

Global Agenda

The High and Low Politics of Trade

Can the World Trade Organization's Centrality Be Restored in a New Multi-Tiered Global Trading System?

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Preface

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Deeply intertwined, trade and investment shape economic growth, development and industry competitiveness, affecting human welfare around the world. As shifting politics, business models and societal expectations create a need for 21st-century solutions, the World Trade Organization and the global trading system are being put to the test. In responding to this challenge, a real opportunity exists to achieve reforms and set the direction of trade and investment policy for the next decade.

By providing the highest level of international expertise and independent thought leadership, the Global Agenda Council on Trade & Foreign Direct Investment plays an instrumental role in the World Economic Forum's International Trade and Investment initiative. This programme, one of nine institutional initiatives addressing the world's most pressing challenges, seeks to understand how new approaches to trade and investment can drive growth and development. The council helps to provide both an overall conceptual framework and strategic guidance on reform options for the architecture of the trading system.

Another important part of the programme is the E15 initiative, delivered jointly with the International Centre for Trade and Sustainable Development. Complementing the council's work, the initiative aims to put forward a set of detailed policy options for building an international trade and investment system to support growth, jobs and development 5 to 10 years in the future.

This first report of the council explores the political dynamics of the global trading system and prospects for inclusive resolution. It is complemented by a study undertaken jointly with the Global Agenda Council on Competitiveness, that highlights the dual role of trade and productivity-enhancing domestic reforms in stimulating a sustained global economic recovery.

Building on the council's insight, the Forum's community works to link business and government in delivery coalitions, responsive to the new dynamics of global commerce and politics while mindful of the needs of people around the world.

The Forum would like to thank all the members of the Global Agenda Council on Trade & Foreign Direct Investment and, in particular, Jonathan Fried, Chair, Ambassador and Permanent Representative of Canada to the World Trade Organization; and Peter Draper, Vice-Chair and Senior Research Fellow, Economic Diplomacy Programme, South African Institute of International Affairs, South Africa.



Introduction

The World Trade Organization (WTO) is in trouble. Its negotiating mechanism has mostly seized up, as reflected in the failure to conclude the long-running Doha Round. No obvious solution to this conundrum is on the horizon, and member states do not know how to solve the problem. Some are reacting by taking their negotiating energies outside the WTO, into various regional and bilateral trade agreements. Meanwhile, geopolitics has reared its head, reviving memories, albeit distant ones, of the world disorder that gave rise to the Bretton Woods system, which has governed global trade and finance since the Second World War.

In this report, key arguments are restated for why the WTO needs to be restored to the centre of global trade governance. In addition, the broad strategic reasons are examined behind its evident failure to achieve this goal – or, more accurately, the failure of its members to get there.

Richard Baldwin, Professor of International Economics, Graduate Institute of International and Development Studies, Switzerland, and Michitaka Nakatomi, Special Adviser, Japan External Trade Organization (JETRO), Japan, begin with an examination of the WTO's core pillars and the dangers to the global trading system should the organization's centrality not be restored. The failure to conclude common rules for governing global trade and investment could lead to a proliferation of rules that would threaten, *inter alia*, the operation of the global value chains (GVCs) that have delivered spectacular success to countries embracing them. This indicates that, in many areas of rule-making relevant to the operation of GVCs, the WTO's rules are either outdated (intellectual property rights), woefully inadequate (investment and, potentially, currencies) or non-existent (state-owned enterprises).

Failure to update the rules, they argue, could lead to system failure. Currently, Dispute Settlement Mechanism (DSM) adjudicators apply evolutionary reasoning to outdated rules, attempting to compensate for the gaps in them that are decades old. In the future, however, these panels or the Appellate Body could decline to adjudicate disputes if they consider the rules as no longer relevant. Further, major countries could reject evolutionary interpretation, particularly if they are on the losing end of panel findings. Either way, a rejection of the DSM's legitimacy would rock the WTO system to its foundations. The increasingly tense geopolitical environment would aggravate this situation, with very uncertain consequences for global order and the conduct of trade. Therefore, restoring WTO centrality is essential.

But how should this be done? Given sharply rising geopolitical contestation, addressing the WTO's ills necessarily requires focusing on the "high politics" of the global system before getting to the grubbier "low politics" of trade and investment negotiations. Both are covered in the remaining sections.

The notion of high politics, as enunciated by international relations scholars, refers to matters concerning the very survival of the state. In the Cold War, this led to sharply

focused international relations, since the prospect of nuclear conflict clearly threatened many states as well as civilization. Low politics, on the other hand, refers to all other matters in international affairs that do not affect the state's survival. Trade and investment have traditionally been considered matters of low politics.

However, because power shifts continuously in the international system, the distinctions between high and low politics become blurred in particular historical epochs. Whereas the concepts could be clearly separated during the Cold War, the distinction was of less use in the post-Cold War phase characterized by US dominance of the international order and peace between major states. Hence, high politics receded into the background and low politics moved to the forefront. Society is now transitioning to a new era, marked especially by China's rise and associated geopolitical tension, but also the rise of other developing countries, notably India and Brazil. At the same time, global trade and investment has changed fundamentally in the last three decades, driven by the emergence of GVCs and associated rapid technological change, thereby inducing major shifts in the location of production in favour of developing countries and, therefore, the geography of development.¹ In this emerging era, trade and investment have become tools of geopolitical contestation. So while high politics is making a return, trade and investment are now part of both high and low politics, as the debate over so-called "mega-regional trade agreements"² makes clear.

The contours of these dramatic shifts characterizing the current era are charted in the report. Peter Draper, Senior Research Fellow, Economic Diplomacy Programme, South African Institute of International Affairs, South Africa, and Robert Lawrence, Albert L. Williams Professor of Trade and Investment, Harvard Kennedy School of Government, USA, situate the dynamics around the global trade and investment system within the current "interregnum", or shifting geopolitics. Next, Lawrence and Harsha Vardhana Singh, Senior Fellow, International Centre for Trade and Sustainable Development (ICTSD), Switzerland, broadly outline important contours of the system's low politics, with particular focus on "new industrial policy" at the domestic level as it relates to the proliferation of special interest groups in key countries, and how these may affect trade negotiations and agreements. James Lockett, Vice-President, Head of Trade Facilitation and Market Access, Huawei Technologies, China, considers a key emerging "battleground" at the intersection of high and low politics: the intersections between national security and cybersecurity. In the penultimate contribution, Yong Wang, Director, Center for International Political Economy Research, Peking University, China, sets out the contours of China's emerging trade policy, a critical issue that will define the nature of the 21st-century global trade and investment system. Lawrence and Draper conclude with some high-level implications for the system, and attempt to answer a critical question at the heart of the multilateral trading system's future in particular: namely, can the high and low politics of the current interregnum permit an inclusive global trading system?

Restoring WTO Centrality to a Multi-Tiered Global Trading System³

By Richard Baldwin, Professor of International Economics, Graduate Institute of International and Development Studies, Switzerland; and Michitaka Nakatomi, Special Adviser, Japan External Trade Organization (JETRO), Japan

International commerce is one of the great progenitors of planetary prosperity. The touchstone economics of this result rest on the simple phrase: “Do what you do best; trade for the rest”. When all nations do this – shifting productive resources into their strong sectors and out of their weak ones – all national outputs and living standards rise. If nations have the right complementary policies in place, these “static” gains can be multiplied by dynamic gains – achievement of greater-scale economies, induced capital formation, and skill and technology upgrading.

Specialization, however, is best advanced in a stable economic environment. When firms, workers and nations invest themselves in “doing what they do best”, they need assurances that market access will remain reliable. International commerce needs “rules of the road”.

GATT’s centrality in global trade governance

For most of the post-Second World War period, the General Agreement on Tariffs and Trade (GATT) was the crucible for these rules. GATT provided the forum for three basic functions beyond its guardian-of-the-rules role: negotiating balanced market opening (liberalization), negotiating rule updates (rule writing) and facilitating diplomatic solutions to commercial differences (dispute settlement).⁴ By today’s standard, these tasks were straightforward because international commerce was straightforward. For the most part, 20th-century international commerce meant made-here-sold-there goods. GATT reflected this simplicity; the whole GATT is less than a hundred pages long, even with the amendments added in the 1960s and 1970s.

GATT was also a smash hit when it came to market opening. It enabled the lowering of tariffs of the world’s leading economies from Great Depression levels to an average percentage in the low single digits. This liberalizing success rested on three political-economy mechanisms: the juggernaut effect, non-discrimination and the “don’t obey, don’t object” principle. To put it starkly, GATT did not work by directly encouraging international cooperation; it worked by rearranging political-economy forces within each nation so that each nation’s government could marshal anti-protection export interests to counterbalance pro-protection interests.⁵ The resulting tariff cuts created a juggernaut-like, political-economy momentum. Each round of mutual tariff cuts weakened protectionists and strengthened exporters.

The don’t-obey-don’t-object principle plus MFN⁶ allowed GATT – which was a consensus-based organization of highly diverse nations – to operate as if it were run by a small group of big-economy nations. Developing countries did not block progress, as they were excused from tariff cutting and adherence to new rules, yet MFN gave them a stake in completing rounds.

Of course, there were regional trade agreements (RTAs), most notably those that covered the world’s largest bilateral trade flows (the European Economic Community and the US-Canada Auto Pact). These RTAs, however, were ancillary to GATT’s centrality.⁷ Their North American and European members were GATT stalwarts – staunch supporters of multilateralism. Beyond these agreements, few RTAs worked. RTAs in Africa, Latin America and Asia tended to be signed and ignored.⁸

While the liberalization of international commerce was difficult in the 20th century, vast liberalization progress was made by developed nations, and almost all of the tariff liberalization happened under multilateralism’s aegis. GATT’s record on developing-nation liberalization was more mixed, but this was not a GATT-specific problem. Until the 1990s, few developing nations embarked on trade liberalization in any form under the view that industrial tariffs helped them industrialize. This changed substantially as the dawn of the 21st century approached.⁹

21st-century system diversity and erosion of WTO centrality

Today’s multilateral trade governance is a far more complex ecosystem of actors for three simple reasons:

First, important elements of international commerce changed.

In brief, 20th-century globalization is about made-here-sold-there goods crossing borders. GATT helped nations sell things by reducing barriers to trade at the border. International commerce is now not just goods crossing borders; it is factories crossing borders, encompassing flows of goods, know-how, investment, training, ideas and people that used to occur only inside factories. Now the trading system must help nations make things, not just sell things.¹⁰



Mega-regionals and plurilaterals

More recently, attempts are being made, again outside the WTO, to harmonize some of the rules among subsets of WTO members. These new “actors” include mega-regionals such as the TPP¹⁴ and TTIP¹⁵ (World Economic Forum, 2014), and plurilaterals such as the Trade in Services Agreement (The Warwick Commission, 2007; World Economic Forum, 2010). Today, the world has a three-pillar system of global trade governance. While the roles are not mutually exclusive, the first pillar is the WTO rules (and its adjudication arm, the DSM¹⁶) that govern made-here-sold-there goods; the second pillar is 21st-century regionalism, i.e. deep RTAs and the web of BITs (and its adjudication arm, the ICSID¹⁷) that govern factories-crossing-borders trade; and the third pillar is the unilateral reforms by developing nations locked in by their national laws (and the desire to encourage factories-crossing-border trade).¹⁸

Second, these changes vastly deepened and widened the range of necessary rules of the road.

Naturally, the more complex cross-border flows involved in factories crossing borders – often called global value chains (GVCs) – require more complex rules.¹¹ In particular, establishing a stable economic environment for internationalized production networks requires disciplines on many behind-the-border barriers to international flows of goods, services, know-how, people and capital.

Third, the WTO did not adapt to the changes.

While GATT led the writing of 20th-century rules of the road, the WTO has had almost no rule-writing role in the 21st century. The organization did make progress on some Uruguay Round leftover issues in its early years (ITA, telecom and financial services¹²), but for the past 15 years it has been locked in a struggle whose core elements involve 20th-century market access issues (NAMA¹³ and agriculture).

The WTO’s steady focus on last-century issues, however, did not prevent the writing of new rules for GVCs. But it did guarantee that this rule writing went on outside the WTO.

The factories-crossing-borders type of international commerce has created, and is creating, massive win-win opportunities. In reaction, some of the necessary pro-GVC policies have been packaged into “deep” RTAs between developed and developing nations, especially those involving the United States, Japan and the European Union. Others have simply been unilaterally adopted by developing nations in the context of pro-business reforms. Curiously, this autonomous tariff cutting accomplished, de facto, the sort of market opening that has eluded the WTO for a decade and a half of Doha Round talks. Nations today seem eager to cut tariffs unilaterally, bilaterally and regionally – everywhere but in the multilateral context. Other central elements of the needed GVC-disciplines are embedded in bilateral investment treaties (BITs) and adherence to international conventions on intellectual property (IP).

The WTO continues to play a critical role – and continues to attract new members – despite its “fail trail” on multilateral negotiations. The reason is that made-here-sold-there goods are still an important part of international commerce. The first pillar still matters. Nevertheless, GATT/WTO centrality has been seriously eroded. In sharp contrast to the 20th-century experience, regionalism and unilateralism are working as vehicles of liberalization while multilateralism is not.

The liberalization of international commerce was relatively easy in the 21st century; vast liberalization progress was made, but almost none of it happened under multilateralism’s aegis. Why hasn’t this happened under the WTO’s aegis? In this sense, the GATT system took care of the “variable geometry” of the members (The Warwick Commission, 2007) with don’t-obey-don’t-object. The Uruguay Round changed the balance. The single undertaking principle¹⁹ forced all members to accept basically the same disciplines. At the same time, the rules became more serious as the dispute settlement system became far more binding than it was under GATT. The don’t-obey-don’t-object principle can no longer function, even though the problem it addressed is more pressing than ever, since WTO members (counting 160) have become more and more diverse. The ambition of the developed-country members to realize a universal system with gold-standard rules seemed to have been satisfied by establishing the WTO, but the euphoria was short-lived. The WTO is not well designed for crafting variable geometry that can accommodate the diverse preferences of its members.

The importance of keeping the WTO going

The mega RTAs – even if they succeed – cannot ensure a harmonized global trade and investment regime.²⁰ They cannot provide an effective global enforcement mechanism like the WTO’s dispute resolution mechanism. Moreover, uncoordinated development of rules across the various mega RTAs could undermine the global rule of law and hinder the development of GVCs. Worst of all, mega RTAs to date are driven forward by advanced economies; most developing nations and all the big emerging markets are

outside the process. The influence of developing economies would be marginalized, and those countries excluded from such RTAs would be sidelined and face discrimination. At the time of writing, it was not clear whether the main mega RTAs would be completed. Even if they are completed, it will take a couple of years for implementation to bite. But if mega-regionalism does turn out to “work”, the WTO’s centrality in global trade governance will be eroded even further. The WTO would become just one pillar of a multi-pillar global governance system.

Multilateralizing the rules in the WTO would seem the best way to avoid this sort of fragmentation and undermining of the rule of law in international trade. But there is no simple way forward here.

Despite a decade and a half of effort, accomplishing the original Doha Agenda seems as far away as ever. The deadlock is a threat to the WTO, but not in the most obvious way. The Doha logjam has not inhibited liberalization per se, but it has inhibited liberalization under the WTO’s aegis. The real threat comes from the way the logjam has frozen the rule-writing functions of the WTO. This poses a very serious problem.

The last time GATT/WTO rules were seriously updated was in 1994 – which was, for example, before the internet existed. The nature of trade, however, has become radically more complex and interlinked with the internationalization of production networks. And a new style of trading firm – state-owned enterprises – has moved from insignificant obscurity to the front row. Likewise, old issues such as currency manipulation are attaining major importance. WTO judges have to make their decisions based on rules that have little to say directly about these new issues. Looking forward, this imbalance between legislation and litigation is dangerous and could lead to system failure. The success of the WTO dispute settlement system rests on its legitimacy. This legitimacy rests on the fact that the rules being enforced were agreed by consensus. As rule updating is extremely difficult politically, except in the context of a big package like the Doha Round, a frozen Doha Round threatens the long-term health of the dispute settlement system.

To date, the judges have muddled through by means of an evolutionary interpretation of legal texts by panels and the Appellate Body. This is tantamount to judging today’s extremely complex international disputes based on the centuries-old Magna Carta. The burden on WTO panels and panellists would become too much to bear; and, in due time, sovereign countries would find it difficult to follow their rulings. Litigation without legislative legitimation is not sustainable. It is just like running a computer without having updated its operating system since 1994.

If this adjudication based on old rules continues long enough, one of two things must happen. First, the judges could refuse to adjudicate disputes on which the rules agreed in 1994 are insufficiently clear. In reaction, aggrieved WTO members are likely to introduce unilateral measures, as happened with the United States’ aggressive unilateralism of the 1980s.²¹ Second, if the WTO judges continue on their current course of stretching 20th-century rules to deal with 21st-century disputes, the time will come when a major WTO member rejects a ruling – claiming, quite rightly, that the ruling on the 21st-century issues is not based on negotiated texts agreed in the 20th century. It is absolutely unclear what the outcome would be, but system failure is one possibility.

Today, key trading nations believe the world trading system will continue to be anchored by the WTO’s shared values, such as reciprocity, transparency, non-discrimination and the rule of law. WTO-anchorage allows each member to view its own policies as minor derogations. Yet, in either of the cases already mentioned, we will come to the point where derogations become the new norm. The steady erosion of the WTO’s centrality will sooner or later bring the world to a tipping point – a point beyond which expectations become unmoored and nations feel justified in ignoring WTO norms, because everyone else does.

It seems unlikely that this system failure would resemble that of the 1930s, with rising protection and defensive regional blocs. The political economy of 21st-century trade has driven forward massive liberalization of trade, investment, services and IP policies. In short, protectionism of the 20th-century sort has become destructionism as far as industrialization, development and growth are concerned. What is more likely is a spaghetti bowl of rules, and a re-emergence of raw power politics in trade relationships, discrimination by the powerful against the weak, disorder in global rules, lack of effective dispute settlement, etc.

In short, a way must be found to move beyond the Doha logjam. While it is unlikely that we can return to a world of WTO centrality, the WTO is still essential. It is about time that the world starts to seriously consider multi-pillar global trade governance with the WTO as the central pillar. The idea of RTAs creating a natural order of trade as a pre-established harmony is an illusion. Shutting our eyes to the dangers posed by a world without the WTO is intellectual negligence. All efforts should be made by business and governments to salvage the WTO and re-establish it as the central pillar of the global governance regime for trade and investment, before it is too late.





High Politics, the Current Interregnum and the Global Trading System

By Peter Draper, Senior Research Fellow, Economic Diplomacy Programme, South African Institute of International Affairs, South Africa; and Robert Lawrence, Albert L. Williams Professor of Trade and Investment, Harvard Kennedy School of Government, USA

A historic transformation

The global trading system, and international order of which it forms a key component, are in the early stages of a potentially historic transformation. International relations scholars characterize this as “the interregnum”,²² a period marked by the relative decline of a formerly dominant “regime” anchored on a key geopolitical power, and the emergence of an alternative regime centred on rising challengers to the erstwhile dominant power. The current regime is centred on the US and especially its Western allies in Europe, the concert among which gave rise to the multilateral trading system in the form of the General Agreement on Tariffs and Trade and its successor, the World Trade Organization (WTO). The end of the Cold War and demise of the Soviet bloc left this Western-dominated multilateral trading order in a position of unchallenged supremacy on the global stage, an achievement cemented by the ultimate accession to the WTO by China and then Russia.

However, leadership of the trading system is shifting to a broader power base with greater divergence of interests. The key shift is from the West to include now the East and South, driven by shifts in the underlying patterns of global growth, trade and investment. These inexorable processes render the formerly dominant states uncertain about their future role. Larry Summers, President Emeritus, Harvard University, USA and Secretary of the Treasury of the United States (1999-2001), is worth quoting in this regard:

“This past month may be remembered as the moment the United States lost its role as the underwriter of the global economic system ... As long as one of our major parties is opposed to essentially all trade agreements, and the other is resistant to funding international organisations, the US will not be in a position to shape the global economic system.”²³

While Summers was writing about the debacle over US opposition to the China-sponsored Asian Infrastructure Investment Bank (AIIB), similar questions could be posed concerning US leadership of the global trading system. Similarly, Europe is too preoccupied with its internal financial crisis to assert trade leadership on the global stage.

Yet those to whom a share in economic power is shifting – notably China, India and Brazil – face many domestic

challenges and are not yet fully ready to assume their presumptive roles as co-leaders of the global trading system. Even among this small, expanding “leadership group”, achieving consensus on the key bargains required to advance multilateral trade agreements has proved frustratingly elusive.

The leadership challenge

When developing countries constituted a minor share of the global trading system, it was feasible for the advanced countries to negotiate mainly among themselves, and then to agree that emerging economies could be subject to weaker disciplines. As relatively poor countries, the emerging economies still view themselves as entitled to such special and differential treatment, but for the advanced countries, making such concessions are viewed as increasingly costly. While developed economies agree to some differential, the level of discipline they seek from emerging economies is considered too high by many among the latter. Even so, North-South coalitions have emerged, which offer grounds for hope. But the proliferation of caucuses and interest groups cutting across the Doha Round agenda renders coordination complex, and overall consensus very difficult to reach.

It is not surprising, therefore, that the WTO, like many multilateral institutions, is mired in an impasse. Traditional multilateral trade rounds, currently being pursued under the rubric of the “Doha Development Agenda”, have fallen out of favour while viable multilateral alternatives are not in sight. Carving out single issues for negotiation, such as the recently concluded trade facilitation agreement, seems the most viable approach. But as that process clearly demonstrated, it is a path fraught with difficulties, not least because the scope for trade-offs among the membership is much smaller than in a full, “single undertaking” round.

New issues, negotiating approaches and divisions

At the same time, trade policy scholars have focused attention on how modern trade and investment is actually conducted, notably through the operation of cross-border value chains,²⁴ and the implications this holds for trade and investment policies.²⁵ A further complexity is the growth of

hybrid commercial transactions constituting a mix of goods, services and intellectual property (IP) – the rules for which are in silos in three different parts of the WTO agreements as well as outside the institution in bilateral investment treaties, and rarely coordinated.²⁶ The policy issues bundled up in cross-border value chains (as well as hybrid commercial transactions) are far-reaching, and highlight the increasingly critical role of non-goods and behind-the-border issues, such as the role of services, IP rights and investment regulations in buttressing the operation of cross-border value chains.²⁷ Pursuing reforms in these areas can be undertaken unilaterally, and negotiations on these issues are sensitive for many states since they involve policies that have long been viewed as primarily domestic. Nonetheless, a growing number of states wish to pursue negotiations on these issues, both to secure market access abroad and to lock in new regulatory approaches at home.

By contrast, some states regard the “global value chains narrative” as being a Trojan horse for a new “Washington Consensus”-style²⁸ onslaught on developing countries, designed to bypass the Doha Round and coax them into unilateral, and potentially destructive, liberalization. Related to this, “new style” industrial policy is making a comeback, meaning that “policy space” in these areas is viewed as crucial by some WTO member states.

Consequently pursuing negotiations on the “services-intellectual property rights-investment nexus” in the WTO is unlikely to succeed on the old basis of comprehensive negotiating rounds. Since the WTO’s negotiating mechanism has clogged up, the negotiating action has moved to three spheres. First, inclusive plurilateral negotiations, involving subsets of the WTO’s membership who are prepared to engage in deeper integration and provide other WTO members access to the results on a most-favoured-nation (MFN) basis, as with critical mass agreements; second, exclusive plurilateral negotiations, whose results are not accessible to others on an MFN basis²⁹; and third, negotiations for preferential trade agreements (PTAs).

Plurilaterals offer the prospect of building “coalitions of the willing”, involving countries prepared to reach agreements on particular issues and to make the required trade-offs in order to secure broader gains in the interests of securing maximum value from cross-border value chains.³⁰ However, from the standpoint of many smaller developing countries, plurilaterals also present dangers.³¹ The dominant fear is that developed countries, and large developing countries such as China, may use plurilaterals to agree on new rules, and then “impose” these rules on the rest of the WTO’s members, who did not have a say in formulating them. An additional fear is that key issues not of core interest to the dominant trading powers, notably agriculture, will simply be left off the table. Further, plurilaterals agreed outside the WTO are non-inclusive and weaken the benefits of the multilateral trading system for smaller and/or excluded economies. Nonetheless, the attraction of plurilaterals continues to be the prospect of greater market access and updated regulatory regimes in the absence of a multilateral consensus.

PTAs have been a growing feature of the global trading system for decades, but particularly since the conclusion of the North American Free Trade Agreement in the early 1990s. They have taken a number of forms. Some are bilateral or involve relatively small numbers of countries, not much actual trade or investment and, particularly where developing countries are involved, do not delve deeply into behind-the-border regulatory issues if at all. But others, especially in the agreements concluded by the US and the European Union, are deeper and more comprehensive than those covered by the WTO. Indeed, they have incorporated issues which are unacceptable to many other WTO members as topics for agreement, such as investment, competition policy, labour and the environment.

This highlights the potentially game-changing dimensions of the so-called “mega-regional trade negotiations”,³² notably the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). The US is central to both, representing a concerted and strategic attempt to reassert its leadership over the global trading system by embracing key allies in the Asia-Pacific and Europe in an ever-closer trade and investment embrace anchored on US regulatory preferences – to the extent possible.³³ Thus the mega-regionals are key pillars of the US’s broader geopolitical response to the rise of China and other developing countries; in them, high politics meets low politics. At the same time, the incentives for excluded actors either to join these mega-regionals or to craft alternatives more suited to their needs, either regionally or at the WTO, would increase. One example of the latter is the Regional Comprehensive Economic Partnership (RCEP).³⁴ The RCEP is less ambitious than its mega-regional counterparts of the TPP and TTIP but greater in economic scale, excluding the United States while uniting most of Asia’s economic powers, at the centre of which looms China.³⁵

If successfully concluded, the mega-regionals will pose both challenges and opportunities to other states not party to these agreements, encompassing traditional market access, diverging regulatory preferences, but also potentially expanded markets.³⁶ If the TTIP and TPP adopt particular approaches and standards in order to participate in global supply chains, others may have no alternative but to follow them – a potential development with many implications for the low politics of trade and investment in many parts of the world.

Although not confined purely to trade, but with implications for it, other institutions promoted by China and challenging the Bretton Woods institutions are also emerging. These include the Asian Infrastructure Investment Bank and the New Development (BRICS) Bank, as well as the ambitious plans for “one-belt, one road”. On the one hand, they will deepen trade, investment and infrastructure links mainly between Asian nations, but at the same time will reduce both the strategic importance of the existing shipping lanes controlled by the United States and through which most Chinese trade currently passes, and the influence of the United States, which has thus far decided not to join them.

So much for the high politics of the interregnum and its associated implications for the multilateral trading system. How the system evolves will depend on the low politics of “special interests” in key member states, those states’ interactions with other pivotal states in the multilateral terrain, and the space to pursue domestic regulatory preferences.

Low Politics of International Trade and Investment



Industrial policy and the multilateral trading system

By Harsha Vardhana Singh, Senior Fellow, International Centre for Trade and Sustainable Development (ICTSD), Switzerland

Over time, international trade has grown more rapidly than income, increasing its importance for economic activity and providing growth opportunities to various economies. This has led to the emergence of a multipolar world with new or emerging centres of economic activity. The experience of growth, generated through deliberate policies to create skills and linkages to global markets through trade, investment and technologies, has generated an interest in several developing countries to break through the middle-income trap by further creating the conditions facilitating acquisition and competitive application of new technologies. Likewise, examples of growth achieved through specialization in traditional sectors such as textiles and clothing, as well as services, have encouraged low-income economies to increase their competitive presence in such sectors – efforts that have been helped by rising wages in some middle income economies and, consequently, investment moving to low-cost locations.

These developments have led to greater interlinkages among nations through foreign direct investment and cross-border value chains, and associated improvement of skills, technologies and transport facilities across a wider group of nations. This has led to an increase in aspirations among nations to extend their capabilities and growth

prospects. Policy-makers thus began to take targeted steps to achieve these objectives, encouraged by nations like China, which have achieved major economic changes in their societies. Policy-makers realized that the structural changes they sought to achieve for addressing poverty traps or the middle-income trap could not be achieved purely through private markets and firms, but rather required complementary support taken by governments. Concurrently, the advances in communications and research informed people about targeted policies used by virtually all nations for developing dynamic advantages, or to support specific sectors that faced major difficulties. Though diverse and separate, each such policy initiative fed into the other and soon, industrial policy was back as an important method of achieving socio-economic goals.

However, this recent resurgence of industrial policy is different from previous import-substitution regimes based primarily on border protection. The changes in trade, investment and cross-border value chains already described mean that the operational conditions for these policies are different. Today, domestic objectives have to be met in a far more interdependent world, where market-restricting policies can have adverse effects on competitiveness and create difficulties in linking up with investment and cross-border value chains. Thus, the aim of policy interventions has to be to facilitate economic transactions both through easing constraints and building domestic systems that ensure stability, predictability and timely response. This is much more possible through market-supporting measures than via restrictions. Hence, with the change in operational conditions and a realization that domestic objectives require significant enhancement of linkages with both domestic and international markets, we now see the emergence of a new industrial policy.

The reorientation of industrial policy reflects both the increasing overlap between trade and investment, and the fact that the focus of trade policy has shifted from border measures to non-tariff measures or to inside-the-border measures, relating, for instance, to food security, standards and services such as logistics and information technologies, and sustainable development and social concerns. This means that the scope of trade policies also shifted towards approaches that supported or improved the operations of enterprises within the border. This led to a focus on facilitation and improving the efficiency of operations, based on a realization that no investment in, or production or sale of any product can occur without a combination of goods and services along different parts of a value chain. Further, the availability of detailed value-added trade data has clarified the synergy and interdependence between goods and services, as well as between domestic and international commercial activity. Domestic and global value chains are linked, and timely responses by domestic businesses and policy implementers are critical so that delays do not cause loss of business opportunities. This has caused policy-makers to focus more closely on factors that maintain competitiveness, including promoting new technologies, boosting investment and creating domestic capacities through learning and innovation. In addition, there is a growing realization that public-private partnerships and interaction is essential, because neither the private sector nor the policy-maker alone can achieve the relevant objectives without cooperative steps through consultation, identification of key constraints and priority issues, and clarity on the responsibilities of each during the investment and production process.

Hence, the world of trade policy today has to be seen through a framework of interlinkages between trade, investment, cross-border value chains, acquisition of technologies and public-private partnerships. The focus of new industrial policies is thus far more complex than it was earlier, and the potential loss of opportunities is greater if appropriate preparation is lacking within any nation. Since overall, economy-wide steps are difficult and take time, priority is often given to steps with the largest impact on national objectives, including continued improvement in competitiveness and meeting the key social objectives of enhancing income and employment opportunities. This implies developing domestic systems that improve capabilities and attract investment with an eye to building the future trajectory of the economy, combined with a focus on some key sectors that may make these possible.

All economies face the difficulty of achieving domestic objectives in an interlinked world; the right balance between short- and long-term considerations needs to be found. On the one hand, global competition tends to focus the attention of policy-makers and domestic industry on short-term mitigating steps, including protectionist policies. This is liable to increase trade conflicts, dissuade investment which focuses on global rather than local markets, reduce competitiveness over time through the cost inefficiencies generated by restrictive policies, and overlook the growing interlinkages already discussed. On the other hand, these interlinkages require medium- and long-term policies to focus on market-supporting initiatives rather than restrictive

ones. Managing sustained capacity upgradation and links to value chains over time requires systems that facilitate a shift from hard to soft policies, assist with cost reduction and innovative activities, and provide a greater role for horizontal policies. This does not mean that other policies may not be adopted, but they must be done in a manner that improves production capabilities and leads to the development of soft, horizontal policies within a time-bound framework.

In view of the cross-border linkages and overlap between trade and investment, it is imperative that new industrial policy moves from governance to good governance, which facilitates achievement of socio-economic objectives through rapid response, extensive coordination and continuous upgradation of skills and value addition. The way forward to address the dilemma between employment or higher-value items is to build inclusive and flexible systems which use the synergies from domestic and international trade and investment linkages. That is where the opportunities will be, and that is the area that needs to be strengthened through policy.

The move towards developing coherent systems is going to continue, but several of these moves are taking place through systems that fragment global markets. The challenge is to build them in an inclusive manner that allows transition towards facilitating good governance. This is as true for domestic systems as it is for investment and trade rules, or even for the presently inchoate private standards. Such an effort towards inclusive systems is essential in an interlinked world, and needs to be supplemented with sharing benefits by companies in the territory where they operate. This could include efforts to develop local capacities, recognizing the key role of improving services, both commercial and social, and establishing platforms which promote inclusive participation within and among nations. Such cooperative steps and mutually supportive linkages would not only reduce potential conflicts, but also allow new industrial policy to move away from a short-term and narrow market-restricting focus.

Within this broad framework, countries with different income levels and natural endowments have different concerns. For instance, poorer economies try to build governance systems, infrastructure and skills that will create hubs of economic activity with relatively simpler technologies to operate, in traditional areas such as textiles, clothing, leather, wood products, simpler services and the trading of natural resources. The objective is to increase value addition within the country and develop clusters and networks among various activities to sustain growth in employment, income and incremental stages of skill acquisition. An important aim of industrial policy is to create production and infrastructural conditions that would lift income levels of the majority of their population above poverty lines.

The objectives of middle-income economies are broadly similar, with an important difference being that they operate in more complex and diversified economic systems, with a range of abilities across the systems. For these economies, the objectives of industrial policies include both those of poorer countries (because a significant part of their society is poor) as well as developing systems and capabilities that will help them link up with more technologically complex, modern, state-of-the-art and innovative activities. The dilemma they face comes from the apparent conflict between value addition and employment generation: higher-value-added parts in value chains are less employment-intensive, more skill-intensive and/or more infrastructure- or technology-intensive. Further, these economies face increasing competition from lower-income countries once they develop their high-employment, less complex sectors and take away increasingly higher market shares in these products. For the middle-income economies, industrial policy has to manage balancing the triple goals of employment generation, value addition and development of high-skill sectors with innovation, in a situation where they face increased global competition. Combined with this is a need to address aspirations of their populations for facilities to meet social objectives, such as health and education.

For the upper-income economies, the growth of technological capabilities in middle-income economies truncates the scope and prevalence of their economic dominance. Therefore, they focus on retaining the technological lead and competitiveness in higher-value-added parts of value chains. However, these are not employment-intensive activities; therefore, sustaining growth with employment is becoming an onerous task for them. This is further complicated because international investment flows are increasingly oriented towards developing economies, which now account for a majority of flows into global foreign direct investment (FDI). Again, FDI presents challenges. On the one hand, foreign firms can be vital in transferring know-how and facilitating entry into global markets; on the other hand, there are concerns that they could hinder the development of domestic national champions.

Special interests and the interplay among key states

By Robert Lawrence, Albert L. Williams Professor of Trade and Investment, Harvard Kennedy School of Government, USA

This situation has led to a closer examination by both producer and consumer organizations in upper-income economies (UIEs) of the conditions of operation prevailing in middle-income economies (MIEs), to assess the various differences which, in their perception, may be contributing to a non-level playing field stacked against them. Primary among these are identified as differential (lower) standards used for sustainable development and social objectives, non-commercial frameworks applicable to state-owned enterprises, and the perceived need for stronger intellectual property rights to better preserve the gains from innovative steps leading to technology changes. UIEs tend to

have relatively high sustainable development and social standards, particularly in the form of private standards. Likewise, their enterprises are mostly in the private sector. While their lead firms in any value chain would insist on their standards, these value chains are moving towards the East, and thus they are incrementally losing control of managing to reflect their standards in the value chains.

Against this background, they seek to “level the playing field” by getting agreed rules or disciplines which would emphasize their concerns, both for trade and investment. Thus, these objectives find a prominent place in their templates for bilateral investment treaties, and in the ongoing mega-regionals such as the Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP). Through these agreements, the attempt is to limit the flexibility of industrial policy, or to bring greater coherence among industrial policies used in UIEs and MIEs. This is an evolution of the new industrial policy, at a time when countries are emphasizing the objectives of developing domestic value chains, skills and links to new technologies, and increasing employment in an era of intense global competition and economic difficulties.

As the scope of trade agreements has moved behind borders, it is not surprising that they have become increasingly politically contentious. These agreements do not simply impact purely economic interests, but also influence those with particular interests and views on rules and regulations that affect broader social questions, such as culture, immigration, environment, privacy, consumer safety and health. In many of these areas, it is particularly difficult to reconcile divergent national preferences.

In addition, as the agreements have included more issues, they have given more scope for certain actors from some countries to advance their interests, even when these conflict with interests elsewhere. For example, the inclusion of intellectual property protection in trade agreements has led to demands by some industries from advanced economies for evermore stringent protections, while many developing countries have raised concerns about such protection in limiting access to essential technologies and medicines.

Trade agreements have thus become increasingly partisan. In the United States, for example, when trade agreements were mainly about removing border barriers, generally regardless of party, politicians from import-competing states tended to oppose them, while those from states with strong export industries tended to favour them. But as trade agreements have incorporated issues like the environment and labour, polarization along party lines has become more common. It is ironic that, despite its relatively weak trade unions and labour laws, the US has been especially vocal in promoting and including labour standards in its trade agenda. But while some negotiating partners are prepared to accommodate such provisions in their agreements with the US, their inclusion could make extending these regional agreements to countries such as China, Vietnam and India especially difficult.

It is also as yet unclear what these domestic political divisions will ultimately imply about the feasibility of achieving and implementing the mega-regional agreements currently under negotiation, with further extensions of these agreements to include other members and/or new agreements at the World Trade Organization (WTO). But there is no doubt that they could present formidable obstacles. In particular, there are deep political divisions in the US over granting the president trade promotion authority, as well as over the desirability of new trade agreements such as the TPP and the TTIP. Similarly, in Europe, the TTIP has brought to the fore concerns related to contentious issues such as privacy, investor-state dispute settlement and differences in approaches to food safety regulation.

It is thus an oversimplification to view the global trading and foreign direct investment (FDI) system as being driven by countries that act as unified entities. Trade often creates winners and losers, and the existence of strong and divergent domestic interests has hindered the achievement of multilateral trade agreements at the WTO and posed threats to the conclusion of regional and plurilateral agreements.

When the Doha Round was launched, for example, many countries in Africa and Latin America had experienced lost decades in growth and development, since they were mired in debt, chronic structural economic problems and associated International Monetary Fund/World Bank lending programmes with all their conditionalities. So it was plausible to argue that the trading system needed to be reformed to enhance the interests of the developing countries. But in the years that followed, developing countries grew rapidly, and it was the advanced countries that experienced economic stagnation. Under these circumstances, the framing of the Doha Round as a development agenda became problematic for developed countries. Indeed, in advanced countries that face slow growth in incomes, increasing income inequality and high unemployment, it is not surprising that while some (often those in export industries) claim new agreements are

a means to spur growth and generate higher incomes and employment, many – especially from import-competing industries – are unsettled by the prospect of additional market opening, especially with large and competitive emerging economies.

Similarly, when the Doha Round was launched, the prices of farm products and other commodities were depressed, and it was certainly plausible to argue that a key element in raising incomes in developing countries was reducing farm subsidies and protection in the advanced economies. However, the strength of farm interests in Japan and Europe especially limited the ability of these economies to conclude comprehensive agreements with developing countries that are highly competitive agricultural exporters, such as Brazil and Argentina. In addition, high rather than low prices of farm products had become the major concern by 2008. Thus, concerns about food security led poor food importing countries to promote domestic production and resist liberalization. Furthermore, those countries are now worried about the impact that low agriculture prices in the future may have on their farming communities, which leads them to seek safeguards against this possibility.

Finally, as a matter of both high and low politics, agriculture requires particular attention: the farmer's voice is especially loud in all countries; the issues cannot be addressed in a regional context; the remaining distortions are larger than in any other field; and "new issues" can't move forward on a multilateral basis until and unless this sector is tackled, with due regard to food security, poverty alleviation and sustainable incomes, among others.

So it is not surprising that concluding the Doha Round has proved so difficult. Nonetheless, there are issues on the trade and FDI horizon that promise to be just as contentious as those in play in the Doha Round, even though they are not included in it. A particularly notable one is cybersecurity, where issues of national security, privacy, cross-border services, hybrid commercial transactions, piracy, online espionage and theft, and cross-border legal enforcement efforts all interact.



Where High and Low Politics Meet: National Security and Cybersecurity

By James Lockett, Vice-President, Head of Trade Facilitation and Market Access, Huawei Technologies, China

The internet is playing a vital role in global trade and offers great potential gains. It is the ultimate globalizing force, dramatically reducing transaction costs, and thus allowing for cross-border trade in services that were once considered to be purely domestic in nature. Because the internet is vital commercially and socially, one would think it would be strongly encouraged on every level, but this is not what has been occurring.

Cybersecurity has been a commercial issue probably for over a decade, but particularly under the trade and investment rules of the past three to five years. During that recent period, “national security” has increasingly been invoked in this sensitive area. Additionally, it has become very clear that this complex subject does not fall neatly into any one set of rules. The issues range from espionage to theft, from privacy and data protection to localization requirements, and from cross-border criminal enforcement to standard setting. While true national security issues exist as a recognized form of high politics – the last bastion of sovereignty in the World Trade Organization (WTO) system – the realm of cybersecurity appears to be a playground for various forms of low politics as well.

The impact of information and communications technology (ICT) in the age of the digital economy and the Internet of Everything will be transformative in the coming decade and beyond. With over 40% of the world online at the end of 2014 and the figure projected to rise to 50% by 2017, the information society is upon us.³⁷ Mass connectivity with broadband promises to transform development and global welfare.³⁸ The International Telecommunication Union predicts that the number of networked devices could reach an astounding 25 billion by 2020.³⁹

National security in the WTO

Governments have used national security to uphold important national security interests, as well as to adopt trade restrictive measures for reasons of supposed national security, defined as self-sufficiency.⁴⁰ Rarely do such attempts hold up to careful scrutiny, but the temptation is always present.⁴¹

When originally established, the General Agreement on Tariffs and Trade (GATT) was intended to deal with a technical matter – the regulation of transnational trade. Other Bretton Woods institutions, notably the United Nations, were to deal with issues of national or international security and peace.⁴² Accordingly, most of GATT’s exceptions deal primarily with “technical” problems caused by imports or exports of goods.⁴³ However, the exceptions in Articles XX and XXI deal with a different kind of situation.⁴⁴ Compared to the broad exceptions of Article XX,⁴⁵ Article XXI provides extensive discretion, the precise limits of which remain largely unexplored in GATT/WTO jurisprudence. Thus, WTO members, otherwise bound by technical rules,⁴⁶ have been viewed traditionally in matters of national security as being largely freed of any legal bonds imposed on them.⁴⁷

Many GATT members stated the belief that Article XXI(b) was self-defining.⁴⁸ The GATT contracting parties adopted a ministerial declaration stating that “... the contracting parties undertake, individually and jointly: ... to abstain from taking restrictive trade measures, for reasons of a non-economic character, not consistent with the General Agreement.”⁴⁹

The notion of self-definition came under renewed scrutiny with the launch of the WTO and its dispute settlement system that no longer allows a member to block formation of panels, thus no longer limiting the ability of another member to question the legitimacy of a measure defended on the basis of national security.⁵⁰

In the US – Helms-Burton panel proceedings⁵¹ – the only case on Article XXI to date under the WTO regime⁵² – the US informed the WTO that it would not participate in panel proceedings since it viewed the Act as outside the scope of WTO law and thus not in the panel’s jurisdiction.⁵³ The US stated that the disputed embargo was about diplomatic and security issues, and “was not fundamentally a trade matter”.⁵⁴ However, “[f]ew Members shared this opinion”, as noted by Peter Van den Bossche, Member, Appellate Body of the World Trade Organization, Geneva and Professor of International Economic Law, Maastricht University, Netherlands.⁵⁵



Thus, there has been no WTO proceeding to determine these issues. The most recent invocation of Article XXI in a possible WTO challenge appears to be the issue of US, Canadian and European Union (EU) sanctions against Russia over Crimea and other issues related to Ukraine.⁵⁶ A Russian official involved in the matter opined that Russia would not expect the national security exception would be available to the US in the same sweeping, self-defining way that some legal experts have asserted.⁵⁷

Cybersecurity

Many cybersecurity issues are also raised in this unclear legal setting. As yet, the WTO's membership does not know whether any measures whatsoever taken by one member on grounds of national security are completely immune to WTO scrutiny, or whether there is a level of WTO review available.⁵⁸

Thus, in the overall realm of cybersecurity, it has proven difficult for one WTO member to argue against measures taken by another WTO member on grounds of national security. Some of the decisions are arguably also outside the remit of the WTO, e.g. certain decisions on cross-border investments, but the potential for mingling of high and low politics is equally strong.

For example, in 2010 a group of US senators called for the blockage of private sales of telecommunications equipment from a Chinese company to Sprint, a major US carrier, on grounds that the carrier was also a supplier to the military.⁵⁹ In a 2012 report, the US House Permanent Select Committee on Intelligence recommended that US telecommunications operators should not do business with China's top network equipment suppliers, and that the government should block takeovers of US companies by the two largest Chinese telecommunications equipment manufacturers because of an alleged threat to cybersecurity.⁶⁰

Those dynamics, enabling the US to take the "high road" on cyberespionage, changed dramatically in June 2013 when Edward Snowden, former US National Security Agency (NSA) subcontractor, revealed that the NSA had been engaged in massive global espionage.⁶¹ The irony became even more apparent when it was revealed that the NSA had been spying for years on the same Chinese companies which the US had targeted for commercial bans owing to fears of espionage.⁶²

Fast forward to 2014-2015: the US and other countries are concerned that China is using cybersecurity criteria in some of its legal and policy proposals, most notably in banking.⁶³ The US complains that China's legislative proposals are not consistent with its WTO obligations.⁶⁴ To date, the US has raised issues about local content requirements in those rules.⁶⁵ The Chinese government has been standing by its regulatory proposals, explaining that it is "necessary for all governments to strengthen security to protect public interests".⁶⁶ Others in China and elsewhere believe forced localization would interfere with free competition and innovation.⁶⁷

A separate issue in the overall cybersecurity topic is cybertheft. One type is the stealing of trade secrets and intellectual property (IP) rights. At least one government has decided to include the use of trade-law tools in its responses to cybertheft and cyberespionage,⁶⁸ with the US arguing that China is violating its commitments to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights by failing to protect trade secrets.⁶⁹ The issues are not unique to these countries, and cybertheft issues are a double-edged security concern, with legal debate over whether a national security exception is available in this type of case.⁷⁰

Yet while the US accuses China of cyberespionage, there was also disclosure that the NSA itself had penetrated a major Chinese company and its equipment worldwide.⁷¹ This type of economic espionage by a WTO member might be argued as being in US national security interests, but the inconsistencies and double standards in such arguments are clear.⁷² One US legal writer has observed: “The NSA’s company-specific intrusion into the network and equipment of China’s leading telecom company does dilute the strength of US claims against China’s targeting specific firms for their commercial secrets.”⁷³

The high and low politics of cybersecurity are not reserved to the US and China. Following the Snowden revelations, for example, there were examples of other governments spying on behalf of the NSA,⁷⁴ where the spying bore no relation to terrorist activities and violated attorney-client privileges.⁷⁵ There also was an avalanche of protests over US intrusions in the personal and corporate spaces in numerous countries, as well as government-to-government spying, and again when it was revealed that commercial espionage by the NSA extended to Germany’s Siemens, Mexico’s Pemex and Brazil’s Petrobras, inter alia.⁷⁶

Finally, cybersecurity issues are also reflected in countries’ responses to NSA spying, such as data protection and privacy, and requirements for local servers. The Snowden *affaire* prompted a particularly strong reaction in Europe, where relevant telecom operators started proposing measures to avoid routing European data across the Atlantic. Also, the EU has criticized the functioning of the EU-US Safe Harbour Agreement that allows for transfer of data between the EU and the US.⁷⁷ Indeed, although the EU has requested assurances from the US on how the national security exception would be utilized with regard to data transfers⁷⁸ – an issue blocking progress in TTIP negotiations⁷⁹ – the US has steadfastly refused to elaborate.⁸⁰

The EU has taken this policy standpoint further, with the European Parliament’s leading lawmaker on this issue arguing that, in the WTO TISA negotiations, the US proposals to maintain an undefined national security exception are not acceptable, and that use of national security must be linked with “objective necessity criteria”.⁸¹

In addition to the reactions in Europe, various forms of data localization requirements and stricter privacy rules have also been discussed and proposed in countries such as India, Brazil, South Korea and Indonesia.⁸²

Some concluding observations

In short, recent issues concerning cybersecurity show that while some WTO members take a high view of national security when it pertains to activity within their borders or when they view sanctions appropriate elsewhere, they are against the same measure of flexibility when exercised by other countries. A refusal to provide objective requirements linked to necessity and proportionality are keeping a consensus at bay, while commercial interests are driving conflicting stances in other countries.



As this short discussion of cybersecurity illustrates, there are many opportunities for the exercise of high and low politics in emerging hybrid areas such as these, and there is no shortage of contentious issues about which there does not appear to be clear policy consensus or clear international legal frameworks.

With the overlapping issues addressed here, and the challenges they represent, there is still the need to optimize the global trading and investment system to encourage the flow and use of ICT goods and services and to protect related IP. Several key solutions should be considered:

1. With regard to GATT Article XXI and related provisions in the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights, there is a precedent from 1982 of the members using a GATT ministerial declaration to clarify principles. Geography-based discrimination in a world of global value chains makes no sense. To provide guidance in the WTO era, recognition could be given to the objective and subjective elements of Article XXI in relation to sanctions and boycotts, secondary boycotts, legitimate cybersecurity concerns, objective necessity, proportionality and other issues. If not, it is likely that the dispute settlement system will be called upon to determine those issues.

2. There is a need for sovereign agreements on cyberspace. Beyond the parameters of the WTO, the international community should reach a post-Snowden consensus on the need for, and boundaries of, true counterterrorism and security espionage. What was well known in the intelligence community is now more broadly understood: spying is ongoing and will not stop, but an agreement is needed on acceptable norms, including those of economic espionage.
3. While data protection and privacy clearly require legal protection, ICT continues to open horizons faster than national regulators can control it; practical trade-facilitating frameworks need to be agreed. We need to do the following:
 - a. Recognize that there are many different approaches to regulating cross-border data transfers, and that differing mechanisms can ensure a similar desired level of data protection
 - b. Move away from rigid one-size-fits-all regulations towards more outcome-focused regimes
 - c. Clearly delineate between the issue of government access to data and the distinct issue of cross-border data transfers in a commercial context
 - d. Assure that the frameworks we develop today are fit for tomorrow
 - e. Implement strong, binding trade-agreement commitments that prohibit data localization requirements, support unimpeded data flows and encourage interoperability among privacy regimes
4. In IP, state-sponsored cybertheft and failures of members to prevent cybertheft should be addressed.
5. In the world of investment, identification of objective necessity (before national security exceptions are invoked) would lessen both the chilling effect on cross-border investment and the tendency to block deals for political or protectionist purposes.

These issues need clarity before further disincentives are posed to delay the provision of cutting-edge ICT solutions for the global economy.



A Very Special Case: China's Emerging Perspectives on the Global Trade Order

By Yong Wang, Director, Center for International Political Economy Research, Peking University, China

Through more than three decades of reform and opening up, China has achieved much in development and growth. It has become the second-largest economy and the largest trading nation in the global economy. The rapid rise of the Chinese economy has benefited greatly from economic globalization, participation in the international division of labour and the emerging network of global supply chains (Draper, 2013). China has become an economy highly dependent on imports and exports.

Key drivers of change in China's trade policy

Since the global financial crisis of 2008, the global economy and international trade regime have experienced tremendous changes, and though it is the largest trading nation, China recognizes that it has to move quickly to adapt to the new world-trade trends. Chinese commentators regret the stalemate of the World Trade Organization's (WTO) Doha Round negotiations, and have been sceptical of the rise of mega-regional free trade agreements (FTAs), represented by the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). In particular, they are concerned about the geopolitical implications of the TPP, which is perceived as the economic arm of the US' "pivot to Asia" or rebalancing strategy under the Obama administration (Wang, 2013b). China is also vigilant about the rise of protectionism in the name of regional cooperation. Though China has become part of the core group in the Doha Round, it is not able to salvage

the trade talks by itself. China's burgeoning domestic interests have built pressure on the country to not give more concessions.

On the other hand, the global financial crisis has also put the Chinese economy on the track of transformation. Global economic rebalancing under the G20 framework produced big pressure on the Chinese economy to transform the former pattern of growth that is mainly driven by rapidly increasing exports. The Chinese economy has restructured into one driven increasingly by domestic consumption. In addition to international pressure, the increase in the price of labour and property price inflation have also put great pressure on the Chinese economy, which has begun to lose relative competitiveness in production of labour-intensive exports. So slower economic growth has become the "new normal" for the economy. Despite challenges ahead, it will likely maintain a relatively high growth rate, targeted at 7.0-7.5%, which is still higher than most major economies in the world (Wang, 2014). Furthermore, it is widely believed that Chinese exports will remain strong even if the economy is on the track of structural transformation. Decision-makers believe that the country should expand its outbound investment in overseas markets, partially to absorb domestic overcapacity and alleviate excessive foreign exchange reserves, and should work hard to export more value-added products. The government has accordingly prioritized export sectors such as Chinese heavy equipment machinery, including high-speed trains, telecommunications equipment and nuclear power generators.



China's emerging trade policy

In order to deal with international and domestic challenges, the Chinese government has moved towards formation of a new, more proactive trade policy, particularly since President Xi Jinping and Premier Li Keqiang came to power in 2013.

The core principle of China's new trade policy seems to be very clear: China should not just be a rules taker. Rather, the country should be a rules maker, and play a leadership role in the emerging regional and global trade order. In particular, China should not stay outside and be marginalized in the new games centred on mega-regional FTAs.

Since the new leadership was sworn in, the Chinese government has given serious consideration to applying for membership in TPP negotiations. Starting in early 2013, the Chinese response to the TPP moderated, as government officials and experts discussed the possibility of China joining the TPP and the potential impacts on the Chinese economy. China and the US have improved communications and mutual trust regarding the TPP since 2012, and President Xi himself has engaged in the process of bilateral communications involving the TPP. The effective senior-level interactions and cooperation between the US and China likely boosted the confidence of China's leaders on China-US relations; they gradually adjusted their judgement of the TPP and no longer took it as a threat to China's vital interests. Indeed, there have been discussions of China eventually joining the TPP or having it linked to the Regional Comprehensive Economic Partnership (RCEP), which would include China and 15 other countries, or some other form of cooperation.⁸³ In addition, the need for domestic reform continues to drive the change in Chinese perceptions about TPP and other mega-regional FTAs.

China has also closely watched, and adjusted its policy towards, the development of plurilateral agreements under the WTO framework. It has eagerly sought to be part of new-generation rules negotiation, especially the new trade in service agreement (TiSA). China's bidding for TiSA can be explained by its concern about being marginalized in the development of new rules, and the enthusiastic demand for development of its services economy. As part of upgrading the Chinese economy, the government has positioned the services sector to drive the transformation of the pattern of growth (State Council of China, 2015). China has made big progress in promoting its service economy, exemplified by the boom in mobile internet commerce in recent years: four out of the top 10 internet companies in the world are now based in China, including Alibaba and Tencent (Lu, 2014).

Another plurilateral trade agreement under the WTO that has benefited Chinese exports and the Chinese economy is the Information Technology Agreement, initially agreed in 1996, and which members have sought to upgrade. After a US-China agreement on the Information Technology Agreement in November 2014 at the Asia-Pacific Economic Cooperation meeting, a further impasse involving South Korea and China developed. China worked to resolve those final issues early in 2015, having offered fresh concessions to open the Chinese market further.⁸⁴

Stimulated by the TPP and other mega-regional FTAs, the Chinese government has raised the quality of trade liberalization agreements with Switzerland in 2014 and with South Korea and Australia, which by early 2015 were almost finalized. The government has also pushed forward with upgrading its FTA with the Association of Southeast Asian Nations (ASEAN), and has received positive feedback from ASEAN countries. In addition, China is determined to speed up the Regional Comprehensive Economic Partnership (RCEP) talks, and set the target for concluding negotiations for the end of 2015. On the other hand, it succeeded in sponsoring a Free Trade Area of the Asia-Pacific (FTAAP) among Asia-Pacific Economic Cooperation (APEC) members during the APEC leaders' meeting in Beijing in November 2014. China and other countries expect that the FTAAP can become the common roof to integrate the rules of the TPP and RCEP in the future, and to ensure the integrity of the regional trade order in the Asia-Pacific region (Hasan, 2014).

Finally, since 2013, the leadership has ushered in a new experiment with the Shanghai pilot free trade zone. It is not only about free trade liberalization, but also involves relaxing regulations on trade in services, capital controls, convertibility of the Chinese currency (renminbi) and improving the standard of intellectual property rights and trade facilitation. Some measures streamlining government structure and procedures have also been adopted. Since then, the State Council extended the pilot free trade zone to other parts of the country, including Tianjin, Guangdong and Fujian (Xinhuanet, 2015).

Why will China embrace higher-standard FTAs?

Competitive liberalization may account for China's more ambitious policy of trade liberalization. Chinese commentators have been worried about possible trade diversion caused by the TPP and TTIP. Some are sceptical of the negative strategic influence of the TPP on China's regional role (Wang, 2013b). So a more ambitious trade liberalization plan is seen to help the Chinese economy to counterbalance the TPP's spillover effects. At least China expects it could gain some bargaining chips in regional or multilateral trade talks.

China has started to endorse higher standards in trade talks because the new leadership is looking to repeat the success story of the country's WTO accession – that is, to use international obligations as pressure to push forward domestic reforms. The leadership released a 60-point comprehensive reform programme in December 2013, but the pace of implementation is not satisfactory owing to resistance from state-owned enterprises and self-serving government bureaucrats. A higher standard of trade liberalization is expected to break the barriers imposed by such interest groups.

Chinese commentators expect that higher-standard trade and investment agreements will ensure better protection of Chinese “going-global” companies. In 2014, the amount of China’s outbound investment equalled inbound investment, at \$120 billion. But Chinese investors have been increasingly frustrated with the old generation of low-standard bilateral investment treaties (BITs). It is imperative to upgrade these investment treaties with major economic partners. By February 2015, China and the US reached agreement on the text of their BIT, and will start negotiations over the negative list (Wuhan University, 2015). In the China-US BIT, China has yielded to American standard texts, but it is believed that this could serve the interests of Chinese companies investing in the US and elsewhere (Ministry of Commerce, 2014). The China-US BIT may set a good example for China’s investment treaty talks with other countries, including the European Union (EU), which has also advanced BIT negotiations with China.⁸⁵

Last but not least, China understands that tremendous changes are taking place, and the WTO may be suffering from structural problems. To some, the failure to conclude the Doha Round negotiations augments complaints about the inefficiency of policy-making of the multilateral trading system. The increasing number of new WTO members results in a longer time to carry forward coordination and compromise; and the global financial crisis of 2008 has put the Doha Round negotiations in a more challenging context. Clearly, the worldwide crisis boosted trade protectionism in major trading nations and has changed expectations about reciprocity. The business communities in developed countries are not very enthusiastic about lobbying each government to move quickly, because they do not expect many market access benefits from finishing the Doha Round talks. They find the high-standard regional FTAs – the TPP and TTIP – more attractive.

The division between the two groups of trading nations in the WTO has been deep and has plagued the WTO talks. Developed economies argue that the existing WTO rules only benefit emerging economies, while developing countries assert that developed countries have not yet fully implemented commitments from the Uruguay Round agreement, and refuse to give sympathetic consideration to development and food-security concerns.

Some may point out that the restructuring of negotiating power also accounts for the slow pace of the Doha Round. In the negotiations, the emerging economies of Brazil, India and China, in particular, have exercised more power and influence, but they are reluctant to make market-access concessions to meet the demands of some developed countries. To Chinese commentators, they see that the actual situation has been more complicated, not limited to the dichotomy between developed and developing countries. The increasing number of anti-dumping cases during the global financial crisis also shows the conflict of vision and interests among emerging economies and less developed countries, with China being an easy target (Wang, 2013a).

The New Silk Road initiatives, the Asian Infrastructure Investment Bank and China’s trade policy

In October 2013, President Xi Jinping put forward the New Silk Road economic cooperation, comprising the New Silk Road Economic Belt and the Maritime Silk Road of the 21st century, called “One Belt and One Road” in Chinese (NDRC et al., 2015). Accordingly, the Chinese government established the \$40-billion Silk Road Fund in 2014. At the same time, the Chinese leader urged for the establishment of the Asian Infrastructure Investment Bank (AIIB) to help developing countries in Asia to finance their badly needed infrastructure projects.

China’s new development initiatives have triggered some dispute and opposition from countries like the US and Japan, the established powers of the existing international financial institutions. However, the AIIB initiative received positive feedback from Asian developing economies, which clearly expect to benefit from these funds. For example, all 10 ASEAN members have signed the AIIB’s memorandum of understanding, including the Philippines and Vietnam, which have been in a fierce dispute with China over sovereignty in parts of the South China Sea. In March 2015, the United Kingdom and other EU countries applied for status as founding members of the AIIB, which was followed by key US security allies, notably South Korea and Australia (Wang, 2015).

Several reasons are believed to account for China’s initiatives on the AIIB and New Silk Road cooperation. First, the reforms of the existing international economic institutions have been too slow; and, as in other emerging economies, the public in China has been increasingly impatient. Second, the AIIB and New Silk Road initiatives are expected to play a role in helping to absorb the problems of overcapacity and excessive foreign reserves, giving a boost to the Chinese economy’s “new normal” (Wang, 2014). Third, with the New Silk Road initiatives, China is attempting to set up its own network of FTAs to deal with the competitive pressure of the TPP and other mega-regional FTAs. China is planning to push forward higher-standard FTAs with the countries located along the ancient Silk Road that are enthusiastic to participate in China’s new cooperation initiatives. As shown in the speeches of Chinese leaders, WTO or WTO-plus rules could apply to cooperation between China and partners along the Silk Road in different forms (Xi, 2014).

In sum, Chinese decision-makers now understand clearly that only with open spirit and by following the rules of the WTO can these initiatives have a chance of succeeding. If China succeeds in opening up previously closed markets in the Middle East and Central Asia, it would lead to big changes in the world trade map.

Implications for the global trade order: back to the future?

China's emerging trade policies will undoubtedly deeply influence the future of the global trade order, in several respects:

1. China's proactive approaches seem to be helping global trade to become more open. China has made efforts to negotiate with major trade partners on bilateral FTAs and BITs. The country's New Silk Road initiatives are expected to open economies in the region that have been relatively slow to embrace free trade, and will tap into the great potential for growth by investing in infrastructure and boosting connectivity among these economies. In fact, the whole world will benefit from these steps advanced by China.
2. China's newfound preference for higher-standard bilateral and regional FTAs will pressure the stalemated WTO Doha Round negotiations. China would like to assist the WTO in maintaining its authority and reputation, and has made efforts to coordinate narrowing the differences between different groups of members in the process of talks. Though it continues to urge respect for the WTO's authority, it has decided to pursue its own trade liberalization goals, including building a network of FTAs to ensure market access for products made in China.
3. China is making deals with the world's major economies, particularly the US, EU and Japan, which will help reduce or diversify the risks of geopolitical competition. The BIT talks with the US have made important progress, and the country is also enthusiastic about the BIT with the EU. It has decided to speed up talks with Japan and South Korea on a trilateral FTA. These moves are based on the principles of more open market access, and combined together, they will push the global economy to be more stable and open, and to consolidate its foundation. With a greater market share and more confidence, China is expected to be more open to world exports and investment. These deals also play a role in decreasing the risks of geopolitical rivalry. China's rise has caused disputes over territory and tensions in regional relationships among major powers. The US-Japan security alliance is taking steps to rebalance China's growing influence. Regarding the US policy, China has proposed a new model for major power relations with the US; and, at the same time, it promotes region-wide dialogue on cooperative security. The closer economic relations between China and the US will help the two competitors to place their relations on a more secure and stable base.

From the perspectives of the China case, we may expect the country's new trade policy to give a further boost to the rise of a new global order, in which China will definitely play a larger role.



Is an Inclusive Trading System Possible? Mega-Regionals and Beyond

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It is reasonably clear that the answer to this crucial question depends largely on what happens with the US-sponsored mega-regional preferential trade agreements (PTAs), i.e. the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). Three broad scenarios are discernible:

Building blocks

One free trade zone spanning the Asia-Pacific region and covering 40% of global gross domestic product, with tariffs completely eliminated and barriers to investment completely removed, and another covering the transatlantic space and of similar shape and magnitude – this is probably the scenario that one would envisage under “full success”. In this scenario, the forces of competitive liberalization⁸⁶ would be unleashed. 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.⁸⁷ Similar though more embryonic discussions are taking place in other significant developing countries, such as India, Brazil and South Africa. Furthermore, if the Regional Comprehensive Economic Partnership, the TPP and TTIP all removed barriers in a sector of mutual interest, there would then be a strong incentive to consolidate this mutually via critical mass sectorals, as well as plurilaterals among willing members at the World Trade Organization (WTO). And that may just be sufficient momentum to give the Doha Round a final push in some form over the finishing line, including inclusive plurilaterals. Under these circumstances it is possible to envisage a revitalized WTO, with a variable geometry at the centre of a trading system capable of meeting the diverse needs of its participants.

Stumbling blocks

This is the more likely scenario of the three, since trade agreements always involve trade-offs and compromises, and both US-driven 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 for promoting global trade liberalization and regulatory convergence. If it operates primarily through either mutual recognition or mutual equivalence modalities, in terms of which outsiders’ access to both markets is enhanced, then the result could be positive for outsiders. Yet, the WTO’s centrality would by no means be assured through such an outcome, 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. In addition, many WTO members would be excluded.

Crumbling blocks

Given the advanced stage of the talks, and the enormous amount of political capital that has already been spent by leaders in countries such 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.⁸⁸ Here one envisages a much more modest agreement that fails to provide a single tariff schedule for goods among all parties to the TPP and significant exclusions in the TTIP, with both limited to a set of largely hortatory declarations on achieving future progress in areas where the talks have proven difficult (e.g. intellectual property rights, the environment, labour). The domestic political economy constraints in a number of countries are, however, formidable, in particular in the US, which is at the centre of both negotiations. In the worst case, both the TPP and TTIP negotiations fail or, even if concluded, are rejected by the US Congress, thereby withdrawing the competitive liberalization impulse and leaving the WTO at an impasse. This scenario would hasten potential Chinese leadership of the global trading system; but, in the interregnum positioning among the major powers, it would likely be intense, putting the very future of the system at stake as the major powers move to shore up regional alliances.

Back to high politics

The direction in which trade agreements evolve could either exacerbate the tensions created by high politics or reduce them. If the deeper regional and plurilateral arrangements are used to complement an inclusive multilateral system that accommodates the diverse needs of its members, the frictions between the status quo and emerging powers could be reduced through enhanced cooperation in trade and investment. On the other hand, if the trading system becomes increasingly divided into exclusionary blocks, with some reflecting the interests of major emerging powers and others excluding them, there are dangers that trade and investment frictions could create additional ones not only in the realm of economics, but also in the broader set of geostrategic issues over which many disagree.

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3. For more detailed analyses, see Baldwin and Nakatomi (2015).
4. For more detail, see World Trade Organization (2014).
5. For a more in-depth explanation of this, see Baldwin (2006a; 2010).
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7. Estevadeordal et al., (2008).
8. De Melo and Panagariya (1995).
9. For a detailed account, see Hoekman and Kostecki (2010).
10. See Baldwin (2006b) for details and analysis.
11. For a more detailed discussion, see Baldwin (2012).
12. ITA (Information Technology Agreement), telecommunication and financial services agreements were realized in 1997 based on plurilateral initiatives, and the results were extended to WTO members on an MFN basis.
13. Non-agricultural market access.
14. Trans-Pacific Partnership.
15. Transatlantic Trade and Investment Partnership.
16. Dispute settlement mechanism.
17. International Centre for Settlement of Investment Disputes.
18. See Baldwin (2011) for an extended examination of 21st-century regionalism.
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 31. Draper and Dube, 2013, op. cit.
 32. World Economic Forum (2014), op. cit.
 33. Draper, P., S. Lacey and Y. Ramkolowan, "Mega-Regional Trade Agreements: Implications for the African, Caribbean, and Pacific Countries", *European Centre for International Political Economy*, Occasional Paper No. 2/2014.
 34. A political counterweight to the TPP, which is a proposed 16-country PTA comprising the 10 countries of the Association of Southeast Asian Nations (ASEAN) plus Japan, South Korea, China, India, Australia and New Zealand.
 35. Indeed, according to the Peterson Institute, while the TPP was projected to bring \$74 billion in income gains by 2025 for its 11 members (pre-Japan), \$24 billion of which are gains for the US (with \$21 billion in losses to China due to the US giving access to other Asian exporters), the RCEP is projected to bring \$644 billion in income gains for the 16 RCEP members by 2025, \$297 billion of which would accrue to China (see "Study Shows TPP Would Boost U.S. Income, Divert Trade From China", *World Trade Online* at Inside U.S. Trade, 11 January 2013, <http://insidetrade.com/inside-us-trade/study-shows-tpp-would-boost-us-income-divert-trade-china> (subscription required). After Japan was included in the TPP negotiations and with two years of new data, the study was updated, showing the TPP would have \$223 billion in income gains by 2025, with \$77 billion in gains for the US and \$35 billion in losses for China. For the RCEP, the figures remain largely the same. See Petri, P., "The new mega-regionals: the TPP, RCEP and beyond", *Asia Pathways*, 22 May 2014, <http://www.asiapathways-adbi.org/2014/05/the-new-mega-regionals-the-tpp-rcep-and-beyond>.
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 41. *Ibid.*
 42. Jackson, J. *World Trade and the Law of GATT*, Bobbs-Merrill, 1969.
 43. *Ibid.*
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 45. Dam, K., *The GATT: Law and International Economic Organization*, The University of Chicago Press, 1970.
 46. Jackson, J., *supra* note 3, at 30.
 47. John Jackson, Founder and Faculty Director, Institute of International Economic Law, Georgetown Law, USA and leading GATT legal authority, has noted that the exceptions found in Article XXI "provide a dangerous loophole to the obligations" contained in the agreement. Jackson, J., *supra* note 3, at 748. While recognizing that Article XXI has a legitimate role to play, Jackson expressed concern regarding its potential for abuse and the possibility for the "arbitrary exercise of economic power". *Id.* at 752. He went on to note that "[i]n addition to possible abuse for international political reasons, Article XXI may also shelter some measures that, although ostensibly imposed for security reasons, may actually be protectionist-oriented". *Id.* at 752.
 48. *Id.*

49. L/5424, adopted on 29 November 1982, 29S/9, 11. This situation also resulted in an unusual decision by the GATT membership which recognized "... that recourse to Article XXI could constitute, in certain circumstances, an element of disruption and uncertainty for international trade and affect benefits accruing to contracting parties under the General Agreement ...", L/5426, 29S/23.
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58. According to Van den Bossche: "[I]t is imperative that a certain degree of 'judicial review' be maintained; otherwise the provision would be prone to abuse without redress. At a minimum, panels and the Appellate Body should conduct an examination as to whether the explanation provided by the member concerned is reasonable or whether the measure constitutes an apparent abuse." Van den Bossche, P., *supra* note 9 at 666, citing GATT Panel state in *US – Trade Measures Affecting Nicaragua*, in *GATT Activities 1986*, 58-59, and citing Cann Jr, W., "Creating Standards and Accountability for the Use of the WTO Security Exception: Reducing the Role of Power-Based Relations and Establishing a New Balance between Sovereignty and Multilateralism", *Yale Journal of International Law*, 2001, 426.
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70. Skinner, C., "An International Law Response to Economic Cyber Espionage," *Connecticut Law Review*, vol. 46, no. 4, May 2014; Fidler, D., "Why the WTO is not an Appropriate Venue for Addressing Economic Cyber Espionage," *Arms Control Law*, 11 February 2013, <http://armscontrollaw.com>; Fidler, D., "Economic Cyber Espionage and International Law: Controversies Involving Government Acquisition of Trade Secrets through Cyber Technologies," *American Society of International Law Insights*, vol. 17, no. 10, 20 March 2013.
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72. Sanger, D. "Fine Line Seen in U.S. Spying on Companies," *The New York Times*, 20 May 2014.
73. Malawer, S., "Confronting Chinese Economic Cyber Espionage With WTO Litigation", *New York Law Journal*, 23 December 2014.
74. Australia gave the NSA "highly useful intelligence for interested US customers". See Risen, J. and L. Poitras, "Spying by N.S.A. Ally Entangled U.S. Law Firm," *The New York Times*, 15 February 2014, <http://www.nytimes.com/2014/02/16/us/eavesdropping-ensnared-american-law-firm.html?hp&r=1>; "Report Of NSA Spying On Mayer Brown Rattles Other Firms", *Law360*, 18 February 2014, <http://www.law360.com/articles/510770/report-of-nsa-spying-on-mayer-brown-rattles-other-firms>.
75. *Id.*
76. Barfield, C., "The NSA saga: Surprising turns and ominous allegations", *TechPolyDaily.com*, American Enterprise Institute, 28 January 2014, <http://www.techpolicydaily.com/technology/nsa-saga-surprising-turns-ominous-allegations>.
77. European Commission, *Communication from the Commission to the European Parliament and the Council on the Functioning of the Safe Harbour from the Perspective of EU Citizens and Companies Established in the EU*, 27 November 2013.
78. "EPP Chief Touts Support For TTIP In Parliament; Reding Says Data Deals Prerequisite", *World Trade Online* at Inside U.S. Trade, 2 March 2015, <http://insidetrade.com/daily-news/epp-chief-touts-support-ttip-parliament-reding-says-data-deals-prerequisite>. In discussions between the European Parliament and the US Congress, one leading Parliament member is reported to have told the Congress that "the success of the TTIP and other trade negotiations hinges upon whether the US can restore the trust that it will protect the personal data of EU citizens." *Supra* note 61.
79. "U.S.-EU 'Safe Harbor' Talks Snag Over National Security Exception Limits", *World Trade Online* at Inside U.S. Trade, 13 June 2014, <http://insidetrade.com/inside-us-trade/us-eu-safe-harbor-talks-snag-over-national-security-exception-limits>.
80. "Commerce Official Says Safe Harbor Stalemate Continues Over National Security Issues", *World Trade Online* at Inside U.S. Trade, 12 March 2015, <http://insidetrade.com/inside-us-trade/commerce-official-says-safe-harbor-stalemate-continues-over-national-security-issues>.
81. Viviane Reding, member of the European Parliament, expresses the view: "We Europeans believe that there are three blocks of questions that need to be treated together ... This is, of course, free flow of data, companies need that, linked together with the protection of personal data, linked together with [a] national security exemption with objective necessity criteria. The three must go together in order to allow the whole thing to function, in order to allow companies to exchange, citizens to feel secure, and national security to act under the rule of law when necessary." In "Reding Says U.S. E-Commerce Proposal in TISA Falls Short on Privacy," *World Trade Online* at Inside U.S. Trade, 5 March 2015, <http://insidetrade.com/inside-us-trade/reding-says-us-e-commerce-proposal-tisa-falls-short-privacy>.
82. Hill, J.F., "The Growth of Data-Localization Post-Snowden: Analysis and Recommendations for U.S. Policymakers and Industry Leaders," *Lawfare Research Paper Series*, vol. 2, no. 3, 21 July 2014, <http://www.lawfareblog.com/wp-content/uploads/2014/07/Lawfare-Research-Paper-Series-Vol2No3.pdf>.
83. A senior Chinese finance official indicated that the TPP would not be complete without China. "Top Chinese Finance Official Signals Support For Concluding ITA By APEC," *World Trade Online* at Inside U.S. Trade, 10 October 2014, <http://insidetrade.com/inside-us-trade/top-chinese-finance-official-signals-support-concluding-ita-apec>.
84. "China Suggests Talks On Phaseout Periods To Restart ITA Expansion Effort", *World Trade Online* at Inside U.S. Trade, 9 April 2015, <http://insidetrade.com/inside-us-trade/china-suggests-talks-phaseout-periods-restart-ita-expansion-effort>.
85. Malmström, C., *China-EU Trade: Mutual Support for Growth & Jobs*, 27 January 2015, presentation of the EUCCC Position Paper 2014-2015, Brussels, http://insidetrade.com/sites/insidetrade.com/files/documents/jan2015/wto2015_0269.pdf.

86. This notion is associated particularly with C. Fred Bergsten, Founding Director, Peterson Institute for International Economics (1981-2012), and Richard Baldwin. The former argues that as the US secures FTAs with other countries, so those countries become like-minded with the US and seek to form FTAs along similar lines with third parties. Soon, those left outside emulate the FTAs, and the logic ultimately finds its way back into the WTO in the form of new agreements. See Bergsten, C.F., "Competitive Liberalization and Global Free Trade: A Vision for the Early 21st Century", Working Paper 96-15, *Peterson Institute for International Economics*, 1996, <http://www.iie.com/publications/wp/wp.cfm?ResearchID=171>. 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 Baldwin, R., "A Domino Theory of Regionalism", *National Bureau of Economic Research*, Working Paper No. 4465, 1993.
87. Draper, P., "SA's trade status is at risk as China grapples with Doha", *BDlive*, 6 December 2013, <http://www.bdlive.co.za/opinion/2013/12/06/sas-trade-status-is-at-risk-as-china-grapples-with-doha>.
88. 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.

ES1 Index Reaction

Large Response
Low Band Response
Low Band Response

Span 30 Minutes
16-Dec-2014
Surprise ES1 %Chg

45K	-1.10	+0.048%
45K	-0.19	-0.039%
45K	+6.89	+0.013%
50K	-1.66	-0.025%
42K	-1.17	+0.038%
40K	+6.81	+0.333%
50K	+0.62	+0.145%
43K	-7.70	+0.027%
30K	-0.32	-0.107%
40K	+6.25	+0.421%
40K	-3.46	-0.629%
41K	+1.5	+0.096%



Volume Statistics
+/- 10 St Devs
+0.027%



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