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**Research Report**

## Mega-regional trade agreements: Implications for the African, Caribbean and Pacific countries

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# MEGA-REGIONAL TRADE AGREEMENTS: IMPLICATIONS FOR THE AFRICAN, CARIBBEAN, AND PACIFIC COUNTRIES

By Peter Draper, Simon Lacey and Yash Ramkolowan

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**ACRONYMS**

AGOA	African Growth and Opportunity Act
APEC	Asia Pacific Economic Cooperation
CARICOM	Caribbean Community
CGE	Computerised General Equilibrium Analysis
EBA	Everything But Arms
EC	European Commission
EPA	Economic Partnership Agreement
EU	European Union
FTA	Free Trade Agreement
FTAAP	Free Trade Agreement Asia Pacific
GIs	Geographic Indications
GSP	Generalised System of Preferences
LDCs	Least Developed Countries
MRAs	Mutual Recognition Agreements
OECD	Organization for Economic Cooperation and Development
PNG	Papua New Guinea
RCEP	Regional Cooperation in Asia and the Pacific
RIAs	Regulatory Impact Assessments
SPS	Sanitary and Phytosanitary standards
SOEs	State Owned Enterprises
TPA	Trade Promotion Authority
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
USA	United States of America
WTO	World Trade Organization

## EXECUTIVE SUMMARY\*

FOR MANY YEARS the World Trade Organization's (WTO) Doha round negotiations have been in the doldrums, with little apparent prospect of success for the single undertaking that lies at its foundation. In the wake of the ninth WTO ministerial conference in Bali, in December 2013, there is renewed optimism that the WTO can deliver, and that something could still be made of the round. The time is therefore right for member states to strategically reappraise their positions in the round, in the context of their overarching domestic and regional trade strategies.

Central to any appraisal is the new geopolitical reality represented by the free trade agreements (FTAs) being negotiated by the major industrial powers. Led by the United States of America (USA), the Trans Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) are wide in scope, deep in ambition, and laden with many implications for non-party states and for the global trading system. Partly a product of the impasse in the WTO, these potential agreements have also sucked negotiating energy out of the WTO, reducing the focus on bringing the Doha round to a conclusion. These FTAs are also a product of the geopolitical rise of China, to the point where it is not far from asserting leadership of the global trading system. Therefore, the USA and its European Union (EU) counterparts are also driven by their own geopolitical imperative of locking in access to key markets and regions, a thrust that has direct implications for ACP member states. Not surprisingly China, and other major developing economies, are responding with initiatives of their own, such as the Regional Cooperation in Asia and the Pacific (RCEP) negotiations. Hence there is renewed impetus behind FTA negotiations across the world.

The paper explores these issues. The first section defines the term "mega-regional" FTA, focusing on those which involve three or more countries; constitute a quarter of world trade or more; and entail deep, behind the border regulatory commitments. By this definition the scope of the paper is confined to analysing the TPP and the TTIP. It then reviews the various publicly available impact assessments on those two negotiations, from the standpoint of their potential economic impacts on ACP countries. Generally the studies concur that the effects of tariff liberalization on negotiating member states will be modest. Similarly there is some concurrence that trade diversion impacts on outsiders will also be relatively small, particularly for the ACP since they do not directly compete with those party to the talks although some countries are likely to suffer from preference erosion in key commodities, limited by the fact that tariff barriers in the EU and US markets are already low. Nonetheless, some studies argue that trade creation impacts may outweigh those of trade diversion, yielding net positive gains. All studies concur that removal of non-tariff barriers to trade, particularly through regulatory harmonization, will have the most significant impacts both on parties and non-parties, although the effects are very difficult to measure let alone predict. Some worry that standards will be raised so high that non-parties will be locked out of erstwhile markets; others argue that mutual recognition backed up by extension of conformity assessments will increase market access substantially. Either way there is concurrence that regulatory standards negotiations are very much here to stay as part of the modern trade diplomacy landscape; a fact that the ACP member states have to adapt to.

The next section unpacks the regulatory agenda in play in both the TPP and the TTIP. This is a detailed assessment, and the issues vary from negotiating area to negotiating area so the reader is invited to read those sections of interest to him or her. Suffice to say that the agenda is very complex and wide-ranging, and is no doubt stretching the capacities of Asia-Pacific countries participating in the TPP in particular. Clearly the ACP countries are some distance

– depending on the sub-region – from being able to absorb such complexity never mind implement the outcomes. Therefore, it is an agenda that bears close watching. The key to understanding how it may unfold is undoubtedly the TPP negotiations, since these are ahead of the TTIP by a long way. While the USA by no means has things all its own way in the TPP negotiations, and the final outcome will not be as ambitious as those found in a “typical” US bilateral FTA, the USA will undoubtedly press its negotiating template on the EU to the extent possible. We have tried to highlight where these templates differ in important respects.

The third section briefly elaborates potential outcome scenarios for these two mega-regionals. It is important to understand how they will unfold, since under these scenarios the strategic implications for the ACP would vary substantially. In the full success scenario the forces of competitive liberalization would march on triumphant, and the regulatory agenda would manifest strongly in the WTO and in demands for reciprocity from the ACP in bilateral or regional settings down the line. The ACP would find this difficult to resist. Under a partial success scenario, the one we regard as most likely, important aspects of the regulatory agenda and trade impacts described above would manifest, but western hegemony over the global trading system would not have been decisively reasserted. This would offer a “balance of power” prospect to the ACP, nuanced according to sub-region and degree of exposure to Chinese influence in particular. But the search for reciprocity in bilateral trade relations would be moved up the radar screen of the major developed countries, with attendant implications for preference schemes. If the failure scenario manifests then the implications just described would manifest much quicker and with more intensity. Furthermore, and particularly if the current Chinese economic reform programme is successful, ACP countries would have to face up to a China dominated trading system earlier, perhaps, than previously anticipated.

The final section then lays out policy options for the ACP in light of the scenarios described. The thread running through them is that the “do nothing” option does not seem to be available, since all scenarios entail major changes to the status quo, and none we can think of that would result in positive gains to inaction. Hence we urge ACP countries to grasp the regulatory and trade reform nettle, at three levels. The key is the unilateral level. We recommend that each ACP member state conduct its own regulatory reform review in light of what is on the table in the mega-regionals, and calibrate domestic reforms accordingly and sensitive to capacity and political economy constraints. At the regional level we advocate, where feasible, a sequenced approach: prioritise regulatory integration tailored to regional realities; then negotiate FTAs with small, less threatening developed countries in order to pioneer approaches and harness domestic implementation institutions to the effort; then conclude reciprocal arrangements with the major powers. Of course this is an ideal type scenario, nonetheless it strikes us as being the most sensible strategic approach given the institutional weaknesses manifest in most ACP states. Finally, in the WTO we advocate a policy of constructive engagement through participating in working groups established to explore new regulatory issues, and preparing the groundwork for their subsequent incorporation by negotiation into the multilateral trading system. That process of incorporation is most likely to involve plurilateral approaches, so that the single undertaking principle will have to be revisited and potentially abandoned. Since the WTO remains central to defending ACP trade interests we therefore advocate that ACP states conditionally support plurilateral negotiations, ensuring that their interests will be accommodated by withholding consent until such time as concrete and enforceable undertakings are in place.

\* The research for this paper was funded by the ACP MTS programme; the paper was presented at a high level meeting of ACP Ambassadors in Geneva that took place January 21-22, 2014.

## 1. INTRODUCTION

UNTIL THE RECENT Bali Ministerial meeting of the World Trade Organization (WTO) the Doha round was completely deadlocked. Consequently many countries pursued their trade interests elsewhere, particularly through free trade agreements (FTAs). The trade facilitation accord agreed to in Bali, and the broader package of which it was a part, while significant and offering the prospect of some forward movement concerns only a small component of the round's agenda. While it is too soon to tell whether the whole package will generate sufficient momentum to unlock the round and secure a broader deal, prospects for this are still not particularly promising in our view. In fact it may be more likely that the round will be progressively unpicked through a process of cherry picking issues that are the least controversial, simply to bring the round to some sort of conclusion.

In this light the establishment by the largest developed economies of regional declarations of co-operation and integration – termed “mega-regional agreements” – is significant. Among these, two major initiatives stand out for their sheer size and ambition: the Transatlantic Trade and Investment Partnership (TTIP) between the USA and the EU, and the Trans-Pacific Partnership (TPP) between the USA and a number of American and Asian states. In addition to encompassing a significant proportion of global trade, these agreements aim to promote deep integration between members, focusing not only on substantial and near-complete tariff liberalisation but also aiming to significantly reduce non-tariff barriers and provide harmonised, consistent rules for a range of issues including services, intellectual property regulations and government procurement.

These mega-regionals have the potential to reshape the global trading system. On the one hand, if successful they will establish new global norms and regulations that may find their way back into the WTO at some point in the future, and also into reciprocal FTAs with non-parties. Under this scenario developing countries not participating in the formulation of these rules in the mega-regionals will be confronted by a changed regulatory landscape; one not necessarily in keeping with their interests and capacities. On the other hand, it is widely accepted that global trade rules have to advance and the mega-regionals may offer some prospects for ensuring this takes place. If so, since other significant developing countries would have signed up to these norms under the TPP especially, it will be difficult for outsiders to resist the regulatory wave. This has implications for the conduct of business in the WTO; for example will plurilateral negotiations become the new normal?

Furthermore, while major economies move forward with bilateral and regional agreements along “twenty first century” lines, there is growing concern by outside countries looking in that these agreements are exclusionary in nature. These countries, most notably developing nations, are rightly concerned that such agreements will substantially harm their trade preferences and prevent them from fully participating in global value chains and regional growth. This is of particular concern to the African, Caribbean, and Pacific (ACP) group of countries. Yet such concerns may be misplaced, since there is a case to be made that in order to plug into global value chains adoption of the regulatory reform package entailed in the mega-regionals is a *sine qua non*.

The paper addresses these issues. First the literature concerning the potential economic impacts of the mega-regionals is reviewed, highlighting possible consequences for the states negotiating the agreements. The same approach is taken to review potential economic implications for developing countries, particularly least developed countries, not party to the negotiations and particularly the ACP. The results are ambiguous to an extent, and much



depends on the extent to which both the TPP and TTIP will grasp the regulatory harmonization nettle. Therefore, the next section focuses exclusively on the principle elements of the regulatory agenda in both negotiations, in some detail. While some outcomes are relatively easy to predict others are less clear, and will only solidify as the negotiating process draws to a conclusion. This highlights the crucial role that political economy will play in the negotiating processes.

In this light to argue that these agreements will ultimately conclude is to assume a successful outcome. The third section briefly reviews three scenarios: full success; partial success; and failure, relating this to potential strategic postures ACP countries could adopt in each case. The final section briefly sets out some policy options for the ACP to position themselves in the brave new world of mega-regionals. Ultimately we conclude that even if a failure scenario were to ensue, the pressure on ACP countries to liberalise their trade policies and reform regulatory approaches broadly along the lines being followed in the TPP and TTIP will not disappear; in fact it may intensify. Therefore we advocate a broad policy approach of sustained reform, tailored to country capacities, at three levels: unilateral; regional; and in the WTO.

## **2. WHICH MEGA-REGIONAL AGREEMENTS MATTER MOST TO THE ACP, AND WHY?**

IN WHAT FOLLOWS we first define the term ‘mega regional’ in order to delimit the subsequent enquiry. Then we review literature that attempts to measure the likely economic impacts of these arrangements on the member states negotiating them, in the process sketching broad implications for global trade and the ACP countries. Then we focus on broad economic and strategic implications for the ACP directly.

### **2.1 DEFINING MEGA REGIONALS**

The term mega regionals is used somewhat loosely. For the purposes of this paper we adopt a restrictive definition. We consider a mega regional to be a trade agreement that:

1. Is negotiated by three or more countries or regional groupings;
2. Whose members collectively account for twenty five percent or more of world trade; and
3. The substance of which goes well beyond current WTO disciplines.

In other words we consider multi-country, globally significant in terms of trade impact, and regulation-intensive agreements. Since the EU comprises 28 countries we consider any ‘bilateral’ involving it and one other party as meeting the first criterion. Regarding the proportion of world trade covered, we specifically exclude intra-EU trade since the EU constitutes a common market. Therefore, Canada-EU and Japan-EU are not included because they cover less than twenty-five percent of world trade (see Figure 1 and Figure 2). This brings the focus to TTIP, TPP, and Regional Cooperation in Asia and the Pacific (RCEP). The third criterion is particularly important as it means that the negotiations in respect of the RCEP would not be included because, as matters currently stand, the agenda is very traditional in its market access and light regulatory focus.

Consequently, our core focus is on US-led agreements since the USA is central to the two that

meet this definition, ie TPP and TTIP. In our view this is appropriate, given the US's pivotal role in the global trading system. It also means that the US's negotiating template is particularly important, a matter to which we return in the regulatory discussion below.

## 2.2 POTENTIAL ECONOMIC IMPACTS

### 2.2.1. *THE TRANS-PACIFIC PARTNERSHIP*

THE TPP ENCOMPASSES a number of East Asian, North and South American countries. In 2006, Brunei, Chile, New Zealand and Singapore initiated a four-way FTA, termed the Pacific -4, with a vision of comprehensive trade liberalisation being implemented by 2015. By 2010 an additional five countries, the USA, Australia, Malaysia, Peru and Vietnam, signaled their intention to join this agreement, leading to the creation of the TPP. In 2012, Mexico, Canada and Japan expressed interest in joining the TPP and by 2013 existing members had approved participation of these three candidates in the expanded TPP (often referred to as the TPP-12).<sup>1</sup>

The TPP aims to achieve extensive liberalisation of both goods and services, and entails comprehensive coverage of trade in services, investment, government procurement, non-tariff measures, and many regulatory topics (discussed below). However, as highlighted by the Congressional Research Service, the 12 countries are economically and demographically diverse. The USA is more than twice as large as any other TPP country in terms of its economy and population; there is wide variation in levels of economic development between member states; and each has significantly different strategic and economic interests.<sup>2</sup>

Given the significant economic diversity of member states in terms of wealth, production structures and strategic goods, the TPP's wide coverage requires extensive negotiations between member states in order to achieve the goal of a significant and far reaching agreement. In addition, the goods sector is being negotiated based on the existence of current bilateral FTAs. Thus, where FTAs exist between countries they are likely to be adopted within the TPP, while countries without an existing FTA between them have entered into negotiations on a bilateral basis.<sup>3</sup> Meanwhile other issues are being negotiated amongst all participants; yet the goal remains a single agreement applicable to all members. This complexity has some implications for the eventual outcome, and is discussed further below.

The TPP can significantly impact on global trade dynamics, given that goods trade among TPP partners amounted to more than \$2 trillion in 2012. The NAFTA (Canada, Mexico and the USA) and Japan nevertheless accounts for the largest proportion of this trade, with intra-NAFTA trade alone amounting to nearly \$1.2 trillion in 2012 (see Table 1); note that the more detailed figures in the rest of this paragraph do not appear in the table). Bilateral trade between Japan and NAFTA accounted for close to \$250 billion (over 80% of which was between the USA and Japan) of total intra-TPP trade, with Japanese exports to NAFTA countries accounting for \$160 billion. Trade flows between the remaining TPP-12 members made

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1. Cheong, I. "Negotiations for the Trans-Pacific Partnership Agreement: Evaluation and Implications for East Asian Regionalism", July, 2013, available on the ADBI website: <http://www.adbi.org/files/2013.07.11.wp428.trans.pacific.partnership.east.asian.regionalism.pdf> (visited on 3 January 2014).

2. Williams, B.R. "Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis", June 10 2013, available at: <http://www.fas.org/sgp/crs/row/R42344.pdf> (visited on 3 January 2014).

3. Cheong, I. op.cit.

up only \$180 billion of total TPP trade. Trade between the remaining TPP-12 members and NAFTA, and between the rest of the TPP-12 and Japan amounted to \$233 billion and \$204 billion respectively. Clearly the NAFTA countries, particularly the USA, and Japan are the key drivers of the TPP.

The large number of FTAs being implemented between Asian and Pacific states also suggests that the effects of tariff liberalization may be low despite the significant share of global trade that this region accounts for. Cheong (2013) underlines the extent to which FTAs may dilute the effect of liberalization on goods trade, with countries in the Asia-Pacific region having signed close to 100 FTAs (either bilateral or regional) between themselves. Cheong (2013) further notes that many previous studies estimating the effects of regional FTAs in the region may have therefore over-estimated the likely GDP and trade gains likely to be achieved through greater regional integration in this region by not taking into account the fact that goods trade is already significantly liberalized through the numerous FTAs already being implemented.<sup>4</sup> In terms of goods trade, the TPP faces a similar situation, with many countries within the TPP already trading under free trade arrangements.

Cheong (2013) suggests that the gains for member states from goods trade liberalisation through the TPP are likely to be negligible for most member countries. The results from this computerised general equilibrium analysis (CGE) are provided in Table 2. All countries, with the exception of the USA, Chile and Peru, are likely to experience a marginal increase in their GDP. However, for all members this increase is less than 1%, with New Zealand experiencing the greatest gain (0.97%) and Canada the lowest (0.02%). On the other hand the results suggest that the USA is unlikely to experience any change, while Chile and Peru are likely to experience negligible GDP declines of 0.13% and 0.04% respectively.

Estimates from the Peterson Institute for International Economics suggest that the potential impact of the TPP may be somewhat larger, when including the impact of reducing non-tariff measures.<sup>5</sup> The model assumes a staggered approach to the implementation of the TPP, with an agreement among the nine original members by 2013 and the three additional members (plus South Korea<sup>6</sup>) one year later. Enforcement occurs one year after the agreement is signed, followed by five years of implementation. The study finds that by 2025 real GDP increases by 0.75% for TPP members. The impact on individual countries ranges from a positive 0.4% impact on GDP for the USA to a 13.6% improvement in GDP for Vietnam. Similarly exports increase significantly, from 2.5% for Chile to 37% for Vietnam. Vietnam's gains are expected to arise through its expanded role as a manufacturing hub for textile and garment industries.

Cheong (2013) and Williams (2013) both note that many see the TPP as a stepping stone to the creation of a Free Trade Agreement among all Asia Pacific Economic Cooperation (APEC) members, given that TPP members form a sub-set of APEC. As Williams (2013) highlights TPP country trade with the other APEC members not currently party to the TPP negotiations is larger than intra-TPP trade, amounting to over \$2.7 trillion in 2012, with China accounting for over 50% of this trade. The creation of an APEC Free Trade Area (also known as the Free Trade Agreement Asia Pacific (FTAAP)) would be the largest single mar-

4. Ibid.

5. Petri, P.A. and Plummer, M.G. "The Trans-Pacific Partnership and Asia-Pacific Integration: Policy Implications", June 2012, available at: <http://www.iie.com/publications/pb/pb12-16.pdf> (visited 5 January 2014)

6. The authors note that while South Korea has not officially expressed interest in joining the TPP, the implementation of the Korea-US Free Trade Agreement and continued interest in the TPP by senior South Korean policy makers makes South Korean membership of the TPP probable in the medium term.

ket on the planet, bringing significant gains to member states. Petri and Plummer estimate that these gains could amount to an additional US\$2 trillion (2007 dollars) by 2025, or an increase in APEC GDP by 3.5%. The long-term gains from the TPP for member states may therefore be substantially greater if this agreement creates a domino effect where all other APEC members subsequently “fall” into the TPP.

The strategic implications of such a domino effect for the Pacific islands are major, and such a process would be difficult to resist if it commenced in earnest. Much depends on China’s posture, an issue to which we return below.

### 2.2.2. THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP

THE TTIP AIMS to be a far reaching trade agreement, focusing on trade liberalisation, behind the border and other non-tariff barriers as well as the liberalisation (and possible harmonisation) of regulations and standards governing the services, investment and public procurement markets.<sup>7</sup>

MFN tariff regimes in the EU and the USA are comparatively low, as noted by ECORYS (2009), Rollo et al (2013) and Fontagne et al (2013). A comparison of trade-weighted MFN rates is provided in Table 3. Fontagne et al (2013) estimate that the average tariff protection on EU goods imported by the USA amounts to only 2.2%, while USA goods imported by the EU attract an average tariff duty of 3.3% in ad valorem equivalent terms.<sup>8</sup> It is clear that tariff liberalisation, while forming an important component of TTIP negotiations, is unlikely to achieve significant economic gains for either the USA or the EU, with the exception of the removal of duties on a comparatively small number of sensitive products.

More significant gains are likely to be made through the elimination non-tariff measures and the harmonisation of standards that act as barriers to trade, investment and public procurement. While many of these non-tariff measures cannot be completely removed (such as geographic, cultural and language barriers), the reduction and standardisation of regulatory measures can reduce the costs of trade and investment across regions. Compared to the low tariff barriers, ECORYS (2009) and Fontagne et al (2013) estimate that bilateral the ad valorem equivalent protection between the USA and the EU from non-tariff measures was significantly higher and ranged between 19% and 73% across the agriculture, manufacturing and services sectors (see Table 4). ECORYS (2009) estimated that roughly 50% of non-tariff measures and regulatory differences between the USA and the EU could be eliminated.

The potential impact of the TTIP on the USA and the EU has been evaluated by a number of studies. The earlier ECORYS (2009) study suggests that the reduction of non-tariff measures produces modest improvements in national income and real wages for the USA and the EU, while changes to total exports are more substantial. In an “ambitious” scenario, where 50% of non-tariff measures and regulatory divergence are eliminated, real income increases by 0.3% and 0.7% in the long run for the USA and the EU respectively. In a “limited” scenario (where 25% of non-tariff measures and regulatory divergence is eliminated), real income increases by 0.1% for the USA and by 0.3% for the EU in the long-term. In the long-term, total

7. European Commission website “In Focus: Transatlantic Trade and Investment Partnership (TTIP)”, available at: <http://ec.europa.eu/trade/policy/in-focus/ttip/> (visited on 3 January 2014).

8. Fontagne, L., Gourdon, J., Jean, S. 2013. Transatlantic Trade: Whither Partnership, Which Economic Consequences? CEPII Policy Brief No. 1, September 2013. Centre d’Etudes Prospectives et d’Informations Internationales (CEPII)

exports by the USA increase by 6.1% and 2.7% in the ambitious and limited scenarios, while EU exports increase by 2.1% and 0.9% respectively. More recently, a study commissioned by the EU effectively updating and using a similar methodology to that of ECORYS (2009), produced similarly modest results.<sup>9</sup>

Fontagne et al (2013), using a different CGE modeling technique and an alternative estimation of non-tariff measures, finds that a 25% reduction in non-tariff measures coupled with a full reduction in tariff duties produces a 0.3% increase in the GDP of both the EU and the USA over the long-run. The volume of total exports increases more significantly in the long-run, by roughly 10% for the USA and by approximately 8% for extra-EU exports.<sup>10</sup> In contrast to these studies, Felbermayr et al (2013), for the Bertelsmann Institute, use a gravitational econometric model approach to estimate the size of protection from non-tariff measures and find that the implementation of the TTIP may produce substantially larger economic gains.<sup>11</sup> They find that tariff liberalisation results in a real per capita income increase of 0.27% for the EU (unweighted mean) and 0.8% for the USA. The impact is much larger under a deep liberalisation scenario, with the full reduction of non-tariff measures. Under this scenario real per capita income increases by 13% for the USA and 5% for the EU. However the vast difference in estimated impacts between this study and those noted previously (including the study commissioned by the EU) has resulted in the EU suggesting that the Bertelsmann Institute's study is based on an untested methodology "that departs from the standard approach used so far in other similar studies" and that some of the results produced are "unreasonable and inconsistent" and "unrealistically high".<sup>12</sup>

Regardless of one's view on modelling techniques and associated results, it is clear that reduction of non-tariff measures and regulatory differences will play a much more significant role in unlocking economic gains for both the USA and the EU than a reduction in traditional tariff duties.

## 2.3 POTENTIAL EFFECTS ON ACP STATES

THE IMPLEMENTATION OF both the TPP and TTIP can potentially have a significant effect on trade with ACP member states. The extent of this effect is dependent on both the existing levels of trade and the structure of trade between ACP countries and members of each of the regional trade agreements. Higher levels of trade between ACP countries and members of mega-regional agreements imply more at stake for ACP countries. In the same way, where the structure of ACP countries exports are similar to exports between members of mega regionals, ACP countries may face stronger export competition in existing markets.

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9. Francois, J et al. "Reducing Transatlantic Barriers to Trade and Investment, An Economic Assessment", March 2013, available on the EU website: [http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc\\_150737.pdf](http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150737.pdf) (visited on 3 January 2014). This study also takes into account the potential impact of "regulatory spill-overs", distinguishing between regulatory spill-overs (trade costs for third countries exporting to the EU or the USA fall as regulations are harmonised) and indirect spill-overs (third countries begin to adopt the standards and regulations set by the EU and the USA through the TTIP).

10. Op.cit.

11. Felbermeyr et al. "Transatlantic Trade and Investment Partnership (TTIP), Who benefits from a free trade deal?", June 2013, available on the Bertelsmann Institute website: <http://www.bfna.org/sites/default/files/TTIP-GED%20study%2017June%202013.pdf> (visited on 3 January 2014)

12. European Commission "Transatlantic Trade and Investment Partnership, The Economic Analysis Explained", September 2013, available at: [http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc\\_151787.pdf](http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf) (visited on 3 January 2014)

At an aggregate level Figure 3 shows the average share of exports from each ACP region destined for the US, EU and TPP members (excluding the US). At a regional level, it is clear that the TTIP is likely to concern Africa the most, given that close to 40% of Africa's exports are destined either for the USA or EU market. For the Caribbean, it would appear that both the TTIP and TPP may have a significant impact on trade, with the USA accounting for close to 35% of the Caribbean's exports while the EU and the rest of the TPP account for 11% and 8% respectively. For the Pacific region it is clear that the TPP will play a significant role in shaping trade performance since over 40% of the Pacific countries exports' are destined for the rest of the TPP states.

A number of studies suggest, however, that the overall impact of either the TPP or the TTIP on non-member states is anticipated to be small. Cheong's (2013) results suggest that the establishment of the TPP will result in a 0.07% reduction in the rest of the World's GDP, mainly as a result of trade diversion from more efficient producers outside of the TPP to less efficient exporters within the TPP. Estimations by the Peterson Institute, which include the potential impact of non-tariff measures, find that implementation of the TPP also results in a roughly 0.07% reduction in GDP for the rest of the World by 2025.

However, the Bertelsmann Institute, whose results the European Commission (EC) cautions against, indicates that the TTIP's impact may be substantially negative for a large number of developing and low income countries. Individual country real per capita income is estimated to change by between 0.5% and -7.4% for developing countries under a tariff liberalization scenario. Under a "deep liberalization" scenario the fall in incomes is more widespread, with real per capita incomes estimated to fall by between -0.1% and -7.2% for developing countries. This occurs largely as a result of preference erosion and trade diversion away from developing countries, with these negative effects accentuated for some countries under the deep liberalization scenario.

By contrast, the EU commissioned study finds that low-income countries would gain marginally from the establishment of the TTIP, with GDP rising by 0.09% relative to the baseline under the "less ambitious" scenario, and by 0.2% under the ambitious scenario. The positive impact of this study is a combined result of wider trade creation effects and the positive "spill-over effects" that arise from the "streamlining of EU and US regulations in the process of negotiations and convergence of EU-US standards" and the "scope for some resulting convergence on global standards and cross-recognition" of standards. These spillover effects are found to offset the negative impacts of trade diversion, but are highly dependent on the extent to which transatlantic negotiations lead to a comprehensively harmonized framework and system of mutual recognition.<sup>13</sup>

There are a number channels through which mega-regional agreements can impact on ACP countries and through which these studies estimate the impact of mega-regional agreements. The first is the direct effect that mega-regional agreements can have on existing ACP access to EU and USA markets on preferential terms not available to middle and high-income countries. The second channel is the impact that the reduction of non-tariff measures and the harmonisation of standards within the mega-regional agreements can have on either raising or reducing export costs for ACP countries.

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13. Francois et al, op.cit.



### 2.3.1 IMPACT ON EXISTING AGREEMENTS AND PREFERENCES

ACP countries have been able to access both the USA and EU markets at preferential rates through a number of preference schemes and trade agreements. The most significant of these are highlighted below.<sup>14</sup>

- African Growth and Opportunity Act (AGOA)<sup>15</sup> – 40 of the 49 potentially eligible countries in sub-Saharan Africa are eligible for preferential tariff access to the USA market for a range of goods, including clothing and apparel for countries that meet AGOA's qualification criteria.
- EU Generalised System of Preferences (GSP)<sup>16</sup> – The EU provides for preferential (reduced duty) access to roughly 65% of all tariff lines for developing country beneficiaries. The same tariff lines are zero-rated for GSP+ countries that meet the criteria set out by the EU, while least developed countries (LDCs) receive full duty free access across all products except arms and armaments through the Everything But Arms (EBA) scheme.
  - Standard GSP beneficiaries – 41 countries across the globe are provided with preferential access to EU markets
  - EBA – The EU's EBA preferential system provides for duty free access to 49 countries across Africa, Asia, the Pacific and Caribbean.
- EU Economic Partnership Agreements (EPAs)<sup>17</sup> – The EU began negotiations with seven regional blocs across the ACP region in order to achieve wider and deeper trade agreements. To date, only the Caribbean region has signed an EPA with the EU, providing the Caribbean Community (CARICOM) with duty free access to the EU. A number of individual countries have either signed or initialed interim EPA agreements, though no countries outside of CARICOM have fully ratified an EPA with the EU.

The true extent to which preferential access for ACP countries could be eroded by the mega-regional agreements depends on a number of factors. This includes the extent to which use is actually made of the preferential access provided. ACP countries may also have a substantially different export structure to those new members within mega-regional agreements. In such a situation, the level of preference erosion becomes irrelevant since exporting countries are not competing across the same product lines and categories.

As noted by Rollo et al (2013), this may be especially true for the TTIP, where two high-income states are negotiating a regional agreement. At an aggregate level Rollo et al (2013) highlight that “there is practically no similarity between, on the one hand, the structure at

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14. A number of bilateral and regional trade agreements are also under negotiation between members of either the TPP or TTIP. An example of this is the Pacific Agreement on Closer Relations (PACER) between Australia, New Zealand and the Pacific Island states. While no FTA is currently in place through PACER, any future preferential access granted to Pacific Island states by Australia is likely to be eroded to some extent by access granted to TTIP members, specifically countries such as Vietnam, which may compete directly with Pacific Island countries in specific product categories.

15. USA International Trade Administration website, “African Growth and Opportunity Act”, available at: <http://trade.gov/agoa/> (visited on 3 January 2014)

16. European Commission “The EU's new Generalised Scheme of Preferences (GSP)”, July 2013, available at: [http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc\\_151705.%2013-07%20GSP%20Info-Pack%20Update%20Final.pdf](http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151705.%2013-07%20GSP%20Info-Pack%20Update%20Final.pdf) (visited on 3 January 2014)

17. See “Overview of the EPA negotiations”, dated November 10, 2013, available on the EC website: [http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc\\_144912.pdf](http://trade.ec.europa.eu/doclib/docs/2009/september/tradoc_144912.pdf) (visited on 5 January 2014)

HS 6 Digit level (around 5000 product categories) of the non-fuel exports of the LIC (low income countries) to the EU and US, and on the other hand, the exports of the EU to the US, and of the USA to the EU”.

The increasing focus on regulatory standards and non-tariff measures also brings into focus the fact that modern FTAs offer substantially less “preferential” tariff access than in the past. As Baldwin (2011) summarises, only a small and shrinking percentage of global bilateral trade flows are eligible for preferences, a significant and growing proportion of trade flows have zero MFN tariffs (implying that no duty preference can be provided) and less than 2% of World imports enjoy preferences of over 10%.

Furthermore, Baldwin (2014), notes that if complementarities are high, as is the case with ACP – EU and ACP – USA trade, then if the TTIP and TPP result in trade expansion for the member states it is likely that this would suck in imports from the ACP in order to supply expanding production plants in the signatory states. This implies increased traditional exports, particularly of resources, and therefore intensification of current comparative advantage patterns. Depending on one’s view of comparative advantage this could be good (more exports, more foreign exchange, more jobs etc) or bad (lock-in effect, marginalization from global value chains, etc).<sup>18</sup>

Selected ACP countries within specific product categories may nevertheless face substantial preference erosion and increased competition (resulting in trade diversion) from countries participating in mega-regional agreements. For example, the inclusion of Vietnam in the TPP may impact significantly on textile and apparel producers from ACP countries that access the USA market at preferential rates. Rollo et al (2013) note that product exports from low-income countries such as textiles, clothing and footwear and specific agricultural products such as fish, bananas and sugar face preference erosion in both the EU and US markets with the implementation of the TTIP.<sup>19</sup> It is clear that while the overall effects of these mega-regional arrangements may be small, certain developing countries are likely to face significantly higher levels of competition in a specific set of products. A summary of low-income countries highlighted by Rollo et al (2013) as likely to be negatively impacted by the TTIP is shown in Table 5.

### 2.3.2. HARMONISATION OF STANDARDS AND REDUCTION OF NON-TARIFF MEASURES

AS THE MARGIN of preferential access given to ACP countries by larger nations through multilateral and bilateral agreements falls, the impact and cost of adhering to non-tariff measures and regulatory standards becomes increasingly important. In general the reduction in divergence of regulatory standards can impact on countries outside of mega-regional agreements in a number of ways, depending on the extent to which these agreements result in the development of common standards and regulations applicable to all members.

Where a mega-regional agreement results in only a partial alignment of regulations, standards and other non-tariff measures or does not result in mutual recognition, countries outside of the mega-regional agreement face two scenarios:

- Non-member countries that struggle to comply with the existing or new

18. Baldwin R “The Impact of Mega-Regionals”, forthcoming, mimeo.

19. Op.cit.



requirements imposed on members of a mega-regional agreement will face increased pressure and competition from exporters within the mega-regional agreement.

- Countries and existing exporters that are able to maintain the standards and regulations set by countries within the mega-regional agreement may be able to withstand competitive pressures from members of the regional agreement, despite any reduction in tariff preferences.

Standards and requirements may also be substantially aligned through a mega-regional agreement, either through processes of harmonisation, equivalence and/or mutual recognition. Countries outside of the mega-regional agreement will then face two competing effects:

- Where requirements, standards and regulations are made stricter, non-member states will face higher compliance and trade costs across all markets implementing the common framework, potentially implying greater competition from exporters within the mega-regional.
- The harmonisation of standards and regulations could lower the cost for non-member exporters to access new markets, as the adherence to a single set of regulations and standards will allow access to all markets within the mega-regional agreement.

It is clear that the reduction of non-tariff measures between members of mega-regional agreements can be both beneficial and harmful to non-member countries. The extent to which changes in non-tariff measures is beneficial for non-member states is dependent on both the level of stringency of the new measures implemented by the mega-regional agreement and the degree to which harmonisation of these non-tariff measures and regulatory standards across members of the mega-regional agreement occurs.

### 2.3.3 FINAL REMARKS

THE ASSESSMENT OF the internal and external impact of mega-regional agreements highlights a number of key conclusions. First, it is likely that the implementation of mega-regional agreements involving either the USA or the EU will result in some preference erosion for ACP countries. The significance and impact of this erosion is likely to be somewhat muted given the fact that existing MFN tariffs duties for the USA and EU are already low across most product categories. The proliferation of multilateral and bilateral agreements has further served to weaken preferential treatment afforded to developing and low income countries. The structure of many ACP countries trade is also substantially different to high- and middle-income economies, making competition along product lines unlikely in the near term. However, the highly concentrated nature of trade (in mainly primary commodities) for some ACP countries implies that the erosion of preferences in a small set of specific product categories where developing countries compete directly with more developed nations (and specifically the EU and the USA) is likely to have important negative consequences for these countries.

Second, the review of studies assessing the possible impact of the various mega-regional agreements makes it clear that non-tariff measures are an increasingly important consideration, and in many cases the effective protection from, and therefore the effective gains from reduction of, non-tariff measures is greater than those presented by tariff duties. This places increasing importance on “21st century regionalism” and the negotiation of agreements that

are able to effectively deal with these issues. These pressures are likely to remain in place and intensify, not least because non-tariff measures impede the operation of global value chains that structure the global trading system.

Finally, from a comparative perspective, in the long-term the establishment and implementation of a comprehensive TPP may be more significant than the Transatlantic Partnership, if it lays the ground for the establishment of an APEC-wide agreement. Such an agreement would see the establishment of one of the largest FTAs incorporating China, Japan and the USA along with a number of fast growing Asian and Pacific countries. The impact of such a regional agreement would have considerable repercussions for the rest of the globe.

### 3. THE STATE OF PLAY AND MAJOR TRENDS

It is clear that TPP negotiations are well-advanced, with some observers expecting them to wrap up in March this year.<sup>20</sup> By contrast the TTIP was only officially launched at the G8 summit in the United Kingdom in June 2013. Furthermore, there is an unofficial understanding that the USA first wants to conclude TPP negotiations before commencing TTIP negotiations in earnest, although agenda structuring in respect of the TTIP is proceeding. Consequently, in order to discern the regulatory implications that may or may not unfold in these negotiating processes, we concentrate primarily on the TPP, supplementing where possible with information on the TTIP. In the process we also highlight potential differences between the USA and EU negotiating approaches.

#### 3.1. REGULATIONS: THE HEART OF THE MATTER

From the outset the TPP negotiations have been driven by the professed goal of achieving a “high-standard agreement”. As negotiations have progressed, a consensus seems to have emerged as to what this language means, namely “a landmark, 21st-century trade agreement, setting a new standard for global trade and incorporating next-generation issues”.<sup>21</sup> The TPP negotiations are taking place across twenty-nine chapters<sup>22</sup> and as part of a single undertaking.<sup>23</sup>

The 20+ negotiating groups that have reportedly been formed are focusing on achieving different legal texts and negotiating outcomes on, inter alia, the following areas: competition, cooperation and capacity building, cross-border services, customs, e-commerce, environment, financial services, government procurement, intellectual property, investment, labor, legal issues, market access for goods, rules of origin, sanitary and phytosanitary standards (SPS), technical barriers to trade (TBT), telecommunications, temporary entry, textiles and apparel, and trade remedies.<sup>24</sup>

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20. Private conversation with Deborah Elms, Bali Trade and Development Symposium, December 4th, 2012.

21. See “Outlines of the Trans-Pacific Partnership Agreement”, dated November 12, 2011, available on the USTR website: <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement> (14 December 2013).

22. Congressional Research Service “The Trans-Pacific Partnership Negotiations and Issues for Congress”, April 15, 2013, available at: <http://www.fas.org/sgp/crs/row/R42694.pdf> (14 December 2013).

23. Quoted from “Joint Statement of TPP Ministers” meeting on the margins of the Asia-Pacific Economic Cooperation (APEC) meeting of Ministers Responsible for Trade, in Surabaya Indonesia, dated April 20, 2013, available on the USTR website: <http://www.ustr.gov/about-us/press-office/press-releases/2013/april/joint-statement-tpp-ministers> (14 December 2013).

24. This list taken from “Outlines of the Trans-Pacific Partnership Agreement” cited above.

In terms of international treaty commitments in areas that have thus far eluded multilateral trade rules, the TPP seems to harbor the prospect of a new textual template that will set the tone in both the TTIP, as well as - further down the road - future trade and investment agreements. These new areas include the following: regulatory coherence, state-owned enterprises, government procurement, competition, investment, e-commerce, environment, and labour.

In this sub-section we discuss the shape of the rules that are likely to emerge from the TPP negotiations in the new areas mentioned above. In the sub-section thereafter we discuss the approach taken in the TPP to strengthen rules already subject to WTO disciplines.

### 3.2. REGULATORY COHERENCE

THE ISSUE OF regulatory coherence has a long institutional pedigree that goes back to the regulatory reform movement of the 1970s and 1980s.<sup>25</sup> At the international level and in terms of the interface between behind the border regulatory frameworks on the one hand and international trade and investment rules on the other, this cause has been most actively championed by both the Organization for Economic Cooperation and Development (OECD) and APEC.<sup>26</sup> The issue of regulatory coherence is a so-called cross-cutting one that is being negotiated as both a stand-alone chapter but also in different negotiating groups such as those discussing sanitary and phytosanitary standards (SPS) and technical barriers to trade (TBT).<sup>27</sup>

The professed scope and goal of these negotiations can be inferred from the 2011 Outlines document presented on the sidelines of the APEC leaders meeting in Honolulu, which states that

*“... we have agreed to work to improve regulatory practices, eliminate unnecessary barriers, reduce regional divergence in standards, promote transparency, conduct our regulatory processes in a more trade-facilitative manner, eliminate redundancies in testing and certification, and promote cooperation on specific regulatory issues.”*<sup>28</sup>

Thus the onus under these talks is clearly on the broad range of non-tariff measures and behind-the-border policies that impact international trade in goods and investment flows, such as testing requirements and procedures, technical regulations, food safety standards, regulatory restrictions and interventions in different services sectors to name just a few.<sup>29</sup> The TTIP has a similar focus. In both cases the relatively low gains from tariff liberalization underscore the focus on regulations.

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25. See Thomas J. Bollyky Chapter 11 *Regulatory coherence in the TPP talks*, in: C.L. Lim, Deborah K. Elms, and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement*, Cambridge University Press, 2012, pp. 171 - 186, at p. 174 f.

26. See, by way of example, the APEC-OECD Integrated Checklist on Regulatory Reform, Singapore, APEC, 2005, available at <http://www.oecd.org/regreform/34989455.pdf> (14 December 2013).

27. Ian F. Fergusson *et al*, *The Trans-Pacific Partnership Negotiations and Issues for Congress*, Congressional Research Service, 21 August 2013, available at: <http://www.fas.org/sgp/crs/row/R42694.pdf> (14 December 2013), at p. 46.

28. See “Trans-Pacific Partnership (TPP) Trade Ministers’ Report to Leaders”, dated November 12, 2011, available on the USTR website: : <http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers-re> (14 December 2013).

29. See C. *An inventory of non-tariff measures and services measures*, in: “World Trade Report 2012”, World Trade Organization, available at: [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/wtr12-2c\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/wtr12-2c_e.pdf) (14 December 2013).

A 2010 draft of the stand-alone TPP text on regulatory coherence has been leaked<sup>30</sup> and gives some insight into the possible outcomes that can be expected from these talks. The text contains little that contracting parties would need to fear given that most - if not all - of the obligations seem to be formulated in language that would bind parties to little more than best endeavors. The main thrust of the text seems to be the establishment of a “body, process or mechanism” to “facilitate central coordination and review of certain regulatory measures”.<sup>31</sup> The text also contains language “encouraging” the national coordinating body, process or mechanism to conduct regulatory impact assessments (RIAs). The text also contains language mandating that covered regulatory measures be drafted in such a way that they are easily understood, and that such measures and any accompanying documentation be publicly accessible. One set of commitments that is not drafted in best endeavors language is that governing the establishment of a Committee on Regulatory Coherence, which is charged with convening within one year of the TPP entering into force and at regular intervals thereafter.

Clearly the obligations that parties could have contemplated under this chapter could have been much more far-reaching, involving at least a set of mutual recognition agreements and/or commitments to adopt and apply international standards across a broad range of product sectors. As it stands, the draft barely constitutes anything already agreed upon in the OECD and APEC, meaning that when it comes to non-tariff measures, the TPP might also amount to little more than a best practices club.

The regulatory agenda in the TTIP may be more contentious. It is well-known that USA and EU regulatory approaches differ in key areas, which is why the TTIP is likely to rely heavily on mutual recognition agreements (MRAs). Unsurprisingly regulatory coherence has quickly emerged as a controversial issue, if a recent critique by Corporate Europe Observatory is to be believed. They argue that the EU’s draft proposal on regulatory coherence “follows a persistent campaign by business lobby groups on both sides of the Atlantic to use the proposed transatlantic trade deal to maximise the deregulation of food and product safety standards. If they have it their way, future decision-making will go underground, escape democratic scrutiny and be wide open to business lobbying”.<sup>32</sup> Their main concern is the proposed “Regulatory Council”, which would oversee the regulatory coherence agenda through coordinating dialogue amongst product and sector regulators on both sides of the Atlantic. Business groups would be represented, but not civil society stakeholders although they would be consulted. Behind this concern is a deeper fear that EU regulatory preferences will be sacrificed to corporate interests. Both the EC and business groups clearly do not see matters this way, and in our view it is unlikely that regulators on either side of the Atlantic would yield their prerogatives, or sacrifice public interest, in favour of business lobby groups. Nonetheless the regulatory coherence agenda will be complex and controversial.

### 3.3 STATE-OWNED ENTERPRISES

State owned enterprises (SOEs) play a very important role in many economies and across various economic sectors, but they have become a particular focus of attention for international observers and western policymakers in China and Russia, where, for structural reasons involving these countries’ transition from planned to market economies, they are still

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30. See [www.citizenstrade.org/ctc/wp.../10/TransPacific](http://www.citizenstrade.org/ctc/wp.../10/TransPacific) (14 December 2013).

31. Leaked draft text, Art. X.2 (1).

32. See “Regulation – None of our Business?”, available at Corporate Europe Observatory <http://corporateeurope.org> (16 December 2014).

very prevalent economic actors. Whereas in the 1990s the emphasis in many countries was privatization of SOEs, the focus seems to have shifted more recently to both the competitive efficiency of SOEs<sup>33</sup> as well as the need to have them adhere to generally recognized principles of sound corporate governance.

In the trade arena, rules have gradually been taking shape to mitigate some of the more competitively distorting practices of SOEs, with the TPP expected to be the first set of commitments to be hashed out between a broad range of different-sized economies with strongly diverging positions on the role and utility of SOEs. Although a number of FTAs with the United States already contain provisions on SOEs,<sup>34</sup> the point of departure for the rules taking shape under the TPP process is bound to be a combination of those that emerged in the context of the US-Singapore FTA and the work that has been done at the OECD under the rubric of “competitive neutrality”. We discuss these two frameworks briefly below, before discussing the likely shape of proposals being advanced on this issue by the US, and the push-back that is certain to ensue from those TPP members whose economies are characterized with the highest incidence of SOE activity, namely Vietnam, Malaysia, Brunei and Singapore.

### 3.3.1 THE US-SINGAPORE FTA AND RULES ON GOVERNMENT ENTERPRISES

THE US-SINGAPORE FTA was concluded in 2003 and entered into force in 2004.<sup>35</sup> Chapter 12 sets out rules on anticompetitive business conduct, designated monopolies and government enterprises.<sup>36</sup> The most important substantive commitments entered into with regard to government enterprises were undertaken by Singapore alone, and require Singapore to ensure that any government enterprise: 1) acts solely in accordance with commercial considerations in its procurement and selling practices; and 2) does not enter into agreements with competitors to restrain competition or engage in exclusionary practices.<sup>37</sup> Singapore also undertakes to comply with a number of other commitments, such as to continue reducing the incidence of government enterprises in the economy (with a view to substantially eliminating them), and to publish details on the extent of government ownership and control of government enterprises on at least an annual basis.<sup>38</sup>

Given that Singapore’s model of state-led industrial development had long subjected government enterprises to market discipline and that Singapore had also been a pioneer in the region in terms of competition policy, these commitments are unlikely to have come at much cost to Singapore, or at least were unlikely to have forced it to make far-reaching changes to the corporate governance of its state-owned (or government-linked) sector. As we shall see below, the commitments being contemplated under the TPP are likely to be perceived as far more intrusive by Singapore and other regional economies that have followed its lead in letting government owned or controlled companies lead the way in propelling them along a predefined path of economic development and industrialization.

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33. See The Economist (2012)

34. SOEs have been addressed in one form or another, albeit not in great detail, in NAFTA and a number of subsequent USA FTAs, including Australia, Chile, Colombia, Peru, and South Korea.

35. See Koh and Lin 2004.

36. The text of the agreement and its various annexes, side-letters and protocols can be downloaded, *inter alia*, from <http://www.ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text> (14 December 2013).

37. See subparagraph 2(d) of Article 12.3 USSFTA.

38. See subparagraphs 2(f) and 2(e) of Article 12.3 USSFTA.

### 3.3.2 THE OECD AND COMPETITIVE NEUTRALITY

ALSO LIKELY TO have a particularly acute influence on the final shape of any rules that emerge to discipline SOEs is the work that has been conducted in this area to date at the OECD. The OECD's main policy response to the problems of poor corporate governance in the state owned sector and the inherent economic inefficiencies and welfare losses this creates, has been the development of so-called "competitive neutrality frameworks" which a number of OECD members countries have implemented. The OECD cites a definition of competitive neutrality used by the Australian Productivity Commission, namely "[c]ompetitive neutrality requires that government business activities should not enjoy net competitive advantages over their private sector competitors simply by virtue of public sector ownership."<sup>39</sup> Some of the advantages cited include:<sup>40</sup> (1) outright subsidization; (2) concessionary financing and loan guarantees; (3) other preferential treatment by government; (4) monopolies and advantages of incumbency; (5) captive equity; (6) exemption from bankruptcy rules and information advantages. A number of reasons are given for the continued existence of SOEs including maintaining public service obligations, serving as a tool for industrial policy, the protection of a public revenue stream, and political-economy imperatives.

The OECD's Competitive neutrality frameworks are therefore generally directed at dealing with the underlying rationales for maintaining SOEs while simultaneously trying to remove any concessionary or preferential treatment these firms may enjoy vis-à-vis other market participants, with the onus being on incrementally exposing the SOE to market forces. Competitive neutrality frameworks are also an effective strategy for preparing a given sector for increased competition as a result of future trade liberalization that has either been committed to by the government in question or which said government intends to commit to in the context of impending trade negotiations. It is also worth noting that the gradual phasing out of SOEs or the removal of their privileged status has been a consistent focus of WTO accession negotiations.<sup>41</sup>

### 3.3.3 THE UNITED STATES' NEGOTIATING AGENDA ON SOE DISCIPLINES

Stakeholder consultations and congressional hearings have provided some insight into what the USA position on this issue is very likely to be.<sup>42</sup> The intellectual work by the OECD cited above seems to have played a key role in shaping USA views on this issue, particularly in terms of competitive neutrality. Some of the proposals advocated by industry groups that traditionally play a very influential role in formulating USA negotiating positions include the following<sup>43</sup>:

- Transparency obligations to notify the existence of SOEs and the degree to which the government in question owns, controls or supports them;

39. Capobianco and Christiansen (2011), p. 3.

40. *Ibid.*

41. See for example See Report of the Working Party on the Accession of China (WT/ACC/CHN/49) dated 1 October 2001, para. 46 (p. 9), or Report of the Working Party on the Accession of Russia (WT/ACC/RUS/70) dated 17 November 2011, para. 98 (p. 25).

42. See for example the submission filed by the Coalition of Services Industries & USA Chamber of Commerce's Global Regulatory Cooperation Project State-Owned Enterprises: Correcting a 21<sup>st</sup> Century Market Distortion, 20 July 2011, available at: <http://www.thecityuk.com/assets/Trade/CSI-paper.pdf>. (14 December 2013); see also Brown, Kyl Urge Disciplines On SOE U.S. Investments As Part Of TPP Deal, 17 August 2011, at World Trade Online.

43. See CSI and USCOC 2011, at pp. 10 - 11.



- Commitments to refrain from providing financial support on non-commercial terms to SOEs;
- Requiring SOEs to act in a manner which does not nullify or impair any benefits granted under the TPP and observes non-discrimination and market access commitments;
- Requiring SOEs to refrain from unfairly exploiting legacy monopoly assets, market positions or engaging in anti-competitive behavior;
- Requiring SOEs to comply with intellectual property obligations;
- Defining the national treatment obligation in the services and investment chapters as treatment no less favourable than that provided to SOEs operating in the same sector;
- Ensuring that SOEs are subject to competition laws; and
- Establishing an independent regulator to prevent SOEs from distorting competition.

Clearly these talks are closely related to those on competition policy and if TPP contracting parties are to adopt some or all of these disciplines, this would in many cases involve a far-reaching re-think of their competition policy regimes. The link between trade rules and competition policy is something that was originally expressed at the multilateral level in the Ministerial Declaration that ensued following the first WTO Ministerial Conference that took place between 9 and 13 December 1996 in Singapore.<sup>44</sup> However, in 2004, WTO Members ultimately decided not to pursue work on trade disciplines governing competition policy.<sup>45</sup> The work ongoing in the TPP on both competition policy and SOEs is in many ways a direct result of the WTO's fateful decision in 2004 to close the door on the elaboration and adoption of such rules at the multilateral level.

### 3.3.4 PUSHBACK FROM OTHER TPP MEMBERS

Some countries, particular developing countries still striving towards industrialization, like Vietnam and Malaysia, may consider that commitments such as these would impinge too heavily on their economic development models.<sup>46</sup> Other countries like Brunei and Singapore may conclude that certain of these potential obligations, particular the national treatment proposals, go too far against the grain of an established and essentially well-functioning economic growth strategy. Any ideological differences may be too broad to bridge completely.

Malaysia has been one of the most vocal opponents of some of the proposals tabled on a number of issues, including SOEs. The current political leadership has gone on record as saying they would prefer to stay out of the trade pact if the rules that emerge on issues such as state-

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44. See Singapore Ministerial Declaration (WT/MIN(96)/DEC) adopted on 13 December 1996, particularly paragraph 20, which itself refers to work that had been ongoing at the time by UNCTAD on the link between trade and competition.

45. See Doha Work Programme, Decision Adopted by the General Council on 1 August 2004 (WT/L/579), second sub-paragraph of item g).

46. One source, however, has reported on reformers within the Vietnamese political establishment who want to use the TPP talks and any emerging disciplines on SOEs to tame the country's own bloated public sector and thereby increase the economy's overall competitiveness, see *The Economist*, Oct. 2013.

owned enterprises, government procurement, intellectual property and investor dispute settlement don't concur with what Malaysia perceives to be its own national interest.<sup>47</sup>

The negotiations on SOEs are only likely to be of limited relevance in the TTIP context, since the proposals being put forward under this heading seem to have been drafted by US business groups specifically in order to counter a number of well-documented practices they have been forced to confront in certain Asian markets, particularly China (not currently negotiating TPP). Both the US and the EU have been actively participating in the debates on competitive neutrality as this issue has evolved at the OECD. Finally, even those economies in Europe that one would expect to be the most heavily SOE-laden have been immersed in over 20 years of privatization initiatives now, almost of all of which were conducted subject to guidelines and practices elaborated at the OECD.

### 3.4 GOVERNMENT PROCUREMENT

GOVERNMENT PROCUREMENT is likely to be one area where the TPP achieves considerable improvements in market access terms for contracting parties, given that only Singapore, Japan and the United States are currently signatories of the WTO Government Procurement Agreement. A number of existing FTAs that the United States has negotiated with countries such as Australia, Peru, Chile, Singapore as well as with Canada and Mexico under NAFTA, include chapters on government procurement.<sup>48</sup> In general FTA commitments tend to incorporate the key provisions of the WTO GPA into the respective FTA texts, with additional annexes/appendices being negotiated between the respective FTA partners on sectoral coverage and the entities that fall within the chapter's scope.<sup>49</sup>

The US-Korean FTA, the most recent FTA the USA concluded prior to the launch of the TPP talks, incorporates a number of the core obligations set forth in the WTO GPA by reference, such as Article III National Treatment and Non-discrimination, Article VII Tendering Procedures, Article X Selection Procedures, and Article XX Challenge Procedures.<sup>50</sup> Interestingly, the government procurement chapter of the KORUS FTA also contains a provision by means of which the 2011 updates that were negotiated to the WTO GPA would apply *mutatis mutandis* to the KORUS FTA once they enter into force<sup>51</sup>, to the extent they constituted changes to the articles incorporated by reference into the KORUS FTA.<sup>52</sup> Given this commitment, it is likely that any provisions the TPP text on government procurement incorporates from the WTO GPA will be from the 2011 text and not the 1994 text.<sup>53</sup>

47. See *Najib may stay out if Malaysians oppose it*, in: "New Straits Times" on 12 October 2013, available at <http://www.nst.com.my/latest/tpa-najib-may-stay-out-if-malaysians-oppose-it-1.374047#ixzz2pJIYrNaB>

48. For an overview of government procurement commitments in preferential trade agreements, see Kamala Dawar and Simon J. Evenett, Chapter 17 Government Procurement, in: Jean-Pierre Chauffour and Jean-Christophe Maur (eds), "Preferential Trade Agreement Policies for Development, A Handbook", World Bank, 2011, pp. 367 - 386, at p. 373 et seq. (Dawar and Evenett 2011).

49. See, by way of example, Chapter 15 and its respective Annex of the US-AUS FTA, available at: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset\\_upload\\_file339\\_5160.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file339_5160.pdf) (14 December 2013).

50. The text of the relevant chapter on government procurement of the KORUS FTA is available at USTR's website at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file2\\_12716.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file2_12716.pdf) (14 December 2013).

51. Something that is still outstanding at the time of writing, see: *Ministers greet progress on ratification of revised Agreement on Government Procurement* at: [http://www.wto.org/english/news\\_e/news13\\_e/gpro\\_04dec13\\_e.htm](http://www.wto.org/english/news_e/news13_e/gpro_04dec13_e.htm) (14 December 2013).

52. Third subparagraph of Article 17.3 of the KORUS FTA.

53. For more detail on the updated WTO Government Procurement Agreement see Sue Arrowsmith and



Four factors will be determinative for just how liberal the government procurement regime that ultimately makes its way into the TPP will be and thus just how far-reaching its implications could be in establishing a template for future negotiations. These are 1) the range of sectoral coverage, i.e. just goods, or goods and services, and whether some sectors (say construction) are *per se* excluded; 2) the level of government which is captured under the chapter's scope, the number of government ministries/agencies and the number of sub-federal/provincial regions/districts that are bound by the chapter's rules; 3) the value thresholds at which the chapter's provisions kick in and finally 4) the recourse and dispute settlement procedures the chapter ultimately provides to losing bidders and their governments.

From the little information that has leaked to the public domain, it seems that these negotiations have run into some trouble due largely to difficulties that USA negotiators are having in both convincing members of Congress to forfeit longstanding "Buy American" provisions in potentially important areas of government procurement (construction services for public infrastructure projects at the district level)<sup>54</sup>, and to convince a significant number of USA state governments to be bound by the rules that would eventually ensue. As the Congressional Research Service has pointed out, USA states' enthusiasm for participating in the government procurement chapters of the steady stream of FTAs the USA has been concluding has been steadily diminishing, down from 39 in NAFTA to just 7 in the KORUS FTA.<sup>55</sup> The 2011 update of the WTO GPA almost faltered when the USA seemed unable to get a number of big states to commit to being bound by the new rules.<sup>56</sup>

With the exception of a few countries such as Japan, Singapore, Korea, Australia and New Zealand, Asia has engaged only very reluctantly in the opening of government procurement markets<sup>57</sup>, so that, by way of example, corresponding disciplines and commitments are completely lacking under the ASEAN texts.<sup>58</sup> The difficulty Malaysia would face in reforming its preferential system of awarding contracts to ethnic Malay-owned companies is well-documented.

These negotiations will undoubtedly be driven by efficient exporters of big-ticket items such as construction, but also big services exporters in sectors such as telecommunications. For countries with offensive interests, like the United States, Australia, and Singapore, the difficulty will be getting countries with overriding defensive interests such as Vietnam, Malaysia, and even Japan to go along with opening their government procurement markets (beyond what Japan has already offered at the WTO). The really convincing arguments will be couched in terms of competitiveness, where *demandeur* countries will have to highlight and drive home the massive welfare losses closing government procurement markets can,

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Robert Anderson (eds), *The WTO Regime on Government Procurement: Challenge and Reform*, Cambridge University Press, 2013.

54. See Donna Cooper, "Meeting the Infrastructure Imperative, An Affordable Plan to Put Americans Back to Work Rebuilding Our Nation's Infrastructure" Center for American Progress, February 2012, available at: <http://www.americanprogress.org/wp-content/uploads/issues/2012/02/pdf/infrastructure.pdf> (14 December 2013).

55. See Ferguson *et al* for the Congressional Research Service (2013), at p. 25.

56. See *Final GPA Deal Imperiled After U.S. Withdraws State Of Georgia From Offer*, in: "Inside Washington Publishers", 13 January 2014, available at <http://iwpnews.com/IWP-General/Public-Content-Trade/final-gpa-deal-imperiled-after-us-withdraws-state-of-georgia-from-offer/menu-id-918.html> (14 December 2013).

57. See Locknie Hsu, *Government Procurement: A View from Asia*, in: "Asian Journal of WTO & International Health Law and Policy", Vol. 1, No. 2, pp. 379-400, September 2006.

58. Dawar and Evenett (2011), at p. 375.

and arguably do, cause to these economies, and pointing out that binding treaty commitments are an important corollary and benchmarking/disciplinary tool for achieving reform in these otherwise competition-deprived sectors.

Nonetheless, it is likely that the ultimate TPP text on government procurement will to a large extent mirror or even incorporate by reference the provisions of the 2011 WTO Government Procurement Agreement. If so, then the TPP process will be a way to indirectly bring a large number of countries under WTO government procurement disciplines without them having to formally negotiate accession to the Agreement in Geneva.

Government procurement has been identified as a major market access issue for the EU in the TTIP negotiations. Of particular concern to EU negotiators are the Buy America provisions attached to federal contracts, and relative lack of access to sub-federal procurement markets in the USA since these remain largely closed to foreigners.<sup>59</sup> Since both the USA and the EU are signatories to the WTO Government Procurement Agreement, the regulatory dimension of this negotiation is likely to be small relative to the market access component. That will become part of the broader market access mix.

### 3.5 COMPETITION POLICY

THE NOVEMBER 2011 framework published on the sidelines of the Honolulu APEC Leaders' Meeting describes the objective of the TPP chapter on competition policy as being "to promote a competitive business environment, protect consumers and ensure a level playing field for TPP companies."<sup>60</sup> The commitments reportedly being envisaged are those on the enactment and enforcement of competition laws and relevant institutional frameworks, due process provisions in the enforcement of competition laws, transparency obligations, consumer protection, affording standing to private parties to initiate legal action under competition laws (known as private right of action) and technical cooperation for the benefit of developing country partners who have not yet or only recently enacted legislation in the area of competition policy.<sup>61</sup> Very little is known about the draft TPP text on competition, although some commentators have speculated that the provisions in the USA FTAs with Korea and possibly Singapore will set the tone at the TPP too.<sup>62</sup>

#### 3.5.1 KORUS FTA PROVISIONS ON COMPETITION POLICY

The KORUS FTA chapter on competition (Chapter 16)<sup>63</sup> contains nine articles spanning just under six pages. Article 16.1 sets forth a number of obligations regarding the enactment of competition laws and the establishment of the relevant authorities, as well as imposing non-discrimination obligations and other requirements intended to guarantee procedural

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59. Jeffrey J Schott and Cathleen Cimino "Crafting a Transatlantic Trade and Investment Partnership: What can be Done?", Petersen Institute for International Economics, Policy Brief 13-8.

60. See "Trans-Pacific Partnership (TPP) Trade Ministers' Report to Leaders", dated November 12, 2011, cited above.

61. See Ferguson *et al* for the Congressional Research Service (2013), at p. 42.

62. See Alice Pham, The TPP Agreement: Chapter on Competition Policy, CUTS International, Hanoi Resource Centre, May 2013 available at: [http://www.cuts-hrc.org/images/stories/doc/tpp\\_competition\\_chapter.pdf](http://www.cuts-hrc.org/images/stories/doc/tpp_competition_chapter.pdf) (14 December 2013).

63. See USTR website for the treaty text *Chapter Sixteen Competition Related Matters* [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file193\\_12715.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file193_12715.pdf) (14 December 2013).

fairness and judicial review of competition authority actions and decisions. Articles 16.2 and 16.3 contains provisions on designated monopolies and state-owned enterprises respectively, and seek to ensure that any entities captured under these provisions are restrained from acting in a manner which would run contrary to their obligations under the agreement, or would otherwise distort conditions of competition. These articles on designated monopolies seek to ensure such entities act solely on the basis of commercial considerations when conducting themselves (i.e. buying and selling), whereas the corresponding provision on state-owned enterprises limits itself to imposing a non discrimination obligation on the relevant entities when selling their respective goods and services, i.e. not to engage in discriminatory pricing, an issue that is fleshed out in more detail in Art. 16.3 and which requires any price differentials to again be based on commercial considerations rather than arbitrary discrimination.

Article 16.5 contains a number of far-reaching transparency obligations in terms of both the competition laws and how they are enforced, and requires parties to provide information on these policies and related enforcement actions on request. Article 16.6 on Cross-Border Consumer Protection sets forth a number of best endeavor obligations for competition authorities in both parties to consult and cooperate. Article 16.7 on Consultations provides for the usual mechanism for intergovernmental discussions concerning the functioning of this chapter of the agreement, and presumably represents a procedural precursor for the next Article, 16.8, on Dispute Settlement. The dispute settlement provision carves out the Art. 16.1 obligations from the scope of this chapter so that neither party can be sued for failing to enact or enforce competition laws. Nevertheless, the important provisions on designated monopolies and state-owned enterprises are not explicitly carved out from the dispute settlement provisions so presumably each party could be taken to task for failing to take action against those anticompetitive practices. Finally, Art. 16.9 establishes a number of definitions, such as what is meant by the terms “consumer protection laws” and “in accordance with commercial considerations”. These definitions adhere to those commonly used in *fora* such as APEC or OECD and don’t contain any new substantive obligations in and of themselves.

### 3.5.2 THE P4 AND COMPETITION POLICY

THE PROVISIONS OF Chapter 9 of the Trans-Pacific Strategic Economic Partnership<sup>64</sup> differ somewhat from those of the KORUS-FTA, in that they specifically name a number of anti-competitive practices that are to be proscribed under parties’ respective competition laws, such as “anti-competitive agreements, concerted practices or arrangements by competitors and abusive behaviour resulting from single or joint dominant positions in a market”.<sup>65</sup> However, the P4 text contains a total carve-out for the entire chapter from the agreement’s dispute settlement provisions, which goes considerably further than the limited albeit significant carve-out in effect under the KORUS FTA (see above).<sup>66</sup> Also rather telling are the specific exemptions from competition rules that the P4 allows parties to table under the third subparagraph of Article 9.2: Competition Law and Enforcement. This sub-paragraph states in relevant part that “[...] each Party may exempt specific measures or sectors from the application of their general competition law, provided that such exemptions are transparent and undertaken on the grounds of public policy or public interest”. The parties are to list

64. The text of the agreement can be downloaded from the website of the New Zealand Ministry of Foreign Affairs and Trade (MFAT): <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/0-P4-Text-of-Agreement.php> (14 December 2014).

65. See Article 9.2: Competition Law and Enforcement.

66. See Article 9.7: Dispute Settlement.

any such exemptions in an annex to the competition chapter (Annex 9A), and can add new sectors or measures to the list in future, subject to the obligation to notify and consult with other potentially affected parties.<sup>67</sup>

A review of the limited number of exemptions that have been scheduled by two parties to the P4<sup>68</sup> provides a roadmap for the likely sticking points in the TPP too, such as in the case of New Zealand, pharmaceutical subsidies by Pharmac, or agricultural producer boards (which operate management supply schemes for commodities like meat or pork); or in the case of Singapore, the supply of piped potable water, the collection, treatment and disposal of wastewater, as well as some public transport services (notably buses), cargo terminal operations and even the approval of mergers and acquisitions (a big carve-out with systemically far-reaching implications). Other countries that are parties to the TPP have their own exemptions from competition laws that are also likely to play an important role in just how far liberalization under this chapter can go, with one of the best-known examples being the numerous exemptions from anti-trust laws enjoyed by the US civil aviation industry in providing air passenger services, so that USA airlines are given what amounts to almost a blank check by the Department of Transportation to merge and/or pool resources in almost any manner they see fit.<sup>69</sup>

### 3.5.3 LIKELY TPP OUTCOMES AND RESONANCE WITH THE TTIP

THE TPP NEGOTIATIONS are unlikely to result in the kind of centralized competition watchdog authority established under regional integration initiatives such as the European Union, the Andean Pact, the West African Economic and Monetary Union, or COMESA.<sup>70</sup> Rather we are likely to see some definitions of the kinds of behavior by private actors that parties to the TPP will be required to ban and prosecute, as well as some degree of carve-out from the agreement's dispute settlement chapter and/or possible scheduled exemptions from competition rules provided such exemptions have a recognized public policy rationale. Although these provisions are likely to be less intrusive in terms of regulatory autonomy than say a centralized system would be, they will still represent a giant leap forward for a number of developing countries, particularly those that adopt some form of these rules in subsequent FTAs further down the road. This is even more so the case when one combines these rules with the ones being contemplated on state-owned enterprises (as the KORUS FTA does). Both the rules on competition policy and those on SOEs have potentially far-reaching implications for the economic governance of developing countries, and their policy space in terms of backing national champions in the context of economic development strategies. In this light, the competition chapter of the EU-Korea FTA specifically proscribes certain kinds of state behaviour, specifically banning unlimited and non time bound subsidies that cover the debts or liabilities of enterprises, and provision of subsidies in the absence of a credible restructuring plan. These subsidies are subject to the agreement's dispute settlement provi-

67. See the penultimate sentence of subparagraph 3 of Art. 9.2: "Should any Party be considering additions to its list of exemptions that it considers may affect trade with another Party, it will inform that Party, which may request consultations under Article 9.5."

68. Specific exemptions from the competition chapter were not tabled by Chile or Brunei.

69. See *All together now: Why antitrust immunity granted in Washington may not wash in Europe*, in: "The Economist", 29 October 2009, available at: <http://www.economist.com/node/14770159> (14 December 2014).

70. See Kamala Dawar and Peter Holmes, *Chapter 16 Competition Policy*, in: Jean-Pierre Chauffour and Jean-Christophe Maur (eds), "Preferential Trade Policies for Development: A Handbook" (Deswar and Holmes 2011), World Bank Group, 2011, pp. 347 - 366, at p. 355.

sions. Consequently it is possible that the TTIP will elaborate more stringent standards in this area than the TPP may achieve.<sup>71</sup>

Nevertheless, as much of the work undertaken by UNCTAD showed in the years between the Singapore Declaration in 1996 and the Cancun Ministerial Conference in 2003<sup>72</sup>, and as the World Bank continues to point out<sup>73</sup>, the lack of proper functioning competition laws and authorities can go a long way to explaining the poor performance and sub-optimal economic governance of a whole range of developing countries. Adopting a limited set of commitments on competition policy is thus likely to be net welfare enhancing to many developing countries that do not yet have them, so that this prospect is not necessarily one to be viewed with the suspicion and enmity that ultimately caused related proposals to falter during the Doha Round. In this context, the TPP is to be viewed as the next logical step in a process that has been going on for some time now, namely the convergence of trade disciplines that focus on market access, and competition rules that concern how such goods and services are treated once they have entered a given market.

### 3.6 INVESTMENT

INVESTMENT APPEARS TO be one of those chapters in the talks where a negotiating text is reported to have been largely completed, albeit with a number of very systemically important sticking points that need to be resolved at the political level, not least of which is an exemption from investor-state dispute settlement that Australia is seeking, despite having such a clause in many of its earlier FTAs.<sup>74</sup> This seems to have been the stated trade policy position of the former Gillard government<sup>75</sup>, but it remains to be seen whether this position will be maintained by the new Coalition government under Prime Minister Tony Abbot, although the existing exclusion of investor-to-state dispute settlement codified in Australia's FTA with the United States was negotiated by an earlier Coalition government under then Prime Minister John Howard. Given the very robust offensive the global tobacco industry has mounted against Australia's tobacco controls laws, it seems unlikely that Australia would be willing to concede on this point in the TPP, unless it can contain a carve-out elsewhere in the treaty text that would shelter it specifically from such challenges in future.<sup>76</sup>

Whereas the EC has only recently acquired competence to negotiate investment in FTAs, it is already clear that it will support investor-state dispute settlement, and is already doing so in the Canada-EU FTA. However, the EC seems to be aware of problems in the system, and

71. Schott and Cimino, *op.cit.*, at P17

72. W. Lachmann, *The Development Dimension of Competition Law and Policy*, UNCTAD, 1999, available at: [http://www.consumer.org.hk/website/wrap\\_en2/20020416/unctad/webpage/backdoc/dev\\_dim.pdf](http://www.consumer.org.hk/website/wrap_en2/20020416/unctad/webpage/backdoc/dev_dim.pdf) (14 December 2013).

73. See, Markus Kitzmuller and Martha Martinez Licetti, *Encouraging Thriving Markets for Development*, World Bank, September 2012, available at: <https://www.wbginvestmentclimate.org/advisory-services/cross-cutting-issues/competition-policy/loader.cfm?csModule=security/getfile&pageid=42573> (13 December 2013)

74. The exception being its FTA with the United States. See Sébastien Miroudot, *Chapter 14 Investment*, in: *Chauffour and Maur* (2011), at p. 311.

75. See Jürgen Kurtz, *The Australian Trade Policy Statement on Investor-State Dispute Settlement*, in: ASIL Insights, August 2, 2011, available at: <http://www.asil.org/insights/volume/15/issue/22/australian-trade-policy-statement-investor-state-dispute-settlement> (14 December 2013).

76. Specific language that would carve out public health measures from challenge has in fact been tabled, as has other product-specific language relating to tobacco, so this might very well portend the quid pro quo that is being contemplated to allow Australia to concede to investor-state dispute settlement under the TPP, a very important objective for the USA given the existence of a number of developing countries among the negotiating partners with less than optimally functioning domestic legal systems.



so it expressly wishes to seek improves in how the dispute settlement system works. This objective includes: preventing frivolous investor claims by obliging investors that lose claims to pay all litigation costs; promoting transparency in the litigation process by making documents public and opening up hearings to interested parties extending to the possibility of making submissions; dealing with conflicts of interest, for example by obliging arbitrators to sign a binding code of conduct; and introducing safeguards for parties to the agreement – for example in the Canada-EU FTA there are clauses that allow signatories to agree jointly on how they interpret the agreement.<sup>77</sup> Consequently the USA and the EU do not appear to be far apart on this issue.

Capital controls seems to be another issue that has eluded consensus so far in the TPP negotiations. Most FTAs the USA has concluded over the last decade or so contain provisions stipulating the free flow of capital and which constrain monetary authorities in the US's FTA parties from imposing controls on capital outflows. An important exception to this rule was the FTA with Singapore, where this issue literally became the final sticking point and was only resolved when the USA agreed to allow Singapore to impose capital controls as a very last resort in times of monetary crisis, and Singapore agreed to indemnify (subject to a negotiated ceiling) any USA investors that had suffered losses due to the imposition of such controls.<sup>78</sup> In December 2012, the International Monetary Fund published a new position that endorses governments having recourse to capital controls and other measures aimed at managing capital flows when certain circumstances apply.<sup>79</sup> This position, which was also supported by the USA as a member of the IMF's executive board, is in stark contradiction to the approach taken by USTR in negotiating investment and financial services chapters in FTAs up to now. The IMF paper is likely to influence the negotiating positions on capital controls of a number of developing countries in the TPP talks, particularly those in Latin America and South East Asia that have experienced regional monetary crisis in the last ten to fifteen years.

A copy of an earlier draft text of the TPP's investment chapter was leaked by an NGO in June 2012. Although a number of the chapter's provisions were criticized by certain civil society elements and academic commentators<sup>80</sup>, it seems to consolidate what has already been achieved by the USA in many of its bilateral FTAs thus far,<sup>81</sup> namely the right of establishment of foreign goods and services providers in the markets of FTA partners, non-discriminatory treatment of USA investors and their investments, minimum guarantees of fair and equitable treatment, disciplines on expropriation, capital controls, exemptions for scheduled non-conforming measures, state-to-state and investor-to-state dispute settlement provisions, and a ban on imposing performance requirements on USA investments, such as minimum export thresholds and local content requirements.<sup>82</sup>

77. European Commission, Fact Sheet "Investment Protection and Investor-to-State Dispute Settlement in EU Agreements", November 2013, [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf)

78. Ravi Menon, Chapter 10 Financial Services and Capital Controls, in: Tommy Koh, and Chang Li Lin (eds), "The United States: Singapore Free Trade Agreement Highlights and Insights", World Scientific Pub Co Inc, 2004, pp. 105-114, at p. 109 f. (Menon 2004)

79. See *New IMF View On Capital Controls Raises Questions For U.S. Approach In TPP*, in: Inside "U.S. Trade" 4 January 2013.

80. See *Newly Leaked TPP Investment Chapter Contains Special Rights for Corporations* at: <http://www.citizenstrade.org/ctc/blog/2012/06/13/newly-leaked-tpp-investment-chapter-contains-special-rights-for-corporations/> (13 December 2013).

81. See for example, Chapter 11 of the KORUS FTA, available at: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file587\\_12710.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file587_12710.pdf) (13 December 2013).

82. This summary paraphrased from that provided by Ferguson et al for the Congressional Research Service (2013), at p. 41.

Investment provisions have featured prominently in most preferential trading arrangements, including FTAs concluded over the last decade and a half, regardless of whether these agreements were being driven by the United States, the European Union, Japan, or even developing countries such as Chile or Mexico.<sup>83</sup> The TPP is likely to consolidate much of the treaty language already agreed in terms of existing legal obligations, with the really difficult trade-offs coming in the negotiations on schedules of non-conforming measures or excluded sectors that will be important for developing and developed countries alike in sectors where the political economy constraints are particularly acute.

The most important thing for countries to watch that are not currently involved in the TPP negotiations but which face the prospect of being bound by its provisions (or provisions very similar to those that emerge from the process) in the medium to long-term, is the degree to which the TPP is able to sweep aside non-conforming measures in sectors that have been particularly resistant to liberalisation in the past. In the KORUS FTA for example, the USA scheduled such non-conforming measures in e.g. the atomic energy sector, in the mining and pipeline transportation sector, for specialty air services<sup>84</sup>, communications and radio communications (particularly the restrictions on foreign ownership of broadcasting licenses), for patent attorneys (these must be USA citizens or legal residents in the US), as well as a long list of regional non-conforming measures.<sup>85</sup>

For the Koreans, a very large number of non-conforming measures were scheduled covering some sixty pages of text,<sup>86</sup> in areas such as construction services the sale, leasing, maintenance and disposal of construction equipment; automobile maintenance, repair, sales, disposal, and inspection services; distribution services - wholesale and retail distribution of tobacco and liquor; rice, barley and beef cattle farming (only Korean citizens can hold investments in rice and barley farming and any foreign investments in beef cattle farming are limited to less than 50 percent), to name just a few of these measures.

The real take-away from FTAs like the KORUS FTA is that developing countries still looking to pursue industrialization strategies that encompass restrictions on foreign investment should be able to do so, depending on the degree to which TPP countries are able to negotiate such policy space for themselves. The extent to which TPP countries will be allowed to maintain lists of non-conforming measures is something that remains to be seen, and given the level of secrecy that the TPP talks have been shrouded in, this is something we are unlikely to know until after the talks are concluded. Nevertheless, given the fact that in the past, the US has been relatively magnanimous in allowing its FTA partners to submit long lists of non-conforming measures, it is probably safe to say this practice will continue in the TPP, to the extent such lists do not go too far in undermining or imperiling the liberalization effects of the agreement as a whole.

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83. See UNCTAD, *Investment Provisions in Economic Integration Agreements*, United Nations, 2006; see also Sébastien Miroudot, Chapter 14 Investment, in: Chauffour and Maur (2011).

84. Specialty air services are defined in Article 1213 of NAFTA as "aerial mapping, aerial surveying, aerial photography, forest fire management, fire fighting, aerial advertising, glider towing, parachute jumping, aerial construction, heli-logging, aerial sightseeing, flight training, aerial inspection and surveillance, and aerial spraying services."

85. See Annex I: Non-Conforming Measures for Services and Investment to the KORUS FTA at the USTR website, available at: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file570\\_12745.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file570_12745.pdf) (14 December 2013).

86. The corresponding number in the USA Annex is six pages.

### 3.7 E-COMMERCE

THE OBJECTIVES BEING pursued in these negotiations are no secret given the proposals that have long been put forward by the USA in the WTO<sup>87</sup> and which have been included in FTAs it has already concluded with partners such as Korea<sup>88</sup> and Australia.<sup>89</sup> In addition, US-based industry groups such as the Business Software Alliance<sup>90</sup> and the Coalition of Services Industries<sup>91</sup> have been very open about the kind of protectionist practices they wish to see addressed in the TPP negotiations. The 2011 outline document states that “[the] e-commerce text will enhance the viability of the digital economy by ensuring that impediments to both consumer and businesses embracing this medium of trade are addressed. Negotiators have made encouraging progress, including on provisions addressing customs duties in the digital environment, authentication of electronic transactions, and consumer protection. Additional proposals on information flows and treatment of digital products are also under discussion”.<sup>92</sup>

In November 2011 the National Foreign Trade Council (NFTC) released a set of USA business community policy priorities for modernizing the international trade rules and practices governing cross-border flows of data and information technologies, calling for the USA government to *inter alia* seek commitments that would: expressly prohibit restrictions on legitimate cross-border information flows; prohibit local infrastructure or investment mandates; promote international standards, dialogues and best practices; improve transparency and predictability; and address legal and policy issues involving the digital economy. When issuing the policy document the NFTC noted that

*“The policy priorities were developed by a core group of associations and companies through a process convened under the National Foreign Trade Council. A variety of America’s leading companies including Citi, Google, IBM, Mastercard, Microsoft and Visa joined NFTC and other associations including the Business Software Alliance, Coalition of Services Industries, Software & Information Industry Association and U.S. Council for International Business to craft the document.”*<sup>93</sup>

Just like the needs and concerns of these interests played a key component in securing closure to negotiating texts on trade in services at the WTO in the Uruguay Round and the years immediately thereafter, USTR is unlikely to be able to ignore their concerns when negotiating the TPP, given that these groups contribute a not insignificant share of USA export

87. See para. 34 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) adopted on 14 November 2001, available at: [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm#electronic](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#electronic) (14 December 2014), as well as the many proposals tabled by various countries currently negotiating the TPP, like Australia (IP/C/W/233), the United States (IP/C/W/149).

88. For the text of this chapter in the KORUS FTA see the USTR website at: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file816\\_12714.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file816_12714.pdf) (14 December 2013).

89. For the text of this chapter in the AUSUS FTA see the USTR website at: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset\\_upload\\_file508\\_5156.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file508_5156.pdf) (14 December 2013).

90. See Business Software Alliance, *Lockout: How a New Wave of Trade Protectionism Is Spreading through the World’s Fastest-Growing IT Markets – and What to Do about It*, December 2012, available at: [http://www.bsa.org/~media/Files/Policy/Trade/BSA\\_MarketAccess\\_Report\\_FINAL\\_WEB\\_062012.pdf](http://www.bsa.org/~media/Files/Policy/Trade/BSA_MarketAccess_Report_FINAL_WEB_062012.pdf) (14 December 2013). (Business Software Alliance 2012)

91. See CSI Releases Paper On The Importance of Cross-Border Information Flows In TPP, press release dated 18 May 2012, available at: <https://servicescoalition.org/images/files/2012-05-22%20TPP%20Data%20Flows%20presser.pdf> (14 December 2013).

92. See <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement> (14 December 2013).

93. See <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&id=236&articleid=3356&category=All> (14 December 2013).



earnings and thus constitute an important element of the calculus that must be undertaken of whether or not the market access gains the TPP ultimately brings with it are sufficient to offset the short-term adjustment costs of relatively less efficient import competing sectors that stand to lose the most from the talks (particularly footwear).

### 3.7.1 THE AUSTRALIAN AND KOREAN FTAS WITH THE USA AS NEGOTIATING TEMPLATES

AS ALLUDED TO above, a number of FTAs have already been concluded which contains chapters on e-commerce. The electronic commerce chapters in both the Australian and Korean FTAs with the USA are largely similar and have to be read in connection with the respective chapters on investment, cross-border supply of services and financial services, as well as in conjunction with the respective annexes on non-conforming measures. In each case, the chapters contain preambular language affirming the importance of electronic commerce to economic growth and the need to avoid barriers to its use and development.<sup>94</sup> In addition both chapters set forth a ban on imposing customs duties, fees or other charges on or in connection with the importation or exportation of digital products.<sup>95</sup> In addition to this, these chapters typically set forth non-discrimination provisions that impose obligations on how equal treatment between digital products and digitally supplied services of different origin. They also contain language on such matters as authentication, digital certificates, and electronic signatures and require the parties to refrain from adopting legislation that would impede the use of these tools (the AUSUS does not contain such an obligation on electronic signatures but instead a best efforts obligation to work towards making such authentication workable at the federal/central level of government). Article 15.7 of the FTA between Korea and the US contains a provision entitled “Principles on Access to and Use of the Internet for Electronic Commerce”, which goes some way to address a number of the complaints raised by big USA exporters in this sector. This includes declaratory language on the importance of allowing consumers in the respective parties’ territories to freely select between the digital products and services of their choice as well as run applications and services of their choosing. The same provision also proclaims the desirability of affording consumers the freedom to connect to the internet using whatever device they so choose as well as extolling the benefits of allowing consumers the benefits of competition between “network providers, application and services providers and content providers”.<sup>96</sup> Although these provisions seem almost tailor made to address the ongoing concerns of device and e-commerce ecosystem brands like Apple in an economy otherwise dominated by Samsung, they are nevertheless likely to play an important role more generally in the TPP negotiations, given their usefulness in serving as a template for future negotiations with countries that currently or are likely in future to give rise to similar concerns for USA players and exporters in the multi-trillion dollar digital and e-commerce economy.

Over the course of the TPP negotiations, USTR has submitted two proposals on the issue of the free flow of data over the Internet. The first proposal (tabled in June 2011 during the seventh round of TPP talks) would commit TPP countries to refrain from blocking cross-

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94. See e.g. Art. 15.1 of the KORUS FTA, available at: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file816\\_12714.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file816_12714.pdf) (14 December 2013).

95. See e.g. Art. 16.3 of the AUSUS FTA, available at [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset\\_upload\\_file508\\_5156.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/australia/asset_upload_file508_5156.pdf) (14 December 2013).

96. See subparagraph D of Art. 15.7 KORUS FTA.

border transfers of data.<sup>97</sup> The second proposal (tabled during the ninth round of TPP negotiations in Peru in October 2011) would bar countries from putting in place requirements that a company store all of its data for local use on a server located in-country. These proposals, however, are reportedly meeting with some resistance by countries like Australia and New Zealand<sup>98</sup> due to domestic data protection and privacy laws, with Australia tabling its own alternative text during the May 2012 Dallas round.<sup>99</sup> Concerns over privacy are likely to only have been exacerbated by the revelations by Edward Snowden of the NSA's electronic surveillance and the degree to which it has compelled the operators of major internet and e-commerce businesses to grant it access to users' personal information. This is also shaping up to be a major potential sticking point in the TTIP negotiations, where many governments have gone on record as having to re-think their hitherto policies on sharing the personal and private information of their citizens with US-based entities.<sup>100</sup>

In the talks on cross-border services, USTR is reportedly working with other interested parties to build consensus on "securing fair, open, and transparent markets for services trade, including services supplied electronically and by small- and medium-sized enterprises, while preserving the right of governments to regulate in the public interest."<sup>101</sup> Finally, USTR has also reported that it is working with other TPP parties on a text covering telecommunications, which would address "the need for reasonable network access for suppliers through interconnection and access to physical facilities", which are equally issues that will have an impact on the actionability of e-commerce commitments achieved in the electronic commerce chapter.<sup>102</sup>

### 3.7.2 E-COMMERCE PROVISIONS NOT LIKELY TO SIGNIFICANTLY IMPAIR POLICY SPACE

ALTHOUGH THE AMBITIONS of many in the USA business community are quite high for these aspects of the TPP talks, governments are still likely to emerge from these negotiations with enough regulatory autonomy to take whatever policy measures they deem necessary in relation to the cross-border flow of information and the regulatory environment governing e-commerce, as long as such measures are enacted in pursuance of a legitimate public policy reason otherwise recognized under international trade rules (public order, public morals, national security) and provided such measures do not represent arbitrary discrimination or a disguised restriction on trade. For those governments who feel they need additional cover beyond the general and national security exceptions, the annex of non-conforming measures will likely be available, provided they can convince their negotiating counterparts that their motives go beyond base protectionism. This logic applies equally to the TTIP negotiations.

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97. See *Official Says U.S. Tabled Text On Free Data Flow At Vietnam TPP Round*, in: "Inside US Trade", 22 July 2011.

98. See Ferguson *et al* for the Congressional Research Service (2013), at p. 42.

99. See *TPP Countries To Discuss Australian Alternative To Data-Flow Proposal*, in: "Inside US Trade", 6 July 2012.

100. See *New EU rules to curb transfer of data to US after Edward Snowden revelations*, in: The Guardian, 17 October 2013, available at: <http://www.theguardian.com/world/2013/oct/17/eu-rules-data-us-edward-snowden> (13 December 2013).

101. See [http://insidetrade.com/iwfile.html?file=nov2011%2Fwto2011\\_4129b.pdf](http://insidetrade.com/iwfile.html?file=nov2011%2Fwto2011_4129b.pdf) (14 December 2013).

102. *Ibid.*

### 3.8 ENVIRONMENT

LIKE LABOUR (DISCUSSED immediately below), trade and environment has been on the negotiating agenda at the WTO since the very first Ministerial Conference in Singapore in 2006.<sup>103</sup> The Singapore Ministerial Declaration limits itself to some very non-committal and declaratory language on the desirability of examining the linkages between trade and environment and continuing the work of the Committee on Trade and Environment, but otherwise commits WTO Members to very little. Developing countries at the WTO have almost unanimously rejected efforts to broaden the scope of trade disciplines to include commitments on protection and conservation of the environment and have been deeply suspicious of efforts by (mostly) developed countries to advance this agenda.<sup>104</sup> Despite the roadblock this represents at the multilateral level, environmental provisions have started to figure consistently in preferential trading agreements over the last decade and a half, albeit mostly in the form of hortatory language, vaguely formulated understandings or best endeavors commitments.<sup>105</sup>

#### 3.8.1 US NEGOTIATING OBJECTIVES

THE SO-CALLED 2007 May 10<sup>th</sup> Agreement between the United States congressional leadership and the Administration of President George W. Bush<sup>106</sup> set the broad outlines that USA trade negotiations must comply with in the absence of Fast Track Negotiating Authority. Thus, the FTAs that have been concluded since then<sup>107</sup> go a long way to informing the objectives being pursued at least by the United States in the TPP and the negotiating outcomes that are likely to ensue from this process in one form or another. These commitments involve incorporating a specific list of multilateral environmental agreements (MEAs) into FTAs, namely the following<sup>108</sup>:

- The Convention on International Trade in Endangered Species (CITES);
- The Montreal Protocol on Ozone Depleting Substances;
- International Convention for the Prevention of Pollution from Ships (MARPOL),
- Inter-American Tropical Tuna Convention (IATTC);
- The Ramsar Convention on Wetlands;
- The International Whaling Convention (IWC); and
- The Convention on Conservation of Antarctic Marine Living Resources (CCAMLR).

In addition to this, under the terms of the May 10<sup>th</sup> Agreement, any obligations FTA negotiating parties enter into must be couched in actionable language (“shall”) rather than language that just holds them to best efforts (“strive to”). Finally the May 10<sup>th</sup> Agreement holds USTR to subject environmental provisions in FTAs to the same dispute settlement procedures as rights and obligations of a commercial nature.

103. See Singapore Ministerial Declaration (WT/MIN(96)/DEC) adopted on 13 December 1996, para. 16.

104. See *Indian Official says Trade and Environment Should Not Mix*, in: “Bridges Weekly Trade News Digest”, 24 February 2010, available at: <http://ictsd.org/i/news/bridgesweekly/71089/> (14 December 2013).

105. See Anuradha R. V. Chapter 19 Environment, in Chauffour and Maur (2011) as cited above, pp. 407 - 425.

106. See [http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf) (14 December 2013) for USTR’s summary and explanation of the terms of the May 10<sup>th</sup> Agreement.

107. Peru, Korea, Colombia and Panama.

108. *Ibid.*

The USA position on inserting environmental provisions has evolved slightly since the May 10th Agreement, and is reported to represent a three-pronged approach in the TPP negotiations.<sup>109</sup> The first of these prongs seeks to have parties to the TPP consent to adopting and enforcing national laws that prohibit trade in protected wildlife or illicitly harvested plant materials (including in particular timber), as well as in marine fisheries.<sup>110</sup> The second prong involves a number of so-called “core commitments” that oblige TPP partner countries to comply with their obligations under the MEAs listed in the May 10th Agreement.<sup>111</sup> The final prong is reported to be to cover input and participation from various stakeholders, creating a mechanism by which they could file a notification where a TPP country fails to comply fully with its obligations under the environmental provisions of the agreement.<sup>112</sup> Procedural provisions similar to those proposed by the USA under the TPP already exist in a number of FTAs concluded by it since the May 10th Agreement.<sup>113</sup>

### 3.8.2 EVOLUTION OF NEGOTIATIONS THROUGH VARIOUS NEGOTIATING ROUNDS

GIVEN THE VERY different degrees of importance that various TPP countries place on including or excluding environmental provisions in their FTAs, and given the very different approaches TPP countries take to enacting and enforcing environmental protection legislation in their own domestic legal systems, these negotiations were always going to be characterized by vast differences in perceived interests and desired outcomes. As alluded to above, the USA has included distinct texts on environment in all of its bilateral FTAs with other TPP negotiating partners, whereas Chile, New Zealand, Singapore and Malaysia have limited themselves to only including environmental provisions in side agreements to their FTAs.<sup>114</sup> Vietnam has so far refrained from including environmental provisions in any of its FTAs as has Australia, with the exception of its FTA with the US.<sup>115</sup>

Although countries such as Australia Chile and New Zealand have tabled proposals on limiting fisheries subsidies meant to address overfishing and depletion of global fisheries stocks<sup>116</sup>, most of the discussion and controversy that has ensued over the proposals advanced by the USA have focused on the issue of enforceability of environmental commitments.<sup>117</sup> Most other TPP parties are reported as rejecting the notion that environmental provisions should be subject to the same dispute settlement procedures as commercial commitments, whereby this issue is equally reported as being a so-called “red line” for the US, with Congress unlikely

109. See *USTR Touts TPP Environment Proposal, But Acknowledges Challenges*, in: “Inside US Trade”, 22 July 2011.

110. See USTR Green Paper on Conservation and the Trans-Pacific Partnership, December 2011, available at: <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/ustr-green-paper-conservation-and-trans-pacific-partnership> (14 December 2013).

111. *USTR Touts TPP Environment Proposal, But Acknowledges Challenges*, cited above.

112. *Ibid.*

113. See for example, Article 20.7: Opportunities or Public Participation of the KORUS FTA, available at: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file852\\_12719.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file852_12719.pdf) (14 December 2014).

114. See Jeffrey J. Schott and Julia Muir, *Chapter 12 Environmental issues in the TPP*, in: Lim Elms and Low (2013), as cited above, pp. 187 - 199, at p. 189.

115. *Ibid.*

116. See Global Ocean Commission, *Policy Options Paper # 6: Elimination of harmful fisheries subsidies affecting the high seas*, November 2013, available at: <http://www.globaloceancommission.org/wp-content/uploads/GOC-paper06-subsidies.pdf>, at p. 9.

117. See *USTR Confirms Objections On Enforceability In TPP Environment Talks*, 2 July 2012, at <http://wto-center.vn/tpp/ustr-confirms-objections-enforceability-tpp-environment-talks> (14 December 2013).

to accept anything less than full enforceability of these commitments.<sup>118</sup> One development that has been reported in these negotiations is a climb-down by countries that originally proposed a total ban on fisheries subsidies to just a ban on those that cause overfishing.<sup>119</sup>

### 3.8.3 LIKELY LANDING ZONES AND IMPLICATIONS FOR FUTURE TRADE RULES

THE STAND-OFF OVER the degree to which environmental provisions are to be subject to binding dispute settlement is something that is only likely to be resolved at the highest political levels and in the closing days of the talks as key trade-offs between different countries' most sensitive political-economy red lines emerge. For now it is relatively clear that proper implementation of the commitments set forth in the seven MEAs listed above is likely to emerge as an issue that TPP partners will be able to largely agree on and which will undoubtedly figure in many future trade agreements going forward. Again we are witnessing the phenomenon by which trade disciplines on protection of the environment that emerge from the nexus of international treaty texts and the realities of an increasingly globalizing world - and which were roundly rejected at the WTO - are coming home to roost in the form of preferentially negotiated regional and inter-regional rules that sooner or later will be multilateralized either formally at the WTO or in practice by becoming the de facto norm from which no country that wishes to engage in international trade can afford to deviate.

Finally another element that bears mentioning and which is likely to be largely non-contentious in the TPP negotiations is the liberalization of trade in environmental goods and services (EGS). Because the market access commitments on goods that emerge from the TPP are likely to see most environmental products traded duty free, the real focus of negotiations on this issue is going to be trade and investment in environmental services<sup>120</sup>, which is something that will be covered in services and investment negotiations and in horse-trading over inclusion or exclusion from lists of non-conforming measures. Because commitments such as these involve market access and commercial considerations, their being subject to binding dispute settlement is not likely to be contentious.

How this issue plays out in the TTIP is also likely to accentuate existing differences of approach between the EU and the US with regard to trade and environment, particularly with the EU being an aggressive proponent of trade measures intended to combat climate change<sup>121</sup>, whereas many lawmakers in the US still seem to be extremely ambiguous on whether or not climate change is even happening and if so, whether it is caused by human activity or is merely a naturally recurring phenomenon.<sup>122</sup> Regardless of these ideological differences, progress is still likely to be achieved in the TTIP on a number of technical issues such as harmonizing standards in the area of e-mobility or lowering tariffs and market ac-

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118. See *U.S. Faces Opposition On Enforceability Of TPP Environmental Chapter*, in: "Inside US Trade", 24 May 2012.

119. See *TPP countries to waive total ban on fishing subsidies*, in: "Kyodo News International", 3 October 2013, available at: <http://www.globalpost.com/dispatch/news/kyodo-news-international/131003/tpp-countries-waive-total-ban-fishing-subsidies> (14 December 2013).

120. See Schott and Muir (2013), at p. 191.

121. See EU revives airline carbon tax proposal, EU Business, 17 October 2013, available at: <http://www.eubusiness.com/news-eu/aviation-transport.qxj> (14 December 2013).

122. See *US Lawmakers Spar on Climate Change*, *Voice of America*, 13 December 2009 available at: <http://www.voanews.com/content/us-lawmakers-spar-on-climate-change-79180872/369006.html> (14 December 2013)

cess barriers to environmentally friendly goods and services.<sup>123</sup> Be that as it may, the kind of consensus that is likely to emerge on this issue is still bound to be of the “lowest-common-denominator” kind, so that one should not expect far-reaching breakthroughs, but rather a consolidation of views and principles that are broadly shared at the international level.

### 3.9 LABOUR

SIMILAR TO ENVIRONMENT (discussed above), the interface between international trade and labour standards (not to be confused with issues like employment or the free movement of labour) has been around for some time. The 1996 Singapore Ministerial Declaration also contained language on core labour standards<sup>124</sup> affirming the competence of the International Labour Organization as the primary multilateral forum where these issues are to be discussed. Indeed, the Singapore Ministerial Declaration does not mince words on this issue, stating that Members “reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question.”<sup>125</sup> Even in the context of preferential trade liberalization the United States, and more recently Canada stand alone as the only countries who feel the need to include commitments on these issues in their trade agreements.<sup>126</sup>

#### 3.9.1 THE UNITED STATES AS DEMANDEUR

THE MAY 10<sup>th</sup> Agreement referred to in the previous section and the FTAs concluded in its wake with Peru, Korea Columbia and Panama seem to also have informed the US’s position on these issues in the TPP. The May 10th Agreement requires that USTR obtain commitments from trading partners on matters such as freedom of association, the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labor, effective abolition of child labour and elimination of discrimination in respect of employment and occupation.<sup>127</sup> It also requires that violations of these commitments be actionable in the same way as violations of commercial/market access commitments, namely through dispute settlement procedures and remedies, with the available remedies being fines and trade sanctions based on amount of trade injury caused. The language in the May 10th Agreement is the result of hard-fought political trade-offs between Democratic members of Congress representing organized labour and their Republican colleagues representing business interests. Their ultimate effectiveness is tempered by a caveat to the agreement that was insisted upon by Republicans stating that the enforceability of labour provisions in FTAs would be limited to the principles set forth in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.<sup>128</sup>

In the course of the TPP negotiations, USTR has reportedly tabled two proposals on labour<sup>129</sup>

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123. See R. Andreas Kraemer and Christiane Gerstetter, *The New Transatlantic Trade and Investment Partnership (TTIP): A Focus on the Environment*, 13 June 2013, available at: <http://www.ecologic.eu/8654>.

124. Para. 4.

125. Ibid.

126. See Kimberly Ann Elliott, *Chapter 20 Labor Rights*, in: Chauffour and Maur (2011) as cited above, pp. 426 - 441.

127. See [http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf) (14 December 2013).

128. See Elliot (2013), as cited above, at p. 205.

129. See Kimberly Ann Elliot, *Chapter 13 Labour standards and the TPP*, in: Lim Elms and Low (2013), as cited above, pp. 200 - 210, at p. 200.



with Canada also taking an active part in submitting proposals on enforcement of these obligations.<sup>130</sup> The USA proposals reportedly require countries to enact labour laws stipulating minimum wage requirements, working hours, and occupational health and safety.<sup>131</sup> In the face of opposition to its proposals (see below), the USA position seems to have softened somewhat - to the dismay of unions and labour organizations in the United States<sup>132</sup> - and may start to pivot towards “improving the labor-related capacity building provisions in past trade agreements”.<sup>133</sup> Whether or not the USA position does eventually gravitate away from the incorporation of harder treaty obligations on core labour standards towards softer commitments on technical assistance and capacity building in this area, the fact that organized labour on the one hand and business interests on the other are at such odds over this issue is likely to ensure that the USA will be unable to escape the reality that their negotiating partners in the TPP are equally ambiguous about the utility of incorporating hard disciplines on these issues in the trade rules that ultimately emerge from this process. This is something that both representatives in Congress and Obama Administration officials have come to realize after several years of tough negotiations on these issues.

### 3.9.2 TO ENFORCE OR NOT TO ENFORCE

AS DISCUSSED ABOVE in the context of the May 10<sup>th</sup> Agreement, USA proposals on this issue tend to favour binding dispute settlement with a range of possible remedies in cases of violation including suspension of concessions (the typical trade sanction) and the imposition of fines based on the volume of trade affected (something relatively new). Indeed, in the KORUS FTA the parties committed to binding dispute resolution, with access to the agreement’s general dispute provisions.<sup>134</sup> However, this approach is reported to have met with concerted opposition from many TPP partners<sup>135</sup>, and has been countered by an alternative proposal (also alluded to above) by Canada that would only allow for the imposition of monetary fines (capped at 15 million dollars annually) in cases of violations of labour standards that the offending party had failed effectively to address under an action plan worked out following a panel’s ruling on the alleged violation.<sup>136</sup>

In general Vietnam, Malaysia and Brunei are reported as opposing enforceable labor provisions in any form, whereas Australia and New Zealand are at best ambivalent on this issue, and view it as leverage for obtaining further market access into the USA for sensitive commodities (such as dairy and sugar) in exchange for their support, albeit not at the risk of scuttling the whole deal in the face of opposition from the pact’s developing country members.<sup>137</sup> The ability of USA negotiators to compromise on enforceability is likely to be determined by the outcome of congressional mid-term elections set to take place at the end of 2014, and will be contingent on the TPP offering solid market access gains in other areas of interest to

130. See *Canada Pushes Alternative Enforcement For TPP Labor Rights Obligations*, in: “Inside US Trade”, 13 December 2012.

131. Uncorroborated reports cited in Ferguson et al for the Congressional Research Service (2013), at p. 44.

132. See Unions Outline Substantive, Transparency Objections To TPP In Wake Of Auckland Round, in: “Inside US Trade”, 17 December 2012.

133. This was at least the approach advocated by key USA lawmakers in a joint letter to former USTR Ron Kirk in December 2011, as reported in Ferguson et al for the Congressional Research Service (2013), at p. 44

134. Schott and Cimino, op.cit, Table at p8.

135. See *Auckland Update: TPP Round Enters Second Phase Focused On Sensitive Topics*, in: “Inside US Trade”, 8 December 2012.

136. This is for example the approach taken under the Canada-Panama FTA, see *Canada Tables Alternative Enforcement Mechanism in TPP Labor Chapter*, in: “Inside US Trade”, 23 May 2013.

137. See *Auckland Update: TPP Round Enters Second Phase Focused On Sensitive Topics*, as cited above.

USA exporters. It is just possible, though, that TPA will pass prior to the mid-term elections, and that would allow for the TPP negotiations to wrap up before the elections take place. If that scenario unfolds then enforceability is likely to be higher up the agenda. However, given its relative isolation on this issue among TPP parties, the USA may have little choice but to acquiesce to limited enforceability of labour provisions, or to a counterproposal such as that put forward by Canada.

### *3.9.3 PROBABLE OUTCOMES AND IMPLICATIONS FOR THE WORLD TRADING SYSTEM*

SIMILAR TO THE SOE issue (discussed above), Vietnam seems to be the country to watch in these negotiations, given that it is currently the furthest from compliance with international norms on labour rights among all the countries negotiating the TPP, and because it exports a lot of labour-intensive manufactures to the United States, particularly footwear and textiles.<sup>138</sup> The political leadership of Vietnam is reported to be particularly suspicious of any text that would impose an obligation to uphold the right to freedom of association and allow for the establishment of independent workers associations given the important role that the trade union movement played in toppling one-party rule in Poland in the 1980s and 1990s. Another country to watch in these negotiations is Brunei, although the sultanate is admittedly likely to attract less attention than Vietnam due to its small size and overwhelming export dependency on a narrow range of primary commodities (particularly palm oil and fossil fuels).

It is probably safe to say that some form of face-saving compromise will be found to limit or blunt some of the most intrusive effects of direct enforceability of labor provisions in the TPP, coupled with binding commitments by all members to ratify the ILO conventions and effectively implement the standards contained therein, perhaps subject to transition periods. Developing countries like Vietnam will also be able to extract concessions from the United States in terms of capacity building and technical assistance to implement these standards. Also conceivable is some form of in-built agenda that might revisit commitments after a suitable implementation period and obligate members to return to the negotiating table to finish the job of agreeing to binding commitments on core labour standards as has been a key USA demand in its trade agreements since 2007. This would mirror approaches taken in the WTO in the context of trade in agricultural products and trade in services. Because the TPP is purportedly being negotiated as a single undertaking, it is difficult to envisage that countries like Vietnam or Singapore would successfully be able to negotiate to opt out from these rules.

The implications for the world trading system more generally are harder to predict. The ongoing Transatlantic Trade and Investment Partnership (TTIP) negotiations will almost certainly culminate in enforceable rules on core labour standards, since it is being negotiated between two developed trading blocks that already enforce these norms. The degree to which the rule framework that emerges from these talks can be imposed upon less developed countries in future trade agreements is questionable at best. Thus the TPP is likely to represent the lowest common denominator going forward as to what is achievable when developed and developing countries sit down to negotiate trade disciplines on labor rights issues.

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138. See Kimberly Ann Elliot, (2013), at p. 206.



### 3.10 OTHER AREAS EXPECTED TO PUSH THE STATUS QUO

IN AREAS THAT have long been part or were recently brought within the purview of multi-lateral trade rules, the TPP seems to promise more far-reaching commitments with regard to contracting parties' policy space and regulatory autonomy, particularly in policy areas like market access, sanitary and phytosanitary measures, trade in services, and intellectual property rights.

#### 3.10.1 MARKET ACCESS FOR GOODS

SO FAR THE talks have been characterized by two general approaches that are largely mutually exclusive. The first is that taken by the USA, which seems to only have made goods offers to those TPP partners with whom it does not have an FTA currently in force (Brunei, Malaysia, New Zealand and Vietnam).<sup>139</sup> Under this approach there would be a separate set of tariff schedules for each bilateral trade relationship under the TPP. This approach is reportedly also being taken by Peru.<sup>140</sup> The second approach, indeed that seemingly favored from the start by the other TPP members, would be to have a single tariff schedule that sets out each and every tariff concession agreed to by members, and that extends these concessions to other TPP members. This would be achieved by each member country submitting identical plurilateral goods offers to its negotiating partners. If this second approach were to ultimately be adopted, it would arguably be the most trade liberalizing and certainly easier for members of the trading community to use. On the other hand, it could also devolve into a lowest common denominator approach.

Regardless of which approach prevails, a number of market access issues portend far-reaching changes that could have important systemic implications for global trade flows down the road. This particularly concerns rules of origin, where the United States is coming under intense pressure from Vietnam to abandon its long-held yarn forward rule for textiles and apparel. Any move away from yarn-forward could not only be a game-changer in terms of access to the massive USA textiles market, but could revolutionize international supply chains across the entire textiles and apparel industries. Despite strong opposition to change from what remains of on-shore USA textiles and footwear manufacturers and more deeply entrenched and politically powerful USA cotton growers, it seems remotely possible that USA market access gains in areas such as beef, financial services, and government procurement may finally be enough to begin the process of unlocking the death-grip that the aforementioned interests have had on USA trade negotiators over the last two to three decades.

Market access commitments under the TPP could also be the beginning of the end for supply management schemes in countries like Canada and New Zealand for products such as dairy, as well as bring about unprecedented openings to the USA sugar market, something that candy and soft drink manufacturers in the United States have long been fighting for against entrenched interests who have the ear of the United States Department of Agriculture, to no avail. Any loosening of the grip that USA sugar producers have on trade policy could have far-reaching implications in the long run for other big sugar exporting countries, particularly within the ACP. Other commodities in which trade has suffered from tightly regulated import regimes would have to include rice, where Japan has already committed to make a big

139. See Deborah K. Elms, *Chapter 6 Negotiations over market access in goods*, in: Lim, Elms and Low (2013), pp. 109 - 120, at p. 114.

140. See "Business Groups Seeking Tariff Cuts Criticize U.S. Market Access Strategy", in: "Inside U.S. Trade" - 24 May 2013.

break with its past policy of providing exorbitant protection to its dwindling but electorally powerful rice farmers.<sup>141</sup> The initial market access gains would likely be captured by TPP exporters of rice like Vietnam, the United States and even Australia, but would inevitably be the first nail in the coffin for similar regimes in places like Korea and Indonesia further down the road.

In the TTIP negotiations industrial tariffs are likely to be phased out reasonably quickly, and comprehensively. The main area of contestation will be agricultural tariffs, and subsidies. In this area tariff reductions will not be comprehensive, and it is probable that subsidies would not be disciplined outside the context of the WTO. However, Japan's decision to abolish direct subsidies to rice farmers referred to above if effectively implemented, could inject some momentum into agricultural subsidy negotiations in the context of the TPP, that may find its way into the TTIP and ultimately the WTO. This is an issue that bears close watching, however unlikely it may seem presently, not least because many ACP countries remain deeply locked into the EU's agricultural policy system. Any major changes there would reverberate throughout the ACP.

### 3.10.2 SANITARY AND PHYTOSANITARY MEASURES

DESPITE THE ADOPTION of the WTO Agreement on Sanitary and Phytosanitary Standards (SPS) in 1995 following a failed attempt by the USA to use the dispute settlement provisions of the Tokyo Round Standards Code to tackle European import restrictions on USA beef imposed due to the use of growth hormones and other substances<sup>142</sup>, the incidence of food safety concerns being used as effective barriers to international trade in agricultural products has increased over the last two decades.<sup>143</sup> Although the WTO SPS Agreement undoubtedly represents progress on tackling import restrictions disguised as food safety concerns, there is nevertheless still room for improvement. Proposals from USA industry groups and lawmakers under this heading in the TPP negotiations have focused on a number of measures designed to facilitate cross-border trade in these products, such as equivalence, mutual recognition of inspection procedures, and the harmonization of documentary requirements.<sup>144</sup>

Except where they have explicitly mandated the use of specific international standards for certain products, it is worth noting that FTAs concluded since the end of the Uruguay Round have not pushed the envelope in terms of new substantive obligations in the SPS area, but have rather limited themselves to incorporating the existing set of rules by reference to the WTO SPS Agreement. The TPP thus represents a unique opportunity to address a number of perceived shortcomings in the current system. One area where parties seem to have coalesced is the issue of increased transparency and strengthening requirements for the use of science-based risk assessments, particular the definition of what exactly constitutes "sound science".<sup>145</sup> However, while there may be convergence on this issue in the TPP, the TTIP is

141. See, Japan approves plans to overhaul rice subsidies, in: Financial Times, November 26, available at <http://www.ft.com/intl/cms/s/0/764176d6-5697-11e3-ab12-00144feabdc0.html?siteedition=intl#axzz2q5AEaznX> (14 December 2013)

142. See, Charan Devereaux, Robert Z. Lawrence, and Michael D. Watkins "Chapter 1 Food Fight: The United States, Europe, and Trade in Hormone-Treated Beef", published in: *Case Studies in US Trade Negotiation, Volume 2: Resolving Disputes*, 2006.

143. See Concerns raised over trade restrictions on dairy products, biofuels, cars and seafood, 18 October 2013, at [http://www.wto.org/english/news\\_e/news13\\_e/good\\_18oct13\\_e.htm](http://www.wto.org/english/news_e/news13_e/good_18oct13_e.htm)

144. See Ferguson *et al* for the Congressional Research Service (2013), at p. 31.

145. See *U.S. Tables Revised SPS Chapter, TPP Round Produces Consolidated Text*, in: "Inside U.S. Trade" - 15 September 2011.

another matter altogether for the simple reason that the EU still adheres to the precautionary principle. Consequently whatever is agreed to in the TPP will not easily translate into the TTIP, since there is likely to be strong resistance in the EU to adopting “sound science” without reference to consumer and other preferences in areas such as biotechnology and genetically modified organisms.<sup>146</sup>

Also likely to emerge from the TPP is some form of expedited procedure for dealing with import restrictions imposed on SPS grounds against perishable products. Still contentious is whether new rules will be subject to binding dispute settlement or some form of “consultative mechanism”. Whatever improvements emerge are likely to be incremental at best. Governments are sure to retain a large degree of regulatory autonomy when it comes to an issue as important and politically sensitive as upholding the integrity of national food safety systems. This applies equally to the TTIP negotiations, only more so given strong EU regulatory preferences.

### 3.10.3 TRADE IN SERVICES

THE IN-BUILT AGENDA contained in Article XIX of the GATS was designed to address the limited degree of actual liberalization achieved in trade and services during the Uruguay Round.<sup>147</sup> The mandate contained in para. 15 of the Doha Ministerial Declaration on negotiating deeper access to Members services markets has also proved elusive, so that certain Members have abandoned the single undertaking and moved towards a plurilateral Trade in Services Agreement (TISA). Most if not all the action on deeper integration of global services markets over the last two decades has thus been achieved in the context of preferential trade agreements<sup>148</sup>, and the TPP will be another significant step in this direction given the size of the services markets in, and export dominance of some TPP members.

The most systemically important gains are likely to be made in areas such as financial services (insurance and banking), professional services, education services, telecommunications services, express delivery and e-commerce (already discussed above). This applies equally to the TTIP negotiations. Furthermore, the TPP will reinforce the trend away from positive list scheduling to the negative list approach, which is rightly perceived as far more trade liberalizing. However, in the TTIP the EU is not likely to be so keen on negative listing across the board, and may instead opt for using this approach to national treatment, while retaining a positive list approach to market access.<sup>149</sup> The TPP is also reported to have a specific chapter on the cross-border supply of services (also important in the talks on e-commerce and free flow of data) which will undoubtedly herald even greater liberalization in this mode of supply - already largely unconstrained by limitations on market access and national treatment in Members schedules in those sectors where commitments have been made. Financial services are also to get their own separate chapter, with deeper commitments envisaged than hitherto contemplated, particularly in financial services markets that are still relatively protected or are dominated by incumbents (this is certainly the case with Japan and arguably also Malaysia). The broader systemic implications of this are difficult to contemplate, since the world

146. See Schott, PP 13-14.

147. See Pierre Sauvé, Chapter 27, *Been there, not yet done that: Lessons and challenges in services trade*, in: Marion Panizzon, Nicole Pohl and Pierre Sauvé (eds), *GATS and the Regulation of Trade in Services*, Cambridge University Press, 2008, pp. 599 - 631.

148. See Aaditya Mattoo and Pierre Sauvé, *Chapter 12 Services*, in: Chauffour and Maur (2011), pp. 235 - 274.

149. See Schott and Cimino, at p8.

of international finance is already deeply interconnected. However, it is safe to say that the combined effect of the TPP, TTIP (which will undoubtedly achieve similar outcomes) and the WTO TISA process will usher in a new generation of more open international services markets that more reluctant liberalizers will ultimately be unable to hide from indefinitely.

### 3.10.4 INTELLECTUAL PROPERTY RIGHTS

A DRAFT OF the TPP text on intellectual property was published by Wikileaks on 13 November 2013<sup>150</sup>, making it possible to obtain a fairly reliable insight into how these talks are unfolding, although the lack of consensus that still prevails on many key provisions makes it impossible to reliably predict likely negotiating outcomes. The leaked text reveals that in areas affecting access to medicines and the use of medical devices and procedures, as well as those that effect the digital environment, the USA position is still separated by those of most of its negotiating partners by a chasm as vast as the Pacific Ocean itself. Particularly on issues such as extending patents and inhibiting access to medicine; data exclusivity for biologics; extending patent protection to plants, animals, and medical procedures in explicit contravention of the respective carve-outs contained in the TRIPS Agreement; and limitations on compulsory licenses, the USA position seems to have been dictated by an overly zealous and aggressive pharmaceutical lobby and has almost no chance of prevailing over almost unified opposition from its TPP partners.<sup>151</sup>

Although these seem to still be early days yet for the IP chapter of the TPP, the most likely final scenario is a mixed approach combining elements of the outcomes achieved under the KORUS FTA (and to apply these standards to developed TPP partners) with the outcomes achieved under the FTAs negotiated with Peru, Colombia and Panama (and to apply these standards to developing TPP countries).<sup>152</sup> This is indeed the approach envisaged under the USA's May 10 Agreement. What this ultimately means for the trading system as a whole is that some variation of TRIPS + is likely to establish itself under the TPP/TTIP processes, but not go so far as to erect major and insurmountable barriers to affordable access to essential medicines, since the needs of public health systems in countries such as Australia, New Zealand, Canada, and many European countries would could never allow this to happen.

Having said that, there are still differences between the US and the EU on certain IPR subjects, particularly concerning geographic indications (GIs). The EU has a longstanding agenda of extending protection over many names, as part of its trademark strategy, to new world countries such as the USA. It remains a central objective in EU FTA negotiating strategy. The USA has equally resisted this agenda, beyond signing up to those GIs – wines and spirits – covered in the TRIPs agreement.<sup>153</sup> Consequently the Transatlantic High Level Working Group, which was appointed by the EC and USA to put forward recommendations for taking the TTIP forward, advised caution with respect to the level of ambition in IPR.<sup>154</sup>

150. Available at <http://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf> (14 December 2013).

151. See the analysis of the text leaked by Wikileaks provided by Sean Flynn (American University College Of Law), entitled *Brief Overview of Top Concerns with U.S. Leaked Trans Pacific Partnership (TPP) Intellectual Property Proposal*, dated 15 November 2013, available at: <http://infojustice.org/archives/31243> (14 December 2013).

152. This is at least the approach reportedly being favoured in the context of negotiations covering pharmaceutical products and access to essential medicines; see Ferguson et al for the Congressional Research Service (2013), at p. 37.

153. See Schott and Cimino, pp. 10-13.

154. Referenced in Schott and Cimino, op.cit, at p10.

### 3.11 CONCLUDING REMARKS

WHEREAS IT IS true that many of the negotiating texts that have been tabled, and even the overall dynamic driving the TPP negotiations are the product of USA trade policy interests, it is also true that a number of other parties to the talks have been equally forceful in asserting and defending their own national economic interests, so that unlike the process of bilateral FTAs where the USA was able to act as hegemon, it is much more constrained in the TPP context. Also the fact that these talks involve a number of advanced industrialized countries as well as a small handful of developing countries with a very sophisticated grasp on the technicalities and underlying geopolitical realities of these talks, bodes well for negotiating outcomes that will ultimately be palatable to a broad majority of countries already participating at various degrees in the global trading system. Clearly, the best place to negotiate WTO plus commitments in many if not most systemically important areas of policymaking is the WTO itself. However, given the reluctance of a small handful of Members to negotiate new issues and/or engage meaningfully with new market access openings for goods and services, and given the unwieldiness of decision-making in an organization that is approaching 160 Members, it is no surprise that progress on these issues is taking place elsewhere and will likely continue to do so, at least in the short to medium term.

## 4. OUTCOME SCENARIOS AND THEIR IMPLICATIONS

IT IS CLEAR from the preceding analysis that the TPP and TTIP are complex negotiations, containing many potential implications, the precise nature of which are in turn subject to political economy constraints and possibilities. Consequently it is impossible to predict their final character at a detailed level, since many trade-offs across and within issues are entailed. However, the character of these agreements, as discussed in the section on economic impacts, will determine how they impact on the ACP. Therefore, we now speculate, in broad terms, about three possible outcome scenarios.

Crucially, this depends very heavily on how one defines success. Some parties, particularly certain civil society groups, may define success as a collapse in the talks and thus the failure of the TPP and TTIP to culminate in the envisaged FTA. Our view is that success would be an FTA based on the solid consensus of all of the parties to the talks, with major trade liberalizing effects for goods, services and investments, and measurable progress in reforming some of the most intractable political economy choke-holds that a limited number of commodities have exercised on the world trading system for many decades, including rice, dairy, sugar and cotton (yarn). This is necessarily a globally systemic view, and not one rooted in the particular interests of any country or group of countries, such as the ACP. Ultimately we believe these two negotiations do offer the prospect of deepening global economic integration, even as we remain alive to the challenges that poses to poorer countries less capable of matching up to the more rigorous standards this implies.

### 4.1 FULL SUCCESS

ONE FREE TRADE zone spanning the Asia-Pacific region and covering 40 percent of global GDP, with tariffs completely eliminated and barriers to investment completely removed; and another covering the transatlantic space and of similar shape and magnitude, is probably the scenario that one would envisage under "full success". But this scenario is also commonly referred to as "utopia", since some tariffs and some barriers to investment will inevitably remain on the most politically sensitive items, and both are only likely to go so far in tackling the now much more important issue of behind-the-border trade barriers in the form of



domestic regulation. The protectionist intent lurking behind many such regulations is best unmasked in the context of dispute settlement, and for this the WTO is likely to remain the forum of choice for most, if not all parties to the TPP and TTIP

## 4.2 PARTIAL SUCCESS

THIS IS THE more likely scenario of the three, since trade agreements always involve trade-offs and compromises, and both mega regionals are almost certain to fall somewhat short of the lofty and ambitious goals aspired to in their founding declarations. This is simply a manifestation of the age-old maxim that trade agreements involve a set of second or even third best policy choices (the best scenario always being free trade). Be that as it may, even if the TPP manages to consolidate existing liberalization efforts undertaken by all the parties to it, and to provide domestic political cover for implementing reforms to some of the most intractable domestic economic problems in member countries (Japanese rice subsidies come to mind), this will still represent considerable progress. Similarly, the TTIP is likely to be relatively comprehensive on the tariff front but to involve numerous regulatory compromises. Nonetheless that would be a significant outcome from the standpoint of promoting global trade liberalization and regulatory convergence. If it operates primarily through an MRA modality, in terms of which outsiders' access to both markets is enhanced, then the result could be positive for the ACP.

## 4.3 FAILURE

Given the advanced stage of the talks, and the enormous amount of political capital that has already been spent by leaders in such countries as the United States and Japan, it is unlikely that either negotiation will be allowed to fail. Instead, negotiators will do what GATT negotiators did after six years of negotiations in the Tokyo Round, which is to draw a line in the sand and call failure a success.<sup>155</sup> Here one envisages a much more modest agreement that fails to provide a single tariff schedule for goods among all parties to TPP, significant exclusions in the TTIP, and with both limited to a set of largely hortatory declarations on achieving future progress in areas where the talks have proven difficult (e.g. IPR, environment, labour etc.). The domestic political economy constraints in a number of countries are formidable, in particular the USA which is at the centre of both negotiations: the Republican dominated house of congress is seemingly determined on denying President Obama any kind of positive outcomes whatsoever; the Obama Administration's commitment to trade and investment liberalization is at most lukewarm (and predicated solely on the objective of increasing US exports); and the President faces hostile opposition from much of his political supporters in the Democratic Party. The USA electorate - currently in somewhat of a declining competitiveness and income equality funk - has admittedly lost much of its appetite for these kinds of deals, particularly with the dominant political narrative regarding NAFTA still being that it ultimately moved a lot of US jobs offshore. One could argue that for the USA the electoral math for a sweeping trade deal like this one just isn't there, something we are seeing now being played out in the difficulties the Obama Administration is having in just obtaining TPA, and which is something that will equally constrain the both the TPP's and TTIP's ultimate scope and effects. So this is a scenario we might realistically be facing.

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155. We say this given the failure of GATT negotiators in the Tokyo Round to bring agricultural trade more fully under GATT disciplines, or to end the proliferation in vertical export restraints by concluding a safeguards agreement, both of which had to wait until the Uruguay Round.



## 5. POLICY OPTIONS FOR THE ACP

### 5.1 CALIBRATE TO THE POTENTIAL OUTCOME SCENARIOS

ACP POLICY OPTIONS are rooted in the outcome scenarios as just described. If one hews to the full success scenario, then “competitive liberalization” will roll across the planet and wrap all up in its path.<sup>156</sup> Already we see that China is closely watching the TPP process, and calibrating its own domestic economic reform programme to mirror potential negotiating outcomes to the extent possible.<sup>157</sup> Similar, albeit more embryonic discussions are taking place in other significant developing countries such as India, Brazil, and South Africa. If China moves to join the TPP, as it has in the case of the TISA negotiations, then the pressure on the ACP countries will rise enormously. Otherwise, and in addition, pressure from smaller, richer neighbours will factor into ACP calculations.

If the partial success scenario unfolds, then the ACP countries will have more wriggle room; more time to adjust their trade strategies and more policy space to pursue. However, this scenario is likely to be accompanied by ongoing stasis in the WTO, since the major developed countries that have traditionally exercised leadership over the global trading system would not have been able to decisively seize the initiative. The pressure on ACP countries to forge reciprocal trade arrangements with the major developed countries would increase somewhat, but probably not much further than where it currently stands. Much depends on the shape of the partial success outcome.

If the negotiations fail, then the immediate pressure will be off the ACP countries. However, there could well be a backlash from the USA and the EU, since this scenario would hasten potential Chinese leadership of the global trading system. In the interregnum positioning amongst the major powers would likely be intense, and therefore pressure on the ACP to yield reciprocity in their trade relations with these powers would likely escalate substantially beyond current levels. Furthermore, this scenario would likely mean that the WTO would be stuck in the doldrums with no leadership from any quarter as the major powers move to shore up regional alliances. In the medium term the ACP would need to adjust to a multipolar trading system. This may present some opportunities to play the major powers off against each other in order to bolster domestic economic priorities, although that can be a risky game to play. However, since the China card would be very much in play ACP countries would need to ask serious questions about Chinese trade diplomacy, its underlying interests and associated strategies for pursuing those interests. At the very least China is likely to pursue

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156. This notion is associated particularly with Fred Bergsten, former Director of the Petersen Institute for International Economics, and Richard Baldwin. The former argues that as the USA secures FTAs with other countries, so those countries become like-minded with the USA and seek to form FTAs along similar lines with third parties. Soon those left outside emulate the FTAs, and ultimately the logic finds its way back into the WTO in the form of new agreements. See C Fred Bergsten “Competitive Liberalization and Global Trade: A Vision for the Early 21<sup>st</sup> Century”, Working Paper 96-15, Peterson Institute for International Economics, available at <http://www.iie.com/publications/wp/wp.cfm?ResearchID=171>, accessed January 14th, 2014. Baldwin identified the “juggernaut” effect, whereby major multinational companies seek regulatory convergence in order to smooth the operation of their global value chains, and lobby host governments to provide it particularly through mutual recognition. This pressure finds its way into FTAs, thereby creating a juggernaut effect reinforced by competitive liberalization. See Richard Baldwin “A Domino Theory of Regionalism”, NBER Working Paper, 4465, 1993.

157. See Peter Draper “SA’s trade status is at risk as China grapples with Doha”, in Business Day, 6<sup>th</sup> December, 2013, available at <http://www.bdlive.co.za/opinion/2013/12/06/sas-trade-status-is-at-risk-as-china-grapples-with-doha>

a more hardheaded approach to securing them, which, if properly harnessed could be very beneficial to ACP countries.<sup>158</sup>

The thread that runs through all three scenarios is that the pressure on the ACP to adhere to rigorous behind the border regulatory norms and to liberalize trade policies is very unlikely to disappear. It may fluctuate depending on the scenario, but to stick one's head in the sand and hope it will never return does not seem like a viable strategy.

## 5.2 POLICY OPTIONS

BECAUSE NO ACP country is a party to the TPP or the TTIP, the group's options in influencing the final outcomes of these talks are ultimately somewhat limited. We do not see much fruit in pursuing this, through playing the "guilt card" in particular. Of course the ACP countries should continue to push for increased and more targeted aid for trade, and should bolster their domestic systems for receiving and utilising this assistance. Beyond this, ACP options are already pretty well known, although opinion on them is understandably divided. Much depends on the stance one takes towards harnessing trade liberalization and regulatory reform to support domestic reform efforts. Our approach is that these tools should be harnessed to the extent possible, catering for the country's domestic institutional, political economy, and governance constraints.

### 5.2.1 UNILATERAL REFORMS: THE FIRST BEST OPTION

TO A LARGE extent the reform options are unilateral in nature; those pursued from the bottom up have the best chance of being grounded in local realities and therefore of enduring. From this standpoint each ACP country needs to conduct its own assessment of how it is positioned in the mega regionals "game", how they may unfold in terms of the broad scenarios presented above, and therefore how domestic reform imperatives could best be pursued so that the country is not left too far behind. The potential threat of either trade preference withdrawal, or the introduction of reciprocity, should serve as a spur to domestic reform efforts. In conducting such assessments careful thought also needs to be given to how aid for trade funding could bolster the reform effort in light of what lies down the road, particularly with respect to the regulatory convergence agenda. In other words, how could aid for trade funding best be sequenced?

### 5.2.2 DEEPER REGIONAL INTEGRATION

ACCEPTING THAT UNILATERAL reforms can be politically fraught, external props need to be found. The first recourse should be to regional economic integration, not least because neighbouring countries tend to be similar in size, development challenges, and economic structure. Furthermore, enlarging the regional economic space will provide some attraction to outside investors, particularly if the transactions costs of accessing regional markets can be made less burdensome or, even better, attractive. Moreover, in regional groupings ACP countries can experiment with negotiations on "behind the border" issues, using the forum as a testing ground for the much more exacting trials with bigger developed and developing

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158. See Martyn Davies, Peter Draper and Hannah Edinger "Changing China, changing Africa: Future contours of an emerging relationship", *Asian Economic Policy Review*, 9(2), xxx-xxx (forthcoming), 2014.

countries that lie ahead. Given the many problems with regional integration initiatives across the ACP group, getting this right is a daunting task on its own.

Nevertheless, as in most things the best defense is to play offence, with a number of possible scenarios suggesting themselves. First of all, one should not forget that the "P" in "ACP" stands for "Pacific" so that one could envisage a member of the ACP that is also a member of APEC and the WTO (there's only one country that fits the bill, and that is Papua New Guinea (PNG)) seeking to join the TPP talks and becoming the focal point for the ACP. Of course, the ability of a small and resource constrained country like PNG to be actively involved in these talks would be limited without support from the most trade-policy savvy members of the ACP engaging directly together with PNG officials. Similarly, PNG could participate actively in the PACER plus talks led primarily by Australia and New Zealand. Whilst this has its own complications, negotiating behind the border issues with mid-sized developed countries is likely to be far easier than doing so with the USA or the EU (as PNG and the Pacific countries have discovered in the EPA negotiations with the EU).

Similarly, African countries will at some point need to get beyond the EPA impasse with the EU, and confront the growing likelihood that AGOA will be replaced in the future by the "offer" of reciprocal FTAs. Sub-regional economic powers that are not LDCs, and therefore do not qualify for EBA non-reciprocal access are particularly important since it is they that will have the most to lose. While it is true that, currently, most export commodities from such countries do not attract duties, all African countries desire to move up the value chain and to export the proceeds into large markets such as the EU and US. FTAs could be very useful tools for aiding that process of diversification, since those are precisely the goods that attract duties in otherwise low tariff markets. Furthermore, by agreeing to regulatory reforms their own markets would become more attractive to multinational companies, which would be more inclined to incorporate the country or region concerned into global value chains.<sup>159</sup>

### 5.2.3 THE WORLD TRADE ORGANIZATION: CONSTRUCTIVE ENGAGEMENT

A THIRD OPTION is to move to have many of the issues being discussed under the TTP and TTIP frameworks effectively brought into the WTO and to begin a dynamic, active and pragmatic process of elaborating rules on these issues. Again, aid for trade funding could be used to build ACP country capacities to participate in such discussions. This would admittedly not have any chance of culminating in new rules before the adoption of treaty texts under the TTP and TTIP processes, but they would eventually come to represent an alternative set of texts on which there is greater consensus than may be the case on the respective outcomes from the TTP and TTIP. Actively discussing these issues in the WTO has the great merit of bringing numbers into the equation. In a bilateral negotiation, such as with the US or EU, ACP regions are undoubtedly at a disadvantage in relative power terms. In the WTO other developing countries, and sometimes developed countries, can be enlisted to the cause through smart coalitional diplomacy. The key is to adopt a positive perspective on the issues under consideration, and not simply to play a blocking game since that would reinforce the move to bilateralism and regionalism on the part of the big powers.

If corresponding negotiations in the WTO were to become bogged down, one could adopt the same approach as has been done for the TISA talks, namely just proceed with a like-minded

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159. World Economic Forum "The shifting geography of global value chains: implications for trade policy", 2012, available at [http://www3.weforum.org/docs/WEF\\_GAC\\_GlobalTradeSystem\\_Report\\_2012.pdf](http://www3.weforum.org/docs/WEF_GAC_GlobalTradeSystem_Report_2012.pdf)

group of countries. This plurilateral option is undoubtedly controversial from the standpoint of many developing countries, since it contains the possibility of isolation in the negotiation, and the specter of subsequent imposition of unpopular regulatory preferences. However, it also offers the prospect of forging new multilateral rules, thereby retaining the centrality of the WTO at the heart of the global trading system; an outcome that ACP countries should strive for given the power asymmetries they otherwise suffer from. A way around this dilemma is to commit to negotiating a plurilaterals “code of conduct” to govern how plurilaterals will be managed, in the interests of all WTO members.<sup>160</sup> Given the successful outcome at the Bali ministerial now would be a good time to take the initiative on this issue, not least because the trade facilitation agreement that lies at the heart of the Bali compromise may represent the death of the single undertaking.

All this essentially boils down to the fact that advanced industrialized countries and a handful of developing countries should not have a monopoly on negotiating actionable rules on many of these issues, which could then be imposed on countries that had no say in negotiating them. For this reason, ACP countries must overcome their reluctance to engage and start talking about and crafting disciplines on these issues that will ultimately be acceptable to them.

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160. See Peter Draper and Memory Dube “Plurilaterals and the Multilateral Trading System”, Think Piece for the E15 Expert Group on Regional Trade Agreements, July 2013.

## APPENDIX 1: SELECTED TABLES

TABLE 1 BREAKDOWN OF TPP-12 EXPORTS, US\$ BILLIONS (2012)

		Importing area		
		Rest of TPP-12	Total TPP-12	
Exporting country	USA	508.0	180.8	<b>688.8</b>
	Canada	343.2	16.2	<b>359.4</b>
	Mexico	299.1	8.6	<b>307.7</b>
	Japan	162.8	75.3	<b>238.1</b>
	Singapore	25.0	99.6	<b>124.6</b>
	Malaysia	22.1	73.1	<b>95.3</b>
	Australia	12.2	72.5	<b>84.6</b>
	Viet Nam	24.1	26.4	<b>50.5</b>
	Chile	12.3	12.1	<b>24.4</b>
	New Zealand	4.1	12.5	<b>16.6</b>
	Peru	10.4	4.9	<b>15.2</b>
	Brunei	0.1	8.3	<b>8.4</b>
	Total	1,423.4	590.1	2,013.5

Source: Author calculations based on data from ITC Trademap database.  
Based on reported and mirror data.

TABLE 2 POTENTIAL IMPACT OF TPP ON MEMBER STATES (PERCENTAGE CHANGE)

Country/Region	TPP9	TPP12	TPP12+PRC
New Zealand	0.17	0.97	0.6
Chile	0.01	-0.13	-2.4
Peru	0.27	-0.04	-0.35
Singapore	0.41	0.48	-0.79
United States	0.01	0	0.45
Australia	-0.01	0.22	0.23
Malaysia	0.71	0.7	-0.24
Viet Nam	0.29	0.18	0.08
Canada	-0.04	0.02	-0.34
Mexico	-0.13	0.9	1.12
Japan	-0.01	0.21	0.53
Korea, Rep. of	-0.03	-0.11	-1.73
PRC	-0.03	-0.11	4.51
India	-0.01	-0.05	-0.38
RASEAN	-0.06	-0.37	-1.59
EU	-0.01	-0.04	-0.33
ROW	-0.02	-0.07	-0.57

Source: Cheong (2013)

PRC = People's Republic of China; EU = European Union; RASEAN = Cambodia, Indonesia, Lao People's Democratic Republic, Myanmar, Philippines, Thailand; ROW = rest of world; TPP9 = Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, United States, Viet Nam; TPP12 = Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, **VIET NAM**.

**TABLE 3 TRADE WEIGHTED APPLIED (MFN) TARIFFS FOR THE USA AND EU (2007)**

Sector	EU	USA
Agriculture, fishing, forestry	3.7%	3.7%
Other primary sectors	0.0%	0.0%
Processed foods	14.6%	3.3%
Chemicals	2.3%	1.2%
Electrical machinery	0.6%	0.3%
Motor vehicles	8.0%	1.2%
Other transport equipment	1.3%	0.2%
Other machinery	1.3%	0.8%
Metals and metal products	1.6%	1.3%
Wood and paper products	0.5%	0.2%
Other manufactures	2.4%	3.2%

Source: Rollo et al (2013)  
Calculations by Rollo et al (2013)

**TABLE 4 ESTIMATED AD VALOREM EQUIVALENT PROTECTION ENSUING FROM NTMS BETWEEN THE EU AND THE USA**

Sector	ECORYS (2009)		Fontagne et al (2013)	
	EU	USA	EU	USA
Agriculture	48.2%	51.3%	56.8%	73.3%
Manufacturing	42.8%	32.3%	19.3%	23.4%
Services	32.0%	47.3%	8.5%	8.9%

Source: Fontagne et al (2013)  
Figures refer to unweighted averages across the sectors.

**TABLE 5 LICs VULNERABLE TO NEGATIVE IMPACTS FROM TTIP (BASED ON NON-FUEL EXPORTS)**

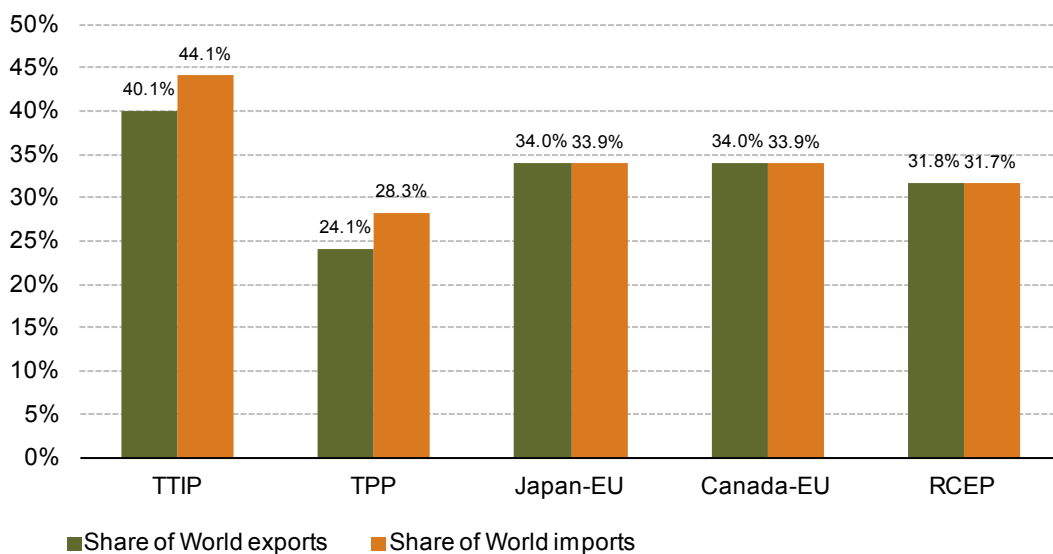
Market	5 or more of top 20 export products have MFN $10\% < \text{Tariff} < 15\%$	1 or more of top 20 export products have MFN Tariff $> 15\%$	10 or more of top 20 export products are Exposed to SPS
EU	Bangladesh, Pakistan, Cambodia, Haiti, Mauritania, Madagascar, Nepal	Cambodia, Ghana, Chad, Burundi, Madagascar, Malawi, Togo	Ghana, Kenya, Mauritania, Burkina Faso, Burundi, DR Congo, the Gambia, Occupied Palestine Territories, Rwanda, Somalia, Sudan, Uganda
USA	Bangladesh, Pakistan, Cambodia, Haiti, Kenya, Madagascar,	Bangladesh, Pakistan, Cambodia, Haiti, Kenya, Ethiopia, Guinea, Burkina Faso, Kyrgyz Republic, Madagascar, Malawi, Mali, Mozambique, Occupied Palestine Territories, Rwanda, Togo, Uganda	Ghana, Nigeria, Malawi, Togo and Uganda

Source: Rollo et al (2013)



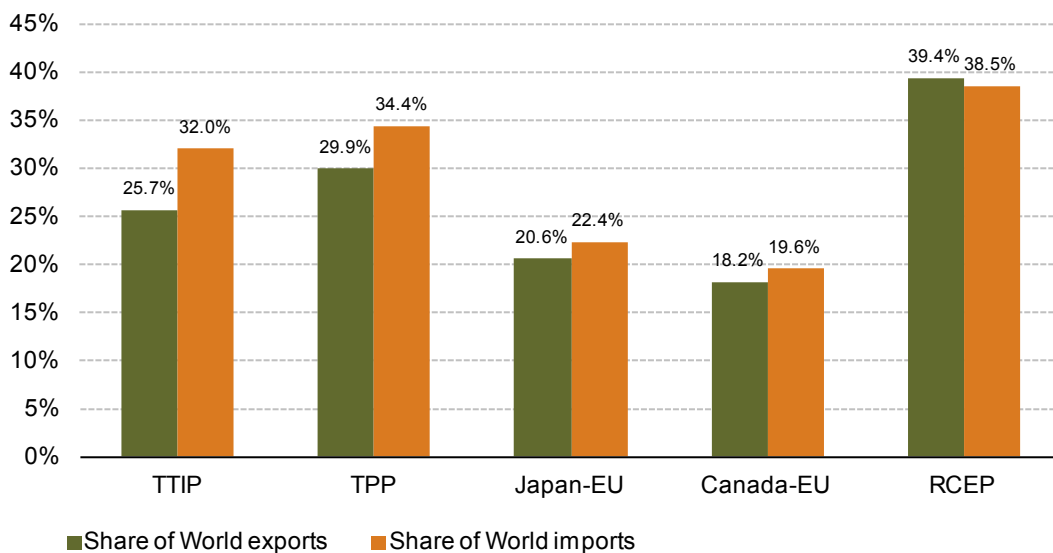
## APPENDIX 2: SELECTED FIGURES

FIGURE 1 RTAS SHARE OF WORLD TRADE (INCLUDING INTRA-EU TRADE), 2012



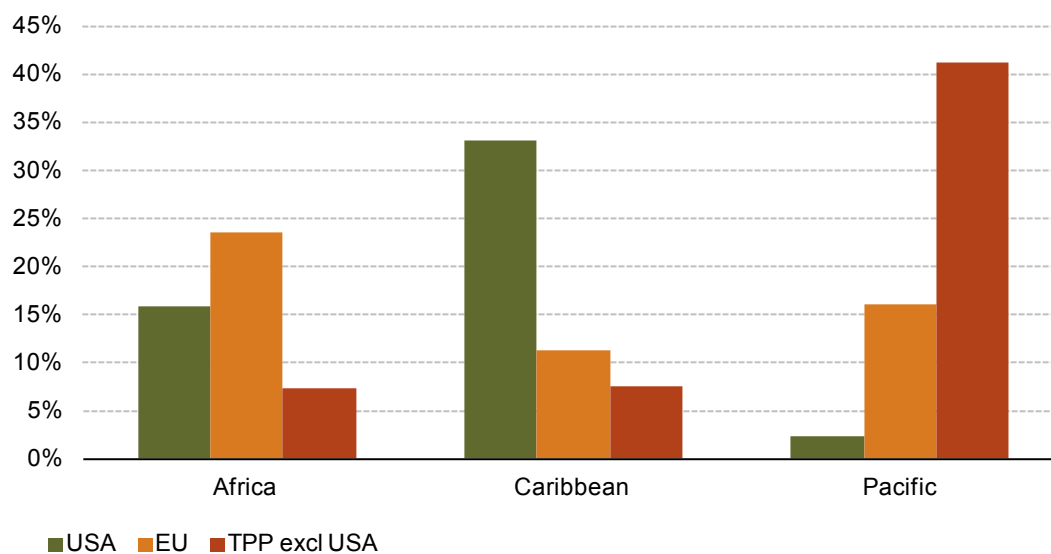
Source: Author calculations based on data from ITC Trademap database.  
Based on reported and mirror data.

FIGURE 2 RTAS SHARE OF WORLD TRADE (EXCLUDING INTRA-EU TRADE), 2012



Source: Author calculations based on data from ITC Trademap database.  
Based on reported and mirror data.

FIGURE 3 ACP COUNTRIES EXPORTS AS % OF TOTAL EXPORTS (AVERAGE 2008 – 2012)



Source: Author calculations based on data from ITC Trademap database.  
Based on reported and mirror data.