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How will TPP and TTIP Change the WTO System?

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ABSTRACT

The rise of new free trade agreements in the 1990s and early 2000s altered the dynamic of the World Trade Organization (WTO) as the arbiter of world commerce forever. Moreover, WTO negotiating rounds over the past decade have been beset with irreconcilable objectives among WTO members, with emerging market members fundamentally opposed to opening their markets to exports from advanced countries. The consequence was scant progress and missed deadlines, culminating in the failed Geneva Ministerial of 2008. At the Bali Ministerial in 2013, the WTO members could only muster strength to endorse the Trade Facilitation Agreement, while postponing action on numerous and more contentious Doha issues. The cumulative result is that the WTO is now at the back of the parade in addressing 21st-century trade issues. Two mega-regionals—the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP)—will undoubtedly change the multilateral trading system. This article assumes both negotiations will be concluded and ratified by 2018. However, even if neither mega-regional agreement succeeded, their negotiating objectives and ultimate stumbling blocks will shape the future of the WTO. If WTO members collectively reject the lessons, the institution will fade as an arbiter of commercial relations between nations.

I. INTRODUCTION

At this writing (June 2015), the Trans-Pacific Partnership (TPP) is not yet in flight, and the Transatlantic Trade and Investment Partnership (TTIP) remains at the launch pad. For the purposes of this article, however, we assume that both mega-regional agreements will be concluded and ratified—TPP by 2016 and TTIP by 2018—and go on to speculate how they will change the multilateral trading system centred on the World Trade Organization (WTO). Even if both mega-regionals crash, their negotiating objectives and ultimate stumbling blocks will shape the future of the WTO.

Before turning to our subject, it is worth summarizing the economic and political dimensions of the mega-regionals. The TPP will join 12 countries from the

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Asia-Pacific region in a free trade and investment pact. In descending order of economic size (as of 2013), they are USA, Japan, Canada, Australia, Mexico, Malaysia, Singapore, Chile, Peru, New Zealand, Vietnam, and Brunei. The TPP countries have a combined GDP of $278 trillion (about 37% of world GDP); intra-TPP export of goods and services is $2.3 trillion (about 13% of world exports); and intra-TPP outward direct investment stock is $2.1 trillion (about 9% of world outward investment).[1]

Because tariff barriers are already low between many partners within the TPP, the foreseeable export gains are modest, perhaps $440 billion within 10 years. Investment gains will be significant, but hard to forecast. Petri *et al.*(2013) estimate that one-third of the US gains from TPP would be due to the investment provisions of the agreement.[2] The negotiating results with the greatest impact on the WTO system will be new rules agreed by TPP members, a central subject of this article.

For North America and the Pacific coast of Latin America, the TPP also represents a step towards closer political relations with Asia, eventually perhaps extending to include Korea, China, Indonesia, and even India, as well as smaller countries in Southeast Asia, if TPP expands after its inauguration. For Asian TPP members, it could presage closer relations between old antagonists (Japan and Korea, and Japan and China), as well as closer relations with North America and Pacific Latin America. Key members of the TPP are already linked in military alliances and hold generally similar views on geopolitical questions (USA, Japan, Canada, and Australia). However, it seems most unlikely that the TPP will create a unified bloc among the founding members on such far-flung subjects as nuclear proliferation, climate change, or even the WTO agenda.

TTIP, if successful, will forge closer economic ties between USA and the European Union, longstanding military allies with similar geopolitical outlooks. Conceivably, within a short period after inauguration, TTIP could be enlarged to include Canada, Mexico, and Turkey, as well as the European Free Trade Area (EFTA) nations (Switzerland, Lichtenstein, Norway, and Iceland).[3] The founding TTIP members have combined GDP of $34 trillion (about 46% of world GDP), transatlantic goods and services exports of $1.1 trillion (about 6% of world exports), and transatlantic direct investment of $3.9 trillion (about 16% of world outward investment). Tariff barriers are even lower between TTIP partners than between TPP partners, so the easily quantified export gains are quite modest, perhaps $70

1 GDP data from IMF, World Economic Outlook Database, October 2014; outward FDI stock from UNCTAD statistics and OECD statistics, FDI positions by partner country; bilateral trade data from UN Comtrade and global trade data from WTO international trade statistics. When breaking down exports by goods and services, intra-TPP merchandise exports account for 38% of global exports in 2013, and intra-TPP services exports account for 11% of global exports in 2012 (the year of the latest bilateral data). Global trade figures exclude intra-EU trade.

2 Peter A. Petri, Michael G. Plummer, and Fan Zhai, 'Adding Japan and Korea to the TPP', 7 March 2013, available at http://asiapacifictrade.org/?page_id=106 (visited 8 April 2015).

3 Turkey and Canada both have comprehensive trade agreements with the European Union [Turkey's Association Agreement with the European Economic Community and a Customs Union agreement since 1996 and Canada's Comprehensive Economic and Trade Agreement (CETA) since 2014], whereas the Mexico-EU FTA is less comprehensive. Individual members of the EFTA have numerous treaties and executive agreements with the European Union. Because of these prior arrangements, it should not be difficult to expand TTIP, in a second phase, to include these countries.

billion within 10 years. Investment gains could be significant, but hard to forecast. Even more than with TPP, the central innovations anticipated in TTIP concern rules, particularly with respect to regulatory barriers. Again, rules changes will have the greatest impact on the WTO system.

Together, the TPP and TTIP founding members will account for 61% of world GDP. Exports between the respective group members will amount to 19% of world exports, and direct investment between the members will amount to 25% of world outward investment. Owing to their economic heft, the mega-regionals will dramatically alter trade and investment rules for a substantial share of world commerce conducted by each of the members. For USA, 60% of its global exports would be affected. With that in mind, we turn to the impact of mega-regionals on the WTO system, starting with the WTO's place in the commercial solar system. We then address several areas in which the mega-regionals could set precedents (or fail to set precedents) and how this could translate to new ideas for the WTO. Finally, we conclude with comments on the outlook for the multilateral trading system.

II. WTO'S PLACE IN WORLD COMMERCE

Using a planetary metaphor, the new mega-regional accords will put the WTO in the commercial shade. The WTO faces three big challenges to re-establish its erstwhile position, if not at the centre, near the centre of world commerce. Foremost, the organization needs to say farewell to the consensus system of reaching new accords. Secondly, the organization needs to accept variable geometry: most new accords will not, at their launch, enlist all 161 WTO members as participants.[4] Correspondingly, giant negotiations covering multiple subjects and subscribed by all members must be recognized as yesterday's way of doing business in the WTO. The interests of 161 members are simply too diverse. The failed Doha Development Round shows that the modality of a single large package no longer suits the differing needs of national members. Thirdly, the organization should open its enormously successful dispute settlement body—the 'crown jewel' of the WTO system—to bilateral and regional trade pacts that wish to avail themselves of this institution. Additionally, the WTO should seek to bring the International Center for the Settlement of Investment Disputes (ICSID) to Geneva and reform some of its procedures.

In the course of examining subject matter issues in this article, we will elaborate on these central challenges. However, it is far from clear that the WTO will rise to the occasion. International institutions seldom go out of business, but many have faded over time owing to their own constitutional weaknesses or external circumstances. Foremost, perhaps, is the United Nations General Assembly, but other fading institutions would include the International Labour Organization (ILO), the International Court of Justice (ICJ), and the Latin American Integration Association (ALADI, its Spanish acronym). Some international institutions have enjoyed initial success, then flagged and later revived. Two notable examples are the World Intellectual Property Organization (WIPO) and the United National Conference on Trade and Development (UNCTAD). It remains to be seen whether the WTO has entered an inexorable decline or will revive to meet the 21st century.

4 As of 26 April 2015, Seychelles became the 161st member of the WTO.

III. INVESTMENT ISSUES

When the General Agreement on Tariffs and Trade (GATT) was established in 1947, the dominant model of international trade was 'make it here, sell it there'. Today, with global supply chains the new model has become 'make it many places, sell it to the world'. For historic reasons, the investment chapter in the Havana Charter was never carried into the GATT.[5] To this day, despite the dramatic expansion of world direct investment (now $25 trillion), the subject is only tangentially covered in the WTO Agreement on Trade Related Investment Measures (TRIMs).

Consequently, the WTO lags far behind the norms set by bilateral investment treaties (BITs), free trade agreement (FTAs), and mega-regionals in terms of rules to accommodate and discipline the close relationship between trade and investment. Nor do WTO disciplines do much to curb the mischief that can arise when individual countries collude with multinationals (MNCs) or state-owned enterprises (SOEs) to attract or retain desirable segments of the global value chain.

Investment chapters in bilateral FTAs, as well as BITs (now numbering more than 2800 worldwide), typically set forth the right of establishment, national treatment, negative lists of precluded investment, repatriation rights, and investor-state dispute settlement (ISDS). The investment chapters of TPP and TTIP remain to be seen, but they will likely follow the models agreed, for example, in the Korea–USA or KORUS FTA and the Canada–EU Comprehensive Trade and Economic Agreement (CETA).

The WTO (like the GATT before it) only allows member states to bring disputes, even though the overwhelming majority of cases entail state practices that arguably harm private firms. In other words, state-to-state dispute resolution is the WTO norm for trade disputes, unlike ISDS resolution under BITs and FTAs. Faced with this difference, when an alternative is possible, private firms often prefer to bring an ISDS case under a BIT or an FTA, rather than a trade case under the WTO. A public and political debate on the merits of the current ISDS system has reemerged alongside the rise of the mega-regionals; but whether this debate will result in any meaningful change in ISDS practices via TPP or TTIP is yet to be seen.

Bearing these observations in mind, at their December 2015 Ministerial meeting, WTO members should keep pace with the strides made within the mega-regionals and consider launching negotiations for a plurilateral Investment Framework Agreement (IFA) that would supplement (not supersede) provisions in bilateral BITs and FTAs. Among other subjects, the IFA might address pre-establishment rights, post-establishment national treatment, compensation for expropriations (both direct and indirect), and define in greater detail the meaning of 'fair and equitable treatment'. In addition, the WTO might make a bid to move ICSID from the World Bank into the WTO and create an appellate mechanism for reviewing arbitration panel decisions—the absence of which has been a central criticism in the current debate.

5 The investment chapter, Chapter V of the Havana Charter, titled 'Restrictive Business Practices', was designed to discipline the multinational corporations of that era. This was not a popular idea with the US Congress.

IV. LABOUR RIGHTS

Starting with the Peru FTA, which entered into force in 2009, US FTAs have routinely included an obligation for each partner to observe the four 'Fundamental Principles and Rights at Work' adopted in 1998 by a Declaration of the ILO:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.

In the TPP, the central issue with respect to labour rights is not the content of the ILO Declaration, but rather how the obligations will be enforced. In its most recent FTAs, USA has agreed to state-to-state consultations and dispute settlement including arbitration, with a range of possible remedies—for example, monetary fines in the event of a breach or suspension of TPP benefits, subject to certain conditions. These features have varied in past US FTAs, but are relatively consistent in trade deals with Peru, Colombia, Panama, and Korea, which all reflect language required by the bipartisan May 10th Agreement negotiated between congressional Democrats and the White House in 2007, which required enforceable labour commitments in US FTAs, among other issues.[6] Some congressional Democrats, echoing the AFL-CIO, urge that the TPP should enforce labour rights through an arbitration mechanism, and that trade unions should have standing to bring cases. This seems most unlikely: neither USA nor its TPP partners want to confer on arbitration panels the power to interpret the four broad principles enunciated in the ILO Declaration.[7] The same reticence will recur in TTIP talks. Countries have their own courts and administrative panels for enforcing labour legislation and they adamantly oppose intrusion by international panels in this sensitive area.

The issue of trade and labour standards was under debate as early as the Ministerial Conference of the GATT held in Marrakesh in April 1994, but unsurprisingly no consensus was reached.[8] The possibility that labour rights might be a fit subject for WTO negotiations was tentatively raised at the first WTO Ministerial meeting, held in Singapore in 1996, but it was rejected almost unanimously by developing country members.[9] They feared that almost any labour agreement in the WTO would lead to harassment and trade penalties. Thus in the Singapore Ministerial Declaration, while trade ministers agreed to 'renew our commitment to the observance of internationally recognized core labour standards,' they upheld the

6 Mary Jane Bolle, *Overview of Labor Enforcement Issues in Free Trade Agreements* (Washington: Congressional Research Service, 2014).

7 To cite just US sensitivities, both state right to work laws, and the federal prohibition against strikes by public employees could be challenged under the Declaration.

8 See 'Trade and Labour Standards: Subject of Intense Debate', World Trade Organization, available at www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/18lab_e.htm (visited 9 April 2015).

9 Craig VanGrasstek, *The History and Future of the World Trade Organization* (Geneva: World Trade Organization, 2013).

ILO as the competent body to deal with labour issues.[10] Subsequent efforts to get labour standards on the negotiating agenda met similar resistance, most notably during the failed third WTO Ministerial held in Seattle in 1999—perhaps the closest and most controversial attempt to create a working group on labour rights. These concerns are still alive, but if TPP and TTIP both contain labour chapters, as expected, it seems plausible that the WTO might move closer towards adopting the ILO Declaration as an aspiration for all members, provided that state-to-state consultations are the sole enforcement mechanism.

V. ENVIRONMENTAL OBLIGATIONS

In the environmental field, there is nothing equivalent to the concise ILO Declaration of 'Fundamental Principles and Rights at Work'. Multilateral environmental agreements (MEAs) do exist on specific subjects: for example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, signed in 1973, with 80 members) and the Montreal Protocol on Substances that Deplete the Ozone Layer (signed in 1987, with 197 members) are two major agreements, while others have been signed on whaling regulation, wetlands, and Antarctic marine resources. In light of varying national commitments to international agreements, as well as varying national laws protecting the environment, US FTAs, starting with NAFTA, have included provisions admonishing partner governments to 'enforce their own laws'.

The admonition may not sound like much, but FTA enforcement provisions make a meaningful addition to environmental obligations, above whatever exists in MEAs and national laws. In NAFTA, the enforcement provisions consisted of objective reviews of claimed violations, coupled with state-to-state consultations. Recent US FTAs with Peru, Colombia, Panama, and Korea go a step further, similar to the labour issue, based on the terms of the bipartisan May 10th Agreement which posits that: 'FTA environmental obligations will be enforced on the same basis as the commercial provisions of our agreements – same remedies, procedures, and sanctions. Previously, our environmental dispute settlement procedures focused on the use of fines, as opposed to trade sanctions, and were limited to the obligation to effectively enforce environmental laws' (USTR 2007).[11] TPP will likely embrace a similar approach.

Whatever environmental enforcement provisions are written into the TPP and TTIP, it does not seem likely that such provisions will find their way into the WTO. However, WTO members might accept the admonition to 'enforce their own laws', with special reference to national commitments under MEAs.

In addition, if ambitious, WTO members might go beyond TPP and TTIP with respect to global warming in a way that complements the international regime on climate change currently evolving under the auspices of the United Nations Framework Convention on Climate Change (UNFCCC). Among the mitigation

10 Singapore Ministerial Declaration, WT/MIN(96)/DEC, Adopted on 13 December 1996.

11 US Trade Representative, 'Bipartisan Trade Deal' (Washington, 2007), available at https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf (visited 13 April 2015).

and adaptation policy options countries have introduced or considered, several have trade implications. Conceivably WTO members could endorse carbon taxes with a border adjustment feature and other measures designed to limit CO_2 emissions. Hufbauer and Kim (2009) overview long-standing concerns regarding environment-related border adjustments and their compatibility with WTO law, and explore options for a plurilateral code or waivers to existing texts that would create the appropriate policy space for climate measures.[12] In an E15 think piece, Victor (2015) advises countries to form smaller negotiating groups to unlock the slow progress and complex diplomacy required to deal with climate change—a problem which is characterized by a handful of 12–15 countries that account for nearly 75% of global emissions.[13] Moreover, Victor argues that such groups could model after the success of 'clubs of conditional commitments' embodied in several plurilateral negotiations in the WTO that have sought to break negotiating impasses.

In the medium term, some 17 WTO members have chosen to deal with climate change more broadly, through plurilateral talks to reduce trade barriers to environmental goods, including low-carbon energy technologies and related services that in turn will help reduce dependence on fossil fuels and associated emissions.[14] Six TPP members—Australia, Canada, Japan, New Zealand, Singapore, and USA—together with China and the transatlantic partners are involved in the Environmental Goods Agreement (EGA) talks.

VI. STATE-OWNED ENTERPRISES

Private firms are troubled by the huge role of state-owned, state-supported, and state-controlled enterprises (collectively referred to as SOEs). The complaint is often heard that SOEs enjoy the advantages of opaque subsidies and protected home markets, allowing them not only to fend off privately owned enterprises (POEs) at home, but also to grab market share abroad.

A new plurilateral code on the conduct of SOEs would not be written on a blank slate. The WTO inherited an SOE rulebook of sorts from the GATT, and these rules were augmented by China's 'Protocol of Accession' to the WTO agreed in 2001. USA has added to the WTO Protocol in its bilateral FTAs, notably the US–Singapore FTA.

In the GATT, market systems are the norm; state-run systems are the exception. In 1994, the WTO re-enacted the GATT-1947 and adopted several new agreements, including the General Agreement on Trade in Services (GATS), the Agreement on Subsidies and Countervailing Measures (ASCM), and the Agreement on Trade-Related Investment Measures (TRIMs). Selected provisions in all these texts affect the conduct of SOEs.

12 Gary Clyde Hufbauer and Jisun Kim, 'The World Trade Organization and Climate Change: Challenges and Options', Working Paper 09-9 (Washington: Peterson Institute for International Economics, 2009).

13 David G. Victor, 'Strengthening the Global Trade System: The Case for Climate Clubs', E15 Expert Group on Measures to Address Climate Change and the Trade System Think Piece (Geneva: ICTSD and World Economic Forum, 2015), available at www.ictsd.org/sites/default/files/research/E15_Climate_Victor_FINAL.pdf (visited 8 April 2015).

14 'Environmental Goods Agreement Trade Talks on Track for Negotiation Stage', *Biores,* 25 March 2015, available at www.ictsd.org/bridges-news/biores/news/environmental-goods-agreement-trade-talks-on-track-for-negotiation-stage (visited 10 April 2015).

After the Second World War, it was feared that some government-sanctioned monopolies might play fast and loose by manipulating markets, and this fear inspired GATT Article XVII (State Trading Enterprises). But in subsequent decades, Article XVII was rarely invoked. One reason is that the sub-text of Article XVII appears to deprive the article of an effective bite against abusive trading practices. Article XVII(1)(a) calls on governments to ensure that an STE '. . . shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment . . .' But Article XVII(1)(b) goes on to announce that STEs shall:

> . . . make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, . . .
>
> Note
>
> *The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

The footnote spelled out above, explaining the meaning of 'commercial considerations', gives STEs ample latitude to price discriminate as they wish. Moreover, Article XVII(4) enables STEs to preserve the confidentiality of their business records. Together these provisions make it hard to challenge an STE under Article XVII.

When it comes to services, the core architecture of the GATS allows obligations to be imposed on SOEs. Under the GATS, industries are subscribed by members on a 'positive list' basis—the service in question must be positively scheduled before foreign firms are guaranteed the right to compete in domestic markets.

However, GATS Article VIII may provide an avenue to attack abusive SOE practices even when the industry is not scheduled under the positive list. Article VIII(1) requires 'monopoly suppliers' to observe the MFN principle in their dealings with other WTO members, and Article VIII(2) prohibits the 'abuse of [a supplier's] monopoly position' when it competes outside the scope of its monopoly rights—if the member country has made a specific commitment to fair dealing.

Competition chapters, including disciplines on SOEs, are now standard fare in US FTAs. USA first addressed the SOE question in the NAFTA, signed in 1993. In Chapter 15, titled 'Competition Policy, Monopolies and State Enterprises', Articles 1502 and 1503 announced limited disciplines when the state authorizes a monopoly or operates a commercial enterprise. Designated monopolies are supposed to act in accordance with commercial considerations except when their mandate says otherwise (e.g. provide cheap gasoline to the public). SOEs are admonished not to abuse NAFTA obligations when they use delegated governmental powers, such as the power to grant licenses, approve commercial transactions, or impose quotas or fees.

Language similar to NAFTA was a staple of US FTAs with Australia, Chile, Korea, and Peru. But more detailed terms were contained in the US–Singapore FTA (signed in 2003), in its day the most advanced agreement on SOEs (reflecting their importance in the Singapore economy). That agreement calls for enhanced transparency, requires SOEs to act in accordance with commercial considerations, not abuse their monopoly or regulatory powers, and prohibits direct government influence on SOEs.

The TPP and TTIP chapters on competition policy will very likely build on the US–Singapore FTA. In turn, they will provide a basis for plurilateral negotiations within the WTO. When such negotiations are launched, the definition of covered SOEs will be a threshold issue. Which state-supported and state-controlled firms are covered? What about sub-federal SOEs and sovereign wealth funds?

Once the issue of coverage is settled, many substantive questions need to be addressed. By way of illustration, here are two:

- The SOE Code should elaborate on GATT Article XVII to better define acting 'in accordance with commercial considerations'. Language along the following lines might be useful: ' "in accordance with commercial considerations" shall mean free from government influence and consistent with normal business practices of privately-held enterprises in the relevant business or industry'.
- SOEs should publish their financial accounts in a timely manner, according to International Financial Reporting Standards (IFRS). They should disclose loan terms from state-owned banks and all transactions with other SOEs. They should disclose tax payments and preferences, and any incentives or subsidies received from central, state or provincial governments.

VII. GOVERNMENT PROCUREMENT

Since government procurement is excluded from coverage under GATT Article III ('National Treatment'), only the Government Procurement Agreement (GPA) serves to open public procurement to competition from the firms of other WTO members. The GPA has just 15 members (counting the European Union as a single party) and among those it covers a rather small share of federal and sub-federal procurement of goods and services. In practice, much more government procurement is closed than open to international competition.[15]

Local content requirements (LCRs), an aspect of closed government procurement, flourished in the wake of the Great Recession.[16] LCRs are designed to ensure

15 Even within FTAs, which partly build on GPA coverage, there remain significant gaps in open procurement. Some ideas for improvements include mandating state-level reciprocity in trading partners markets, firm-level reciprocity, whereby eligibility to bid on foreign contracts is conditioned on location in states that abide by open procurement obligations, and requiring projects at the sub-federal level that are funded by federal funds to be subject to any procurement obligations. See Gary Hufbauer and Tyler Moran, 'Government Procurement in US Trade Agreements', Paper prepared for conference on the 'Internationalisation of Government Procurement Regulation', 15–16 December 2014 (European University Institute, Florence, Italy), on file with author.

16 Simon J. Evenett, *What Restraint? Five Years of G20 Pledges on Trade: The 14th GTA Report* (London: Centre for Economic Policy Research, 2013), available at www.globaltradealert.org/sites/default/files/GTA14_0.pdf.

that domestic firms enjoy the role of preferred suppliers for goods, services, and entire projects.[17] More than 100 LCRs have been proposed or implemented since 2008, by developed and developing countries alike, and these may have reduced global trade by about $93 billion annually.[18] A large subset of these cases is directly related to procurement.

An enlargement of GPA coverage will, as a matter of course, expand disciplines on the use of LCRs. The WTO estimated that the revised GPA agreement, which entered into force in April 2014, could expand total market access coverage to as much as $100 billion of procurement annually, but still a small fraction even of OECD procurement.[19] Moreover, many GPA members will continue to take advantage of exceptions for specific projects and agency funds. US practice illustrates this problem. While the GPA schedule agreed by USA covers over 80 federal entities that administer billions of dollars in government procurement, much of US public expenditure still remains outside GPA coverage. For example, under the 'Buy America' clause, stimulus funds, when administered by the states, generally escaped from GPA coverage.[20]

TTIP is more likely than TPP to enlarge the scope of government procurement open to competition from partner country firms. In the Canada–EU CETA, provincial and municipal procurement was opened in Canada, with some exceptions, along with central and sub-central procurement in Europe.[21] Both sides considered the agreed terms to be their most ambitious concessions to date. The European Union puts a high priority on parallel achievements in TTIP. If that objective is achieved, some WTO members will want to negotiate the same extensions in the GPA and non-members of the GPA may want to sign up.

17 Concentrated in government procurement and publicly supported projects, LCRs take many forms: price preferences awarded to domestic firms; mandatory minimum percentages required for domestic goods and services; and discretionary guidelines that both encourage domestic firms and discourage foreign firms. They crop up with notable frequency in renewable energy and information technology projects. While support schemes and subsidies have been critical for renewable energies to compete with fossil fuels, linking them to LCRs almost always raises the cost of renewable energy deployment, besides contradicting the principle of national treatment. See Gary Hufbauer and Jisun Kim, *Issues and Considerations for Negotiating a Sustainable Energy Trade Agreement* (Geneva: International Centre for Trade and Sustainable Development, 2014).

18 Gary Clyde Hufbauer, Jeffrey J. Schott, Cathleen Cimino, Martin Vieiro, and Erika Wada, *Local Content Requirements: A Global Problem, Policy Analyses 102* (Washington: Peterson Institute for International Economics, 2013).

19 'Historic deal reached on government procurement', *2011 WTO News Items*, 15 December 2011, available at www.wto.org/english/news_e/news11_e/gpro_15dec11_e.htm (visited 12 November 2013). OECD government procurement is estimated at around 13%of GDP on average.

20 'Buy America' provisions were inserted into the 2009 American Recovery and Reinvestment Act (ARRA), the central fiscal program designed to combat the Great Recession. Such provisions have been included in subsequent US legislation, for example the Water Resources Reform and Development Act of 2014, which has been contested by GPA members, notably Canada. For more detail see, 'Canada Raises Objections To New "Buy American" Provisions At GPA Meeting', *Inside US Trade,* 26 July 2014, available at www.insidetrade.com (visited 6 April 2015).

21 For more detail on the terms, see Government of Canada, *Technical Summary of Final Negotiated Outcomes: Canada-European Union Comprehensive Economic and Trade Agreement* (Ottawa, Ontario: Government of Canada, 2013), available at: www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/ceta-aecg/ceta-technicalsummary.pdf (visited 23 March 2015).

VIII. TRADE IN SERVICES AGREEMENT

Now that the Trade Facilitation Agreement is on the threshold of adoption as a WTO Protocol by two-thirds of WTO members (107 out of 161 members), the Trade in Services Agreement (TiSA) may be the next big Geneva pact. Here is a case where progress on the plurilateral level complements concurrent efforts within the mega-regional pacts to expand services liberalization in a way that counts as GATS-plus. Measured by CEPII's calculations of *ad valorem* tariff equivalents, national barriers to services trade are highly restrictive, often with tariff equivalent rates of 40% or higher.[22] Hence, the potential payoff from TiSA is huge: global trade gains could be as large as \$1 trillion.[23] While the gains are large, services trade liberalization is far from straightforward as it relies on tackling a variety of regulatory and other 'behind the border' non-tariff barriers (NTBs).

Launched by the Really Good Friends (RGF), the group of WTO members that opened negotiations in 2012, the TiSA talks involve the world's largest advanced economies, accounting for more than two-thirds of global trade in services.[24] TiSA is not yet a WTO project but rather a separate plurilateral agreement negotiated among 24 WTO members under the auspices of GATS Article V. However, the overlapping membership and negotiating dynamics of TPP and TTIP could help bring TiSA into the WTO tent.

A non-paper circulated by the European Union proposes that the architecture of TiSA should start with a 'central pillar' of obligations drawn from the GATS.[25] Attached to the central pillar would be schedules of obligations committed by TiSA members in some 14 individual sectors.[26] When the obligations are accepted by countries that account for a 'critical mass' of services trade in the sector, the rights in that pillar would be extended on an unconditional basis to all WTO members.

China expressed its interest in joining TiSA negotiations in September 2013, and USA and other TiSA members are still considering their response.[27] Before China's change of heart in 2013, all five BRICS—Brazil, Russia, India, China, and South Africa—had shown little interest in a plurilateral agreement on services trade, despite

22 Lionel Fontagné, Amélie Guillin, and Cristina Mitaritonna, *Estimations of Tariff Equivalents for the Services Sector, No 2011-24* (Paris: Centre d'Études Prospectives et d'Informations Internationales, 2011).

23 OECD countries might see an estimated \$720 billion in increased exports; of this amount, US exports would increase by nearly \$300 billion. For detail, see J. Bradford Jensen, *Global Trade in Services: Fear, Facts, and Offshoring* (Washington: Peterson Institute for International Economics, 2011); and Gary Clyde Hufbauer and Jeffrey J. Schott, *Payoff From the World Trade Agenda* (Washington: Peterson Institute for International Economics, 2013).

24 Gary Clyde Hufbauer, J. Bradford Jensen, and Sherry Stephenson, *Framework for the International Services Agreement, Policy Brief 12-10* (Washington: Peterson Institute for International Economics, 2012).

25 See 'The EU publishes TiSA position papers', European Commission News archive, 22 July 2014, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1133 (visited 6 April 2015).

26 The 14 services sectors identified by the EU are: business, communication, construction, distribution, education, environmental, financial (includes insurance), health and social services, tourism and travel-related services, recreational, cultural and sporting services, transport services, services auxiliary to transport, and energy services.

27 See Shawn Donavan, 'China in Push to Join US-led \$4tn Services Trade Talks', *Financial Times*, 23 September 2013, available at www.ft.com/intl/cms/s/0/864744ec-21eb-11e3-bb64-00144feab7de.html (visited 5 April 2015). US acceptance of China as a TiSA member is partly conditioned on China's willingness to conclude the Information Technology Agreement 2 (ITA2). The US position exemplifies a linkage between the two plurilateral agreements.

accounting for a large portion of international services trade.[28] If China and one or two others join TiSA, the critical mass test proposed by the European Union will be met for many service sectors.

TiSA negotiations are still at an early stage, so exactly what the agreement will cover and how ambitious it will be is not yet clear. However, some features are emerging. While GATS applied a positive list approach to schedule commitments for services trade, TiSA is moving towards a hybrid approach.[29] Members will still schedule market access commitments under the positive list approach, but national treatment obligations will be handled under a negative list approach, in which members commit to national treatment in all sectors except for those where an exception is scheduled.

Since 2013, 12 rounds of negotiations have been completed, with the latest round in mid-April 2015 and an upcoming stockholding session in July 2015. The TiSA members reviewed initial market access offers in February 2014, circulated by all of the participants except for Pakistan and Paraguay, and are continuing to negotiate the terms.[30] Apart from the European Union, which published its proposed concessions in July 2014 and negotiating mandate in March 2015, and a handful of other countries, including Iceland, Switzerland, and Norway, the majority of TiSA members have not disclosed their offers. As a starting benchmark, members are offering the most liberal terms contained in their FTAs. Thus, whatever is concluded in TPP will also serve as a benchmark for TiSA members that are also TPP members, notably Australia, Canada, Japan, and USA.

A TTIP pact could push the goal post further. Accounting for a significant share of GDP and employment, the service sector is highly important for USA and the European Union, which remain the world's top two exporters and importers of services. There remain high expectations that TTIP can propel substantial services reforms and result in a common approach to broader global services liberalization—though for the moment TiSA seems to be progressing on a faster timeline. TTIP services talks stalled early over disputes on financial services regulations and cross-border data flows. TTIP will need to resolve differences in approaches to key market access issues, including EU concerns regarding sub-federal regulations; the use of a hybrid approach (both positive and negative lists) as in the TiSA proposal versus the purely negative list approach favoured by USA; and concerns over liberalization carve-outs for areas like maritime transportation services and mode 4 services trade (the movement of natural persons as services suppliers).[31] How TTIP addresses major issues like e-commerce and data flows could further shape future disciplines.

28 However, China did sign a services agreement with Taiwan on 21 June 2013.

29 'U.S. Proposes Alterations To TISA Text, Delaying Market Access Offers', *Inside US Trade*, 3 July 2013, available at www.insidetrade.com (visited 5 April 2015).

30 International Centre for Trade and Sustainable Development (ICTSD), 'TISA Talks Continue in Geneva, Eyeing July Stocktaking Session', *Bridges* 19, no. 6 (2015), 13–15.

31 Jeffrey J. Schott, Cathleen Cimino, Sean Miner, and Tyler Moran, *Does the Transatlantic Trade and Investment Partnership Need a Mid-course Correction?* (Washington: Peterson Institute for International Economics, forthcoming 2015).

IX. INTELLECTUAL PROPERTY RIGHTS

The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) provides the basics for the protection of IP, including minimum standards of protection and enforcement procedures for related infringements. Many FTAs reaffirm provisions of TRIPS, but several have sought to expand the scope and coverage of IPR issues—the TPP and TTIP will likely continue this TRIPS-plus trend.

Recent US FTAs, most notably KORUS, expanded TRIPS to include enhanced provisions on patents, such as data exclusivity, patent linkage, and term extensions, as well as new provisions relating to trade secrets, e-commerce, and internet service provider liability in an effort to better reflect the realities of the 'new digital economy'. USA is seeking similar provisions in TPP, but it seems unlikely all will be accepted as general provisions. IPR has been a contentious area in the negotiations, due to differences among TPP partners on appropriate levels of obligations in patent rights for pharmaceuticals, copyright terms, and enforcement mechanisms. Major concerns relating to pharmaceuticals and biologics in particular—certainly not unique to the TPP context—are balancing strong IPR provisions that incentivize innovation while ensuring access and affordability of medicines.

In TTIP, both USA and European Union are seeking a high-standard IPR chapter given the importance of IP-intensive sectors in their respective economies. But several sticking points will shape the negotiations, including protections for geographical indications (GIs)—names that protect distinctive products originating in a certain region—as well as possible differences held over from the failed negotiations on the Anti-Counterfeiting Trade Agreement (ACTA).[32] Strong protections for trade secrets, including related issues of forced technology transfer and data privacy are key issues which both sides have shared interests, and in which TTIP could possibly set precedents.

The WTO has no obvious articles relating to data privacy in particular, and new provisions would not be easy to negotiate. TRIPS does obligate WTO members to prohibit, among other forms of IPR theft, cyber espionage. These provisions are directed against foreign commercial firms engaged in stealing trade secrets. Moreover, WTO members are committed to enact laws and procedures that permit 'effective action' against infringement. But a nullification or impairment claim for breach of these requirements is not currently available under TRIPS, as such claims have been subject to a long-standing moratorium that has been extended multiple times, including at the most recent WTO ministerial in Bali. Pressure is beginning to build not to extend the moratorium further—which is the US preference—and, if the moratorium expires, cases could give more meaning to the WTO proscription of trade secret theft.

32 ACTA was negotiated between a handful of countries including USA and European Union, but only seven of the negotiating countries signed the final deal. Its passage was blocked by the European Parliament primarily due to consumer concerns over online privacy. The European Commission has sought to debunk claims that TTIP will amount to a 'super ACTA', see for example, European Commission, 'How much does the TTIP have in common with ACTA?' (Brussels, 2013), available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151673.pdf. (visited 9 April 2015).

X. REGULATORY COHERENCE

Countries have made substantial strides towards reducing traditional barriers to trade, like tariffs, leading negotiations to increasingly focus on regulatory and other 'behind-the-border' non-tariff barriers (NTBs) to trade and investment. Of course not all regulations and standards act as NTBs, but many can discriminate against foreign firms and insulate domestic producers from foreign competition. Moreover, divergent regulatory requirements across countries can be burdensome, redundant, and costly for companies expanding business and marketing products abroad.

Global trade rules offer some scope for disciplines on NTBs. The WTO Agreement on Technical Barriers to Trade (TBT) intends to ensure that regulations, standards, and testing and certification procedures are not designed to create unnecessary barriers, while at the same time maintaining a country's right to implement measures that achieve 'legitimate policy objectives' relating to health, safety, and the environment. Likewise, the WTO Agreement on Sanitary and Phytosanitary (SPS) measures aims to ensure similar goals in regard to food safety and animal/plant health measures. Most high-standard FTAs build on the fare of these WTO agreements, with enhanced provisions to promote better transparency and information sharing, mutual recognition agreements (MRAs) where possible, and institutional mechanisms for regulatory cooperation. The mega-regionals will follow these trends with explicit chapters on regulatory coherence and sectoral commitments.

The potential for achieving regulatory coherence, either through recognition of equivalence or agreed common standards, is especially high in the TTIP. Since the transatlantic economies have already achieved a large measure of economic integration and enjoy relatively low tariffs in each other's markets, the bulk of estimated gains from a comprehensive trade deal depend on regulatory cooperation that reduces NTBs. Moreover, as major leaders in the global economy, both sides are viewed as holding great potential for guiding international standards through TTIP.

The TTIP negotiations are still at an early stage and the realm of regulatory cooperation has proven difficult, reflecting years of failed transatlantic efforts to bridge differences both in legislative and stand-setting procedures. TTIP talks currently include detailed discussions in nine sectors: autos, chemicals, cosmetics, engineering, medical devices, pharmaceuticals, pesticides, information and communications technology, and textiles and clothing. But it remains unclear to what extent USA and Europe will achieve some convergence in their standards. Progress may hinge on improving regulatory processes rather than adopting similar standards. A so-called 'horizontal approach' to cooperation would entail greater transparency, more stakeholder participation, and close communication across the Atlantic—with the end goal of ensuring that both sides are better informed about the costs and benefits of their domestic regulatory measures as they affect the other party. The European Union has published its draft provisions for such horizontal disciplines and also proposes a new Regulatory Cooperation Body (RCB) to monitor the commitments of both sides.[33]

33 'Initial Provisions for CHAPTER [] Regulatory Cooperation', European Commission, February 2015, available at http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153120.pdf (visited 24 April 2015).

Ultimately, one objective of TTIP is to create a template for better convergence of global standards. Indeed, TTIP is viewed as a 'unique chance to give new momentum to the development and implementation of international regulations and standards (multilateral or otherwise plurilateral). This should reduce the risk of countries resorting to universal and purely national solutions, leading to regulatory segmentation'.[34] If achieved, this objective would perhaps have the most implications for the WTO, but it is too soon to tell whether US and EU negotiators will capitalize on this opportunity for global leadership.

XI. EXCHANGE RATE PRACTICES

A lively debate surrounds the WTO's role, and the role of TPP in particular, in addressing exchange rate practices. Protagonists complain that exchange rate movements in the course of a week can offset tariff reductions negotiated over a decade. To buttress their argument, protagonists contend that large current account imbalances erode the appetite for fresh liberalization, at least among deficit countries.

Antagonists counter by observing that the International Monetary Fund (IMF) has primary responsibility for exchange rate practices. The text of the GATT, in particular Article XV (Exchange Arrangements), assigns the WTO a second fiddle role. Antagonists stress the political reality that finance ministers adamantly oppose any attempt by trade officials to 'mess in their turf'. In 2012, when Brazil persuaded the WTO to hold a meeting on exchange rates, Chinese and US officials joined forces in opposition and insisted that the meeting be closed to the public.

Influential members of the US Congress are insisting that an exchange rate chapter be included in TPP. Some 60 Senators and 230 Congressmen have signed letters to President Obama urging this approach. Their objective is to commit TPP members to abstain from 'manipulation', broadly defined as sustained intervention in currency markets by a trade surplus country to depress its exchange rate and further improve its trade balance.[35]

Since most TPP members have refused to consider an exchange rate chapter, some US congressmen are drafting companion bills to Trade Promotion Authority (TPA) that would authorize countervailing duties (CVDs) equal to the subsidy equivalent of manipulated currencies. Under his approach, the US imposition of CVDs would put the onus on the offending country. That country could challenge

34 'Trade Cross-Cutting Disciplines and Institutional Provisions', initial EU position paper, European Commission, July 2013, available at http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf (visited 24 April 2015).

35 The recommended TPP chapter would track the relevant IMF article but add specific thresholds and impose trade sanctions for misbehaviour. IMF Article IV, Section (iii) commits members to 'avoid manipulating the exchange rate or the international monetary system in order to prevent effective balance of payments adjustment or to gain unfair competitive advantage over other members'. Under a proposal by Peterson Institute colleague Fred Bergsten, threshold levels of three variables would need to be specified to trigger a finding that the commitment had been violated: large current account surpluses, excessive levels of reserves, and substantial intervention. In an earlier Policy Brief, Bergsten and Gagnon (2012) spelled out these triggers in detail. See C. Fred Bergsten and Joseph E. Gagnon, *Currency Manipulation, the US Economy, and the Global Economic Order, Policy Brief 12-25* (Washington: Peterson Institute for International Economics, 2012).

its consistency with the ASCM by bringing a WTO case.[36] But a case would take at least 2 years before the WTO Appellate Body handed down a decision.

Thus, if the US Congress passes currency legislation in a companion bill to TPA, the issue will be in play, both as a subject of litigation and as a topic of negotiation. But in the absence of TPP or TTIP chapters, it seems very doubtful that any sort of plurilateral accord will be negotiated in the WTO dealing with exchange rates.

XII. EXPORT CONTROLS

During the past 5 years, national export controls on oil and minerals suddenly came to the attention of the world trading system, reflecting three developments. First, in 2009, USA, the European Union, Japan, and other countries launched a WTO case against Chinese export duties and quantitative restrictions on a broad array of industrial minerals (bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc). Second, in 2012, USA and many of the same countries launched another WTO case against Chinese export duties and quantitative restrictions on rare earths widely used in electronic products, along with tungsten, and molybdenum. In both cases, the WTO Appellate Body ruled against China (on 'Raw Materials' in 2012, and on 'Rare Earths' in 2014).[37] The third and most important development is the shale revolution, converting USA into a potential exporter of liquefied natural gas and crude oil.[38] US legislation dating from an earlier era restricts but does not forbid US exports of liquefied natural gas (LNG) and crude oil. These restrictions raise serious concerns with US trading partners in Europe and Asia, but so far no country has challenged USA.

The WTO rulebook on export duties and quantitative restrictions is relatively short. Export duties are prohibited only when scheduled in a member's WTO bindings. The US Constitution (Article 1, section 9) forbids export duties, but not export controls. China, in its Protocol of Accession, committed not to impose export duties—a central reason why the Appellate Body ruled against China in the cases on 'Raw Materials and Rare Earths'. Few other countries face similar constraints, which means that they enjoy considerable latitude to impose export duties.

However, unlike export duties, quantitative limitations are subject to GATT Article XI (General Elimination of Quantitative Restrictions) that forbids both import and export quotas (and kindred measures such as licensing requirements). Article XI(2)(a) provides an exception for 'restrictions temporarily applied to relieve critical shortages of foodstuffs or other products . . . '. Since the 'Raw Materials' restrictions were not 'temporarily applied', this defense fell flat and China did not

36 See Gary Clyde Hufbauer and Cathleen Cimino, 'Looming US-China Trade Battles?: Currency Manipulation (Part I),' Trade and Investment Policy Watch (blog), 6 March 2015, available at http://blogs.piie.com/trade/?p=142 (visited 7 April 2015).

37 The two WTO cases are: WTO Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, circulated 30 January 2012; and WTO Appellate Body Report, *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, circulated 7 August 2014.

38 Cathleen Cimino and Gary Clyde Hufbauer, *US Policies toward Liquefied Natural Gas and Oil Exports: An Update, Policy Brief 14-19* (Washington: Peterson Institute for International Economics, 2014), available at www.iie.com/publications/pb/pb14-19.pdf (visited 26 March 2015).

even raise a similar defense in 'Rare Earths'. US limitations on LNG and crude oil exports have been on the statute books for more than 40 years, clearly violating Article XI.[39] But that piece of trade history illustrates the true problem with Article XI: in very few instances have GATT or WTO cases been brought against quantitative export restrictions.[40]

Under a US law enacted in 1992, natural gas exports to countries with which USA has an FTA are given special consideration via an expedited review with a presumption of approval. By contrast, LNG sales to non-FTA countries require a determination by the Department of Energy that exports are in the national interest. The rationale for distinguishing between FTA and non-FTA countries was to bring US law into compliance with the US–Canada FTA of 1989, which mandated 'national treatment' for energy trade.

USA now has FTAs with 20 countries and echoing the Canada–US FTA, limitations on export controls are included in nearly all of them.[41] The agreements prohibit the parties from adopting or maintaining any restriction on the export of any good, except in accordance with GATT Article XI (General Elimination of Quantitative Restrictions). US FTAs also prohibit the use of taxes on exports, unless the same tax is applied to the same good consumed domestically. Exceptions to these rules are included in certain FTAs.[42] It seems likely that similar limitations will be written into TPP and TTIP. In particular, through TTIP, the European Union is pushing for non-discriminatory access to US energy exports and the repeal of remaining quantitative restrictions. To be sure, the potential for TTIP to fundamentally alter energy policy in USA or Europe seems limited, but the negotiations may serve as impetus for better market access down the line.

If that happens, the table will be set for a WTO plurilateral code that would discipline export restraints on natural gas, oil, and minerals. Such a code would principally benefit WTO members that do not belong to TPP or TTIP. It would call for the repeal of any export taxes or duties on natural gas, oil, or minerals, and the commitments should be accompanied by WTO bindings to that effect. It would call for the repeal of all quantitative restrictions on exports of natural gas, oil, and minerals, consistent with GATT Article XI. USA would need to reform its LNG and crude oil limitations, and certain other code members would need to enact similar reforms.

39 Among the Organization for Economic Cooperation and Development (OECD) countries, USA remains the only country that continues to ban the export of most domestic crude oil. See Lisa Murkowski, 'A Ban for One: The Outdated Prohibition on U.S. Oil Exports in Global Context', Report prepared by Minority Staff (Washington: US Senate Committee on Energy and Natural Resources, 2014), available at www.energy.senate.gov/public/index.cfm/files/serve?File_id = 8749ae25- 8446-4d5e-bab2-d68f02f293df (visited 1 July 2014).

40 As just one example of an export restriction that was never challenged, USA invoked the Export Administration Act of 1979 to limit exports of western red cedar logs from state and federal lands, found mostly in Washington state, as a means of supporting domestic lumber mills. By 1982, exports were completely phased out. As another example, in 2014, Indonesia banned the export of unrefined nickel and bauxite, as a means of compelling foreign firms to build refining plants in Indonesia.

41 The exceptions are FTAs with Israel and Costa Rica (under the CAFTA-DR agreement).

42 For example, FTAs with Australia, Colombia, Korea, Morocco, Peru, and Singapore allow USA to implement controls on the export of logs, to accommodate the US ban on exports of red cedar logs.

XIII. CONCLUSIONS

When the GATT was created in 1947, it became the sole global institution that established rules for merchandise trade. The Treaty of Paris of 1951 set the stage for the European Common Market (now the European Union) to regulate trade among the six founding member states. But between 1947 and 1994, the GATT expanded from 23 to 128 members, and until that date, GATT augmented its position as the preeminent global commercial institution.

Two events encroached on GATT's domain. First, the Canada–US FTA (CUSFTA), implemented in 1989, led to closer economic integration between two very large advanced countries, an event that GATT members did not anticipate. CUSFTA was followed by NAFTA, ratified in 1994, proving that a developing nation, Mexico, could embrace the same high standards. In fact, NAFTA's achievements in the realms of intellectual property and services paved the way for new accords in the Uruguay Round in 1994. For a brief moment, it seemed that the newly created WTO would become the arbiter of world commerce.

But another cluster of events soon eroded the WTO's preeminence. In the 1990s and early 2000s, a swarm of new FTAs drew the attention of trade ministers away from talks in Geneva: by 1994, some 130 regional trade agreements (FTAs, preferential trade agreements, and customs unions) had been notified to the GATT; by 2005, the number notified to the WTO had almost tripled, with more than 600 cumulatively notified today.[43] Then the Seattle Ministerial meeting, held in 1998, rather than launching a new WTO round, turned into an anti-globalization festival, complete with street riots. In response to the 9/11 attack, the Doha Ministerial did inspire a new round in 2001, but the mandate collected irreconcilable objectives, and emerging market members fundamentally opposed the idea that they should open their markets to goods and services exported by advanced countries. The result was scant progress and missed deadlines, culminating in the failed Geneva Ministerial of 2008.

Momentum soon gathered for new mega-regionals: TPP negotiations (launched in 2010), then TTIP negotiations (launched in 2013). The WTO could only muster strength to endorse the Trade Facilitation Agreement at the Bali Ministerial in 2014, while putting to one side numerous and contentious Doha Development Round issues. The cumulative result is that the WTO is now at the back of the parade in addressing 21st-century trade issues. This article illustrates how the WTO can learn from, and be prodded by, the mega-regional accords. If WTO members collectively reject the lessons, the institution will sadly fade as a pioneer and arbiter of commercial relations between nations.

43 This includes both RTAs that are effective or have yet to enter into force. See 'Regional Trade Agreements: Facts and Figures', World Trade Organization, available at www.wto.org/english/tratop_e/region_e/regfac_e.htm (visited 9 April 2015).