantive Pluralism" (2015) 56(1) *Harvard International Law Journal* 1-79.

[132] Ibid, 37

[133] Ibid.

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 of the TTP's parties are also willing partakers in the negotiations of the RCEP and that China itself has expressed a desire to be involved in the negotiations of plurilaterals such as the TiSA and has countenanced the possibility of joining the TPP. The hubs provided by the large emerging economies are therefore unlikely to shield weaker states from the push towards deeper integration – because of their bargaining power, the EU, the US as well as other advanced economies will likely be able to gradually impose their regulatory preferences on such states. Instead of the emergence of competing regulatory blocs which would undermine multilateralism, what we may be seeing is a trend towards global convergence in line with the EU/US model, with the exception of those countries whose economies are large enough to resist[134]. Viewed from this perspective, the supposed race to set the global rules of international trade is not much of a race at all; rather, it is a slow ineluctable process of grinding down the opposition, one bilateral, one mega-regional and one plurilateral agreement at a time.

4.2 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 multilateralisation, 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, one of the main obstacles towards WTO domestic regulatory reform was the conviction shared

[134] R. Baldwin, supra footnote 13, 281.

by most developing countries, and confirmed by subsequent studies, that domestic reforms triggered by the conclusion of the various WTO agreements in the Uruguay Round were not necessarily welfare enhancing[135]. 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, investment, labour, environment and competition) are, in the main, those that were rejected by developing countries in the context of the Doha Round. And just as in the Doha Round, where the likes of the EU presented the adoption of deep disciplines as beneficial to developing countries – the idea being that trade liberalisation should be underpinned by an overarching regulatory framework that would allow countries to better realise gains from trade liberalisation whilst simultaneously taking into account other non-trade objectives, such as the promotion of environmental and social standards[136] – the current wave of trade deals is also being packaged in pro-development language. For example, the current US Trade Representative, Michael Froman, recently put forward the idea that the high level of standards enshrined in the TPP not only reflects the country's interests and values but also 'underlies a broader reform agenda promoting sustainable development and competitive market reforms'[137]. On the other side of the pond, some have described

[135] See, for example, J. Finger, supra footnote 24; K. Gallagher, supra footnote 25.

[136] European Commission, "Communication "Towards a global partnership for sustainable development", COM/2002/0082 final, 7. With respect to the US see S. Evenett and M Meier, supra footnote 38.

[137] M. 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. Available at: http://www.cfr.org/trade/us-trade-negotiations-aim-raise-labor-environmental-standards/p35681.

the TTIP as a "unique chance to structure globalisation more fairly [by setting] minimum ecological and economic standards for the entire world"[138].

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 Roessler were keen to stress that it would be wrong to assume that the harmonisation 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"[139]. 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 and needs of developing nations[140]. 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 whilst representing a cost for developing nations who must pay to access technologies developed elsewhere[141] In addition, high levels of IP protection have been shown to stunt economic development by impeding the transfer of technologies[142]. Another example concerns the linking of international trade rules and labour rights, which is usually justified by the arguments of human rights advocates keen to raise global labour

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[138] D. Sarmadi, "TTIP is 'big bonanza' for developing countries, EU claims" Euractiv, 23 January 2016. Available at: http://www.euractiv.com/sections/development-policy/ttip-big-bonanza-developing-countries-eu-claims-311507.

[139] F. Roessler, "Diverging Domestic Policies and Multilateral Trade Integration" in J. Bhagwatti and R. Hudec (eds.) *Fair Trade and Harmonization: Prerequisites for Free Trade* (Cambridge: MIT Press 1996) 22 at 46.

[140] For an overview of literature on New Development Economics see M. Trebilock, "Between Theories of Trade and Development: The Future of the World Trading System" *Journal of World Investment and Trade* 16 (2015) 122-140. See also D. Alessandrini, "WTO at a crossroads: The Crisis of Multilateral Trade and the Political Economy of the Flexibility Debate", (2103) 5(2) *Trade Law and Development* 256-285.

[141] S. K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge University Press, 2003), 9; D. Das, "Intellectual Property Rights and the Doha Round", (2005) 8(1) *Journal of World Intellectual Property*, 33-52; R. Kaplinsky, "Spreading the gains from globalization: what can be learned from value-chain analysis?" (2004) 47(2)Problems of Economic Transition, 74-115.

[142] S. Sell, supra footnote 141 9.

standards, or of exporters (mostly from developed countries) wishing to remove the competitive advantages enjoyed by firms operating in countries where the cost of labour is low[143].

However, the rationale for the imposition of global labour standards in international trade rules is very much disputed. Firstly, from a political economy perspective, requiring an increase in labour standards abroad seems at odds with the idea that trade liberalisation is intended to allow countries to exploit their respective comparative advantages. Rather than levelling the playing field, the incorporation of labour 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[144]. Secondly, it is not a given that raising minimum labour 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 are able to absorb the ensuing costs. However, developing countries are generally in no position to demand or achieve the "trade-off between monetary and non-monetary wealth"[145]. These examples illustrate the most problematic aspect of the drive for ever-increasing standards in trade agreements and the ongoing attempts to diffuse such standards globally. They are based on the assumption that the policies that worked for advanced economies will necessarily work in different environments, but by increasing policy constraints, they undermine the ability of developing countries to experiment with and devise policies that may better suit their

[143] R. Hudec, "Introduction", in R. Hudec and J. Bhagwati (eds.), *Fair Trade and Harmonization: Pre-requisites for Free Trade?* (Cambridge MIT Press, 1996) 1

[144] G. Hansson, "Trade and Labour Standards1", in K. Heydon and S. Woolcock (eds.)" *The Ashgate Research Companion to International Trade Policy* (Ashagate, 2012), 285,

[145] G. Burtless, R. Lawrence, R. Litan and R. Shapiro (1998*), Globaphobia: Confronting Fears about Open Trade* (The Brookings Institution, 1998), 122.

particular circumstances and that may enhance growth and immersion into the global economy[146].

It would be wrong to present the loss of policy autonomy resulting from trade agreements as a problem which only affects developing countries. Advanced economies are also feeling the bite and questioning 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; firstly in the area of regulatory cooperation and secondly in the area of investment protection. The EU has earmarked financial services as a key area in which it would like to pursue regulatory cooperation with the US. It would like 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 on 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.[147] The main goal 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.[148] 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 sectors (e.g., car safety, chemicals and pharmaceuticals)

[146] D. Rodrik, *The Globalization Paradox* (New York: Oxford University Press) 176-177; D. Dalle, V. Fossati, and F. Lavopa (2013), "Global value chains and development policies: setting the limits of liberal views on integration into the global economy", *Revista Argentina de Economía Internacional* 1 (2013) 16. Available at: http://www.cei.gov.ar/es/revista-argentina-de-econom%C3%ADa-internacional-n%C3%BAmero-2.

[147] European Commission, *Cooperation on Financial Services Regulation*, 27 January 2014, 5. Available at: http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152101.pdf.

[148] 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).

have been beset by similar disagreements and that the parties are currently considering leaving them out of the agreement altogether[149]. The experience of the EU and the US 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 regulatory disciplines in PTAs between advanced industrialized nations can be found in the TTIP investment chapter. The EU has faced criticism from the public, 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 to pursue public interest objectives. Such skepticism fits with the general criticisms 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 on the rights of host countries to regulate to pursue public interest objectives. To allay the concerns expressed by opponents of the TTIP investment protection chapter and ISDS, in 2014 the EU suspended negotiations to launch on online public consultation where it invited the general public to weigh in on the debate. The feedback received was overwhelmingly negative, with contributors arguing for the extensive revision of the EU's proposed language or the exclusion of the investment chapter in its totality. The EU has reacted by releasing a new text for a proposed investment chapter, which adds safeguards intended to protect the regulatory autonomy of states and significantly revises the operation of the ISDS by including enhanced transparency requirements, a binding code of conduct for arbitrators and an appellate mechanism.

[149] O. Tudor, "TTIP: due for a diet in the New Year resolutions", TouchStone, 29 December 2015. Available at: http://touchstoneblog.org.uk/2015/12/ttip-the-year-ahead/

In sum, it appears that for the first time since the Uruguay Round, the US, followed closely by the EU, may be successfully setting the agenda of global trade negotiations. Through their PTAs, they are expanding the reach of rules and regulatory policies that were either never contemplated or openly rejected in the context of the Doha Round. The foregoing discussion suggests that these '21st century agreements' are not as problematic as some fear them to be. Barring a few exceptional areas such as agriculture, trade diversion resulting from market access commitments is limited because tariffs are already at a very low level[150]. Trade diversion is also not a major concern with respect to rules, as most regulatory disciplines included in these agreements entail the adoption of domestic rules that apply on a non-discriminatory basis. In fact, some have argued that the promotion of global rules in mega-regionals will facilitate global trade. With respect to technical standards, for example, the adoption of common standards by countries involved in the TTIP and the TPP means that third parties can subscribe to a set of standards that will ensure access to the largest economies in the world[151]. However, one problem with setting global rules and standards is that they do not necessarily fulfill the needs of third parties or the global trading system at large. The experience of developing countries in the WTO has shown that not only can the implementation of certain rules be prohibitively expensive and time-consuming, but it can also be against the economic and social interests of countries, depending on their particular circumstances.

[150] R. Baldwin, supra footnote 10, 21.

[151] J. Rollo, P. Holmes, S. Henson, M. Mendez Parra, S. Ollerenshaw, J.Lopez Gonzalez, X. Cirera and M. Sandi, "Potential Effects of the Proposed Transatlantic Trade and Investment Partnership on Selected Developing Countries", Centre for the Analysis of Regional Integration at Sussex (CARIS), University of Sussex, UK, 2013, http://r4d.dfid.gov.uk/Output/193679/Default.aspx.

4.3 What 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 Conference[152] shows that it is still an organisation with much to offer in the development of international trade rules. For all its flaws and limitations, the WTO remains the centrepiece of global trade governance[153]. It imposes legally binding liberalisation 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 its membership and its dispute settlement mechanism that can issue binding rulings means that as a venue for trade regulation, the 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 whilst the WTO remains relevant, there must also be recognition that in a world where domestic regulation is becoming the 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, as we have seen, 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. Equally, there is no point in corralling poorer countries into signing agreements when these may lack the capabilities, resources and political drive to implement regulatory reforms which may, in any case, undermine key public interest

[152] WTO, Tenth WTO Ministerial Conference, Nairobi Ministerial Declaration 19 December 2015, WT/MIN(15)/DEC.

[153] S. Lester, "The WTO vs the TPP", *Huffington Post*, 5 February 2014. Available at: http://www.huffingtonpost.com/simon-lester/the-wto-versus-the-tpp_b_5252810.html; P. Mavroidis, "Dealing with PTAs in the WTO: Falling through the Cracks between Judicialization and Legalization" 14 (2015) *World Trade Review* 120

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, whilst it seems that the regulatory disciplines included in deep PTAs will not, for the most part lead to trade diversion, the WTO can help to minimise the risks of market segmentation which 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[154]. Hoekman suggests in this regard that the requirement of a two-thirds majority for the opening of negotiations on plurilaterals would remove the ability of a small number of WTO Members to block negotiations whilst, at the same time, ensuring that issues that are viewed as problematic by a significantly substantial pool of members would not make their way into WTO law[155]. The advantage of plurilateral agreements, compared to PTAs, is that the former are open to the entire WTO Membership, meaning that all WTO Members (irrespective of geographical location and levels 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 law framework[156]. As seen in the context of PTAs, by

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[154] A. Cornford, "Variable geometry for the WTO: Concepts and Precdents", UNCTAD Discussion Paper No. 171, May 2004 (available at: http://unctad.org/en/docs/osgdp20045_en.pdf); F. M. Abbott, "Toward a new era of objective assessment in the field of trips and variable geometry for the preservation of multilateralism" (2005) 8(1) Journal of International Economic Law 77-100; C. Van Grasstek and Pierre Sauvé "The consistency of WTO rules: can the single undertaking be squared with variable geometry?" (2006) 9(4) *Journal of International Economic Law*, 837-864; B.. Hoekman and P.. Mavroidis, "WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements" (2015) 26(2) *Eur J Int Law*, 319-343.

[155] B. Hoekman, "Sustaining multilateral trade cooperation in a multipolar world economy" (2014) 9 *Rev. Int. Organ* 241,257-258.

[156]See R. Wolfe, "Regulatory transparency, developing countries and the WTO" (2003) 2(2) *World Trade Review* 157-182; B. Hoekman and A. Mattoo, "Regulatory cooperation, aid for trade and the GATS" (2007) 12(4) *Pacific Economic Review* 399-418; B. Hoekman, A. Mattoo, and A. Sapir, "The political economy of services trade liberalization: a case for international regulatory cooperation" (2007) 23(3) *Oxford Review of Economic Policy* 367-391.

enabling the mutual exchange of information and experiences between regulators and the identification of best regulatory practices, regulatory cooperation mechanisms could lead to the determination of areas where deep integration can realistically be envisaged at the multilateral or plurilateral level, and enhance the capacity of WTO Members to efficiently implement such rules domestically[157]. Mattoo and Hoekman have proposed setting up 'Knowledge Platforms' aimed at "fostering a substantive, evidence/analysis-based discussion of the impacts of sector-specific regulatory policies [which] could help build a common 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"[158]. 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 would reduce trade costs. Finally, it has been suggested that the WTO should look to use the experience of PTAs in addressing regulatory trade barriers to spot the rules and practices that could be exported to the WTO. This could be achieved by increasing the transparency of PTAs at WTO level. Currently, the WTO's Transparency Mechanism for Regional Trade Agreements merely requires the notification of PTAs to the WTO Committee on Regional Trade Agreements (CRTA) which delivers a factual description of the content of such agreements to WTO Members, who can then submit questions that must be answered by the PTA parties. The process culminates with a formal meeting where the PTA is discussed, but no assessment is made as to the consistency of the PTA with WTO law[159]. Mavroidis has proposed reforming the transparency mechanism to

[157] T. Epps, supra footnote 94, 149-151.

[158] B. Hoekman and A. Mattoo, "Services Trade Liberalization and Regulatory Reform: Re-invigorating International Cooperation", World Bank, Policy Research Working Paper 5517, 14.

[159] P. Mavroidis, supra footnote 126, 377.

allow the CRTA to conduct comparative and in-depth analyses of the rules and the impact of PTAs of which it is notified[160].

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 which reflects the interests of the entire WTO membership rather than those of just a few. In this quest to iron out problematic regulatory divergences, the WTO must also bear in mind the need to put in place 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 WTO Members that are reluctant to engage in further integration to stay behind, but in all likelihood, the rules negotiated in these agreements will be held as global standards to which they will at some point be compelled to subscribe[161]. 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 developing country accession into regulatory frameworks by allowing for the gradual subscription of WTO rules depending on the 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[162]. Cottier has proposed an alternative (or complementary) solution, which would entail implementing the concept of 'graduation', relating to the "differential and progressive application of suitable norms commensurable

[160] P. Mavroidis, supra footnote 153, 118-120.

[161] R. Z. Lawrence, "When the Immovable Object Meets the Unstoppable Force: Multilateralism, Regionalism and Deeper Integration", ICTSD, World Economic Forum, December 2013, 3

[162] Peter Cowhey and Mikhail Klimenko, "Telecommunications reform in developing countries after the WTO agreement on basic telecommunications services" (2002) 2 *Journal of International Development*, 275.

with the level of competitiveness of industries and sector concerned"[163] in individual WTO Members. Graduation would allow countries to progressively sign up to the various regulatory principles, rules and standards set at WTO level, depending on whether they met a series of pre-determined economic thresholds which would take into account the level of economic development of the country and the state of the industry affected by the WTO rules in that particular country[164]. This may result, for example, in the delayed application of WTO rules by a country where it has been determined to not have the capability to implement those rules, or the exemption of the application of such rules to certain industries which are not deemed sufficiently competitive within the country[165]. Finally, a differentiated approach to rule making at WTO level should also reflect the fact that the welfare effects of regulatory disciplines are highly contingent on institutional and regulatory capacities. In this respect, a number of proposals have been advanced to incorporate an aid for trade component within the WTO, which would provide developing countries with financial and technical assistance and capacity building programs to facilitate the implementation of regulatory reforms[166].

At the time of writing, there is little to suggest that the WTO is considering any of the above mentioned perform proposals or, indeed, that it is set to change its modus operandi in a significant way in the short to medium term. But there is no reason why, in the meantime, some of the mechanisms explored in this discussion could not already be incorporated in PTAs. A case in point is the TiSA, whose proponents may wish to consider incorporating flexibilities and assistance instruments in favour of developing countries if they are to command wider support from the WTO Membership. Whilst broad, many of the pro-competitive regulatory disciplines that are to be included in the

[163] T. Cottier, "From Progressive Liberalization to Progressive Regulation in WTO Law" (2006) 9(4) *Journal of International Economic Law* 779-821

[164] Ibid, 807.

[165] Ibid, 803-805.

[166] B. Melo Araujo, "The Trade in Services Agreement (TiSA): State of Play and Potential Pitfalls" (2016) *European Yearbook of International Economic Law*. Forthcoming.

TiSA have the potential to significantly undermine regulatory autonomy[167]. Providing for differentiation within the TiSA by allowing developing countries to inscribe 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. A further factor that has played a key role in undermining efforts towards further multilateral liberalization of trade in services is the fear harboured by governments that the opening of 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 liberalisation whilst also ensuring that equity concerns are addressed[168]. In this context, domestic regulatory reform improving the contestability of markets and addressing equity concerns is a pre-requisite for the opening of services markets. The TiSA could accommodate these concerns by establishing legal and institutional frameworks that would ensure that regulatory reforms conducted by developing countries as a result of compliance with the agreement are facilitated and supported by the membership through technical assistance and capacity building mechanisms.

5. SOME CONCLUDING REMARKS

This paper has focused on how the international trading system has struggled to address demands to negotiate regulatory barriers, and the fragmentation of the system which has resulted from this. But this is not the only issue currently undermining multilateral trade governance. The membership is also divided on a number of "traditional" trade issues, from disagreements on farm subsidies between the EU and

[167] M. Krajewski, *National Regulation and Trade Liberalisation in Services* (Kluwer Law International, 2003), 176; S. Woolcock, "EU Policy on Preferential Trade Agreements in the 2000s: A Reorientation towards Commercial Aims"(2014) 20(6) *European Law Journal* 727-729.

[168] B. Hoekman and A. Mattoo "Services Trade Liberalization and Regulatory Reform: Re-invigorating International Cooperation", World Bank, Policy Research Working Paper 5517, p.10; B. Hoekman, P.A. Messerlin, "Liberalising Trade in Services: Reciprocal Negotiations and Regulatory Reform" World Bank and CEPR, July 5 1999; B. Hoekman, A. Mattoo & A. Sapir, "The political economy of services trade liberalization: a case for international cooperation?" (2007) *Oxford Review of Economic Policy*, 367.

China[169] to fallings out between developing countries on market access issues[170]. Recent events had, however, given supporters of the WTO some cause for optimism. In December 2013, the WTO Members agreed the so-called Bali package, which includes deals on key issues for developing countries, such as trade facilitation and duty-free, quota-free treatment for all goods originating from least developed countries. This was then followed by a further package which was agreed in early December 2015 at the WTO's Tenth Ministerial Conference held in Nairobi, and 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". Whilst the Bali and Nairobi packages are not negligible, especially for developing countries, they fall some way short of achieving the grand ambitions of the Doha round, as key issues such as agricultural markets access, domestic subsidies, and anti-dumping were left untouched, and do little to address demands from developed countries. In fact, the prevailing narrative for the Nairobi Ministerial Conference was set by the US Trade Representative, Michael Froman, when he called for the membership to move beyond the strictures of Doha[171]. It was a message that was reflected in the Nairobi

[169] S. Donnan, "Doha is stuck but WTO no longer paralysed, says Roberto Azevedo" *Financial Times* , 28 September 2015. Available at: http://www.ft.com/cms/s/0/591f4894-65d6-11e5-a28b-50226830d644.html#axzz3xgxMHEMH.

[170] G Rushford, "The WTO struggles in Nairobi", *Wall Street Journal*, 21 December 2015. Available at: http://www.wsj.com/articles/the-wto-struggles-in-nairobi-1450720701

[171] M. Froman, "We are at the end of the line on the Doha Round of trade talks", *Financial Times,* 13 December 2015. See also S. Donnan, "World Trade Organisation moves on from stalled Doha round", *Financial Times*, 19 December 2015; B. Patnaik and T. 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, 24 December 2015 (available at: http://us5.campaignarchive1.com/?u=74907371d448da77287940e4d&id=738bdd887a&e=516605b62f); G. Hufbauer, "The WTO lives on, the Doha Round does not" Vox, 29 December 2015. Available at:

Ministerial Declaration, which recognized that although many members reaffirmed the Doha Development Agenda, others were keen to explore different approaches and issues[172].

Whether these new approaches entail a shift away from the single undertaking and towards variable geometry within the WTO remains to be seen, but what seems increasingly clear, at this stage, 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 countries' trade policy, and these countries are perfectly happy to pursue these interests through PTAs. 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 EU and the US is better suited to 'small group' negotiations between countries that share common interests and preferences[173]. However, the outcome of this fragmentation of the international trading system and the return to power-based politics is hard to predict. The rules incorporated in the TTIP and TPP may eventually be embraced by the large emerging economies and lead to the establishment of a WTO 2.0[174], but they could just as easily further existing divisions with, on the one side, developed nations subscribing to particular rules and, on the other side, large emerging economies who are unwilling to subscribe to such rules[175] . In either scenario, the greatest losers from the progressive marginalization of a multilateral system are likely to be weaker developing economies, who will not only be excluded from the rule-making process, but also find themselves

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http://www.voxeu.org/article/wto-lives-doha-round-does-not; "Global Trade after the Failure of the Doha Round" *New York Times*, 1 January 2016; R. Anuradha, "The many must resist the some", *The Hindu*, 5 January 2016.

[172] WTO, Nairobi Ministerial Declaration adopted on 19 December 2015: WT/MIN(15)/DEC., para 30.

[173] C. Brummer, supra footnote 129, 81.

[174] R. Baldwin, supra footnote 13, 270-279.

[175] R. Z. Lawrence, supra footnote 161, 3

with no choice but to adopt regulatory standards that may not address their specific circumstances and needs.