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Mega-Regional Trade Agreements: Strategic Implications for South Africa

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ABSTRACT

For many years the Doha Round of negotiations of the World Trade Organization (WTO) had been in the doldrums, with little apparent prospect of success in its primary aim. In the wake of the ninth WTO ministerial conference in Bali in December 2013 there is renewed optimism that the WTO can deliver, and that something can still be made of the Round. The time is thus right for WTO member states to reappraise their positions in the Round in the context of their overarching domestic and regional trade strategies. Central to any appraisal is the new geopolitical reality represented by the free trade agreements (FTAs) being negotiated by the major industrial powers. Led by the US, the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) are wide in scope, deep in ambition, and laden with implications for both non-states parties and the global trading system. Partly the products of the WTO impasse, these potential agreements have sucked negotiating energy out of the WTO, reducing the focus on bringing the Doha Round to a conclusion. They are also the product of China's geopolitical rise, to the point where it is close to asserting its leadership in the global trading system. The US and its European Union counterparts are also driven by their own geopolitical imperatives of locking in access to key markets and regions, a thrust that has direct implications for outsider states. Not surprisingly, China and other major developing economies are responding with initiatives of their own, such as the Regional Comprehensive Economic Partnership negotiations in Asia and the Pacific. Hence there is renewed impetus in FTA negotiations across the world. The paper explores these issues and lays out the policy options for South Africa in light of these developments.

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ABBREVIATIONS AND ACRONYMS

AGOA	African Growth and Opportunity Act
APEC	Asia-Pacific Economic Co-operation
ACP	African, Caribbean and Pacific
COMESA	Common Market for Eastern and Southern Africa
EC	European Commission
EBA	Everything But Arms
EPA	economic partnership agreement
EU	European Union
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GIs	geographic indications
GPA	Government Procurement Agreement
GSP	Generalised System of Preferences
ILO	International Labour Organisation
KORUS FTA	South Korean–US Free Trade Agreement
LDCs	least-developed countries
MEAs	multilateral environmental agreements
MFN	most-favoured nation
MRAs	mutual recognition agreements
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
RCEP	Regional Comprehensive Economic Partnership
SADC	Southern African Development Community
SPS	sanitary and phytosanitary standards
SOEs	state-owned enterprises
TBT	technical barriers to trade
TPP	Trans-Pacific Partnership
TISA	Trade in Services Agreement
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
USTR	US Trade Representative
WTO	World Trade Organization

INTRODUCTION

Until the recent ministerial meeting of the World Trade Organization (WTO) in Bali, the Doha Round was deadlocked. Consequently, many countries pursued their trade interests elsewhere, particularly through free trade agreements (FTAs). While the trade facilitation accord agreed to in Bali in December 2013, and the broader package of which it forms part, is significant and offers the prospect of some forward movement, it concerns only a small component of the Round's agenda. It is still too soon to tell whether the whole package will generate sufficient momentum to unlock the Round and secure a broader deal, but in our view prospects for this are not particularly promising. In fact, it is more likely that the Round will progressively be unpicked through a process of cherry-picking issues that are the least controversial, simply to bring the Round to some sort of conclusion.

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

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

Furthermore, while major economies move forward with bilateral and regional agreements along '21st century' lines, there is growing concern among countries on the outside looking in that these agreements are exclusionary in nature. These outsider countries, most notably developing nations, are rightly concerned that such agreements will harm their trade preferences and prevent them from fully participating in global value chains and regional growth. This is of particular concern to countries that are not part of the mega-regionals, especially the African, Caribbean and Pacific (ACP) group of countries, of which South Africa forms part. However, their concerns may be misplaced, since there is a case to be made that in order to plug into global value chains, adoption of the regulatory reform packages entailed in the mega-regionals is a *sine qua non*. These agreements and the associated developments should therefore matter to South Africa.

In addressing these issues, the first section of the paper deals with definitional matters to demarcate the kind of regional agreements under discussion. The next section focuses

exclusively on the principal elements of the regulatory agenda in the TTIP and the TPP. While some outcomes are relatively easy to predict, others are less clear and will only solidify as the negotiating process draws to a conclusion. This highlights the crucial role that political economy will play in the negotiating processes. In this light the third section briefly reviews three outcome scenarios (full success, partial success and failure), relating these to the potential strategic postures countries outside the negotiations could adopt in each case. The final section sets out some policy options for South Africa to position itself in the brave new world of mega-regionals.

Ultimately we conclude that even if a failure scenario were to ensue, the pressure on South Africa and other countries to liberalise trade policies and reform regulatory approaches along the lines followed in the TPP and TTIP will not disappear; in fact, it may intensify. This paper therefore advocates a broad policy approach of sustained reform tailored to country capacities at three levels: unilateral, regional and in the WTO.

DEFINING MEGA-REGIONALS

It is important to first define the term ‘mega-regional’ in order to delimit the subsequent enquiry. The term is used somewhat loosely in the burgeoning literature on the subject. For the purposes of this paper a restrictive definition is adopted. A mega-regional is thus considered to be a trade agreement that:¹

- is negotiated by three or more countries or regional groupings;
- whose members collectively account for 25% or more of world trade; and
- the substance of which goes well beyond current WTO disciplines.

In other words, only multi-country, globally significant in terms of trade impact, and regulation-intensive or ‘WTO+’ agreements qualify. Since the EU comprises 28 countries, we consider any ‘bilateral’ involving it and one other party as meeting the first criterion. Regarding the proportion of world trade covered, we exclude intra-EU trade since the EU constitutes a common market. Therefore, Canada–EU and Japan–EU agreements are not included because they cover less than 25% of world trade. This places the focus on the TTIP, the TPP and the Regional Comprehensive Economic Partnership (RCEP). The third criterion is particularly important as it means that the RCEP negotiations will not be included because, as matters currently stand, the RCEP’s agenda is very traditional in its market access and light regulatory focus. It is worth noting that in the long term the establishment and implementation of a comprehensive TPP may be more significant than the TTIP if it prepares the ground for the establishment of an APEC-wide (Asia-Pacific Economic Co-operation) agreement. Such an agreement would see the establishment of one of the largest FTAs incorporating China, Japan and the US along with a number of fast-growing Asian and Pacific countries. This would have considerable repercussions for the rest of the globe.

Nonetheless, our core focus is on US-led agreements since the US is central to the two that meet this definition, ie, the TPP and TTIP. Given the US’ pivotal role in the global trading system, its negotiating template is particularly important, a matter that is canvassed in the regulatory section below. First we consider the potential economic

impacts of these two mega-regionals on outsiders, drawing on the impact assessments conducted to date.

Potential effects on outsiders²

The implementation of both the TPP and TTIP could have a significant effect on trade with non-member states. The extent of this effect depends on both the existing levels of trade and the structure of trade between outsider countries and members of the TTIP and TPP. Higher levels of trade between outsider countries and members of mega-regional agreements imply that there is more at stake for the outsider countries. In the same way, where the structure of outsider countries' exports are similar to exports between members of mega-regionals, outsider countries may face stronger export competition in existing markets.

A number of studies suggest, however, that the overall impact of either the TPP or the TTIP on non-member states may be small. Cheong's results suggest that the establishment of the TPP will result in a 0.07% reduction in the rest of the world's gross domestic product (GDP), mainly as a result of trade diversion from more efficient producers outside the TPP to less efficient exporters within it.³ Estimates by the Peterson Institute that include the potential impact of non-tariff measures find that implementation of the TPP may also result in a roughly 0.07% reduction in GDP for the rest of the world by 2025.⁴

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

By contrast, the EU-commissioned study finds that low-income countries will gain marginally from the establishment of the TTIP, with GDP rising by 0.09% relative to the baseline under the 'less ambitious' scenario, and by 0.2% under the ambitious scenario. The positive result predicted by this study is a combined result of wider trade creation effects and the positive 'spill-over effects' that arise from streamlining EU and US regulations and the potential convergence of EU-US standards, with some scope for convergence on global standards arising from a successful TTIP. These spillover effects are found to offset the negative impacts of trade diversion, but are highly dependent on the extent to which transatlantic negotiations lead to a comprehensively harmonised framework and system of mutual recognition.⁵

There are a number of channels through which mega-regional agreements can have an impact on outsider countries and through which these studies estimate their impact. The first is the direct effect that mega-regional agreements can have on existing outsider country access to EU and US markets on preferential terms. Since our focus is on South Africa, and to a lesser extent the Southern African region, we concentrate on the preference arrangements pertaining to these interests. The second channel is the impact that the reduction of non-tariff measures and the harmonisation of standards within the

mega-regional agreements can have on either raising or reducing export costs for outsider countries.

South Africa and other Southern African countries have been able to access both the US and EU markets at preferential rates through a number of preference schemes and trade agreements. The most significant of these are highlighted below.

- African Growth and Opportunity Act (AGOA)⁶ – 40 of the 49 potentially eligible countries in sub-Saharan Africa are eligible for preferential tariff access to the US market for a range of goods, including clothing and apparel for countries that meet AGOA's qualification criteria.
- EU Generalised System of Preferences (GSP)⁷ – The EU provides for preferential (reduced duty) access to roughly 65% of all tariff lines for developing country beneficiaries. The same tariff lines are zero-rated for GSP+⁸ countries that meet the criteria set out by the EU, while least-developed countries (LDCs) receive full duty-free access across all products, except arms and armaments, through the Everything But Arms (EBA) scheme.
 - » Standard GSP beneficiaries – 41 countries across the globe are provided with preferential access to EU markets.
 - » EBA – The EU's EBA preferential system provides for duty-free access to 49 countries across Africa, Asia, the Pacific and the Caribbean.
- EU economic partnership agreements (EPAs)⁹ – The EU began negotiations with seven regional blocs across the ACP region in order to achieve wider and deeper trade agreements. To date, only the Caribbean and West African regions have signed EPAs with the EU. A number of individual countries have either signed or initialled interim EPA agreements, although no countries outside the Caribbean Community and Common Market have fully ratified an EPA with the EU.

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

As noted by Rollo *et al*, this may be especially true for the TTIP, where two high-income states/regions are negotiating a regional agreement. At an aggregate level Rollo *et al* highlight that 'there is practically no similarity between, on the one hand, the structure at HS 6 Digit level (around 5 000 product categories) of the non-fuel exports of the low-income countries to the EU and US, and on the other hand, the exports of the EU to the US, and of the US to the EU'.¹⁰

The increasing focus on regulatory standards and non-tariff measures also highlights the fact that modern FTAs offer substantially less 'preferential' tariff access than in the past. As Baldwin summarises, only a small and shrinking percentage of global bilateral trade flows are eligible for preferences, a significant and growing proportion of trade flows have zero most-favoured nation (MFN) tariffs (implying that no duty preference can be provided) and less than 2% of world imports enjoy preferences of over 10%.¹¹

Furthermore, Baldwin notes that if complementarities between insider and outsider states are high and the TTIP and TPP result in trade expansion for member states, this will most likely suck in imports from those outsiders to supply expanding production plants in the signatory states. For low-income countries in particular, but also for developing countries reliant on commodity exports, this implies increased traditional exports, particularly of resources, and therefore the intensification of current comparative advantage patterns. Depending on one's view of comparative advantage this could be good (more exports, more foreign exchange, more jobs, etc.) or bad (lock-in effect, marginalisation from global value chains, etc.).¹²

Selected outsider countries within specific product categories may nevertheless face substantial preference erosion and increased competition (resulting in trade diversion) from countries participating in mega-regional agreements. For example, the inclusion of Vietnam in the TPP may have a significant impact on textile and apparel producers from outsider countries that access the US market at preferential rates. Rollo *et al* note that product exports from low-income countries such as textiles, clothing and footwear, and specific agricultural products such as fish, bananas and sugar, face preference erosion in both the EU and US markets with the implementation of the TTIP.¹³ It is clear that while the overall effects of these mega-regional arrangements may be small, certain outsider countries are likely to face significantly higher levels of competition in a specific set of products that will vary from country to country.

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

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

- Non-member countries that struggle to comply with the existing or new requirements agreed on by members of a mega-regional agreement will face increased pressure and competition from exporters within the mega-regional agreement.
- Countries and existing exporters that are able to maintain the standards and regulations set by countries within the mega-regional agreement may be able to withstand competitive pressures from members of the regional agreement, despite reductions in tariff preferences.

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

- Where requirements, standards and regulations are made stricter, non-member states will face higher compliance and trade costs across all markets implementing the

common framework, potentially implying greater competition from exporters within the mega-regional.

- The harmonisation of standards and regulations could lower the cost for non-member exporters to access new markets, as the adherence to a single set of regulations and standards could allow access to all markets within the mega-regional agreement.

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

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

Second, the review of studies assessing the possible impact of the various mega-regional agreements makes it clear that non-tariff measures are an increasingly important consideration. In many cases the effective protection from, and therefore the effective gains from the reduction of, non-tariff measures is greater than those presented by tariff duties. This places increasing importance on '21st century regionalism' and the negotiation of agreements that can deal effectively with these issues. These pressures are likely to remain in place and intensify, not least because non-tariff measures impede the operation of the global value chains that structure the global trading system.

REGULATIONS: THE HEART OF THE MATTER

It is clear that the TPP negotiations are well advanced, with some observers having expected them to wrap up in March 2014.¹⁴ By contrast, the TTIP was only officially launched at the G-8 summit in the United Kingdom in June 2013. Furthermore, there is an unofficial understanding that the US first wants to conclude TPP negotiations before starting TTIP negotiations in earnest, although agenda structuring in respect of the TTIP is proceeding. Consequently, in order to discern the regulatory implications that may

or may not unfold in these negotiating processes, we concentrate primarily on the TPP, supplementing where possible with information on the TTIP. In the process we also highlight potential differences between the US' and the EU's negotiating approaches.

From the outset the TPP negotiations have been driven by the professed goal of achieving a 'high-standard agreement'. As negotiations have progressed, a consensus seems to have emerged as to what this language means, namely 'a landmark, 21st-century trade agreement, setting a new standard for global trade and incorporating next-generation issues'.¹⁵ The TPP negotiations are taking place across 29 chapters¹⁶ and as part of a single undertaking.¹⁷ The 20+ negotiating groups that have reportedly been formed are focusing on achieving different legal texts and negotiating outcomes on, *inter alia*, the following areas: competition, co-operation and capacity building, cross-border services, customs, e-commerce, environment, financial services, government procurement, intellectual property, investment, labour, legal issues, market access for goods, rules of origin, sanitary and phytosanitary standards (SPS), technical barriers to trade (TBT), telecommunications, temporary entry, textiles and apparel, and trade remedies.¹⁸

In terms of international treaty commitments in areas that have thus far eluded multilateral trade rules, the TPP seems to promise a new textual template that will set the tone in both the TTIP and – further down the road – future trade and investment agreements. These new areas include regulatory coherence, state-owned enterprises (SOEs), government procurement, competition, investment, e-commerce, environment and labour. These are discussed below, as is the approach taken to strengthen existing WTO disciplines.

Regulatory coherence

Regulatory coherence is a so-called cross-cutting issue that is being negotiated as both a stand-alone chapter and in different negotiating groups, such as those discussing SPS and TBT.¹⁹ The professed scope and goal of these negotiations can be inferred from the 2011 Outlines document presented on the sidelines of the APEC leaders meeting in Honolulu.²⁰ It is clear from this document that the focus is on the broad range of non-tariff measures and behind-the-border policies that impact international trade in goods and investment flows, such as testing requirements and procedures, technical regulations, food safety standards, regulatory restrictions and interventions in different services sectors, to name a few.²¹ The TTIP has a similar focus. In both cases the relatively low gains from tariff liberalisation underscore the focus on regulations.

A leaked 2010 draft of the stand-alone TPP text on regulatory coherence²² gives some insight into the possible outcomes that can be expected from these talks. The bulk of the obligations in the text are couched in best endeavour language. The main focus seems to be the establishment of a 'body, process or mechanism' to 'facilitate central co-ordination and review of certain regulatory measures'.²³ The leaked draft barely constitutes anything more than already agreed upon in the Organisation for Economic Co-operation and Development (OECD) and APEC, meaning that when it comes to non-tariff measures, the TPP might also amount to little more than a best practices club.

The regulatory agenda in the TTIP, however, may be more contentious. It is well known that US and EU regulatory approaches differ in key areas, which is why the TTIP is likely

to rely heavily on mutual recognition agreements (MRAs), as the regulatory coherence agenda will be complex and controversial.

State-owned enterprises

SOEs play an important role in many countries and analysts find them particularly interesting in terms of their role as the prevalent economic actors in countries such as China and Russia. In the trade arena, rules have gradually been taking shape to mitigate some of the more competitively distorting practices of SOEs, with the TPP expected to be the first set of commitments to be hashed out between a broad range of different-sized economies with strongly diverging positions on the role and utility of SOEs.

The position of the US in the negotiations is key to whatever commitments will be agreed. This position can be inferred from stakeholder consultations and congressional hearings.²⁴ The work done by the OECD on SOEs seems to have played a key role in shaping US views on this issue, particularly in terms of competitive neutrality.²⁵ Proposals advocated by industry groups that traditionally play an influential role in formulating US negotiating positions include the following:²⁶

- instituting transparency obligations to notify the existence of SOEs and the degree to which the government in question owns, controls or supports them;
- putting in place commitments to refrain from providing financial support on non-commercial terms to SOEs;
- requiring SOEs to act in a manner that does not nullify or impair any benefits granted under the TPP and observes non-discrimination and market access commitments;
- requiring SOEs to refrain from unfairly exploiting legacy monopoly assets, market positions or engaging in anti-competitive behaviour;
- requiring SOEs to comply with intellectual property obligations;
- defining the national treatment obligation in the services and investment chapters as treatment no less favourable than that provided to SOEs operating in the same sector;
- ensuring that SOEs are subject to competition laws; and
- establishing an independent regulator to prevent SOEs from distorting competition.

These talks are closely related to those on competition policy. If TPP contracting parties are to adopt some or all of these disciplines a far-reaching re-think of their competition policy regimes will be necessary. Competition policy is one of the four 'Singapore issues' raised at the WTO Ministerial Conference in December 1996 in Singapore and eventually precluded from the WTO agenda in 2004. The work ongoing in the TPP on both competition policy and SOEs is in many ways a direct result of the WTO's decision not to pursue multilateral disciplines on these issues. Nevertheless, the gradual phasing out of SOEs or the removal of their privileged status has been a consistent focus of WTO accession negotiations.²⁷

The US' proposals on SOEs, particularly on national treatment, are likely to be perceived as intrusive by Singapore, Vietnam, Malaysia and other regional economies that are still striving for industrialisation. Government-owned or -controlled companies have played a major role in propelling them along a predefined path of economic development and industrialisation.²⁸ Malaysia has gone on record to say it may opt out of the TPP if the

negotiated commitments go against its national interest.²⁹ The ideological differences may therefore be too broad to bridge completely.

The negotiations on SOEs are likely to be of only limited relevance in the TTIP context. The proposals on SOEs by US business groups seem to have been formulated specifically to counter a number of well-documented practices they have had to confront in certain Asian markets, particularly China (not currently negotiating the TPP). Both the US and the EU have been actively participating in the debates on competitive neutrality as this issue has evolved at the OECD.

Government procurement

Government procurement is likely to be one area where the TPP achieves considerable improvement in market-access terms for contracting parties, given that only Singapore, Japan and the US are currently signatories to the WTO Government Procurement Agreement (GPA). The US' FTAs with Australia, Peru, Chile and Singapore, as well as with Canada and Mexico under the North American Free Trade Agreement (NAFTA), include chapters on government procurement. These generally tend to incorporate the key provisions of the WTO GPA, with additional annexes/appendices being negotiated between the respective FTA partners on sectoral coverage and the entities that fall within the chapter's scope.³⁰

In its government procurement chapter, the US–South Korean FTA (KORUS), the most recent FTA the US concluded prior to the launch of the TPP talks, incorporates a number of the core obligations set forth in the WTO GPA by reference, such as Article III National Treatment and Non-discrimination, Article VII Tendering Procedures, Article X Selection Procedures and Article XX Challenge Procedures.³¹ This chapter also contains a provision facilitating the application of the 2011 updates to the WTO GPA to the KORUS FTA once they enter into force, to the extent that they constitute changes to the articles incorporated by reference into the KORUS FTA.³² It is highly likely that the TPP text on government procurement will follow suit.

Four factors will determine just how liberal the TPP government procurement regime will be and thus just how far-reaching its implications could be in establishing a template for future negotiations. These factors are: the range of sectoral coverage and whether some sectors are *per se* excluded; the level of government that is captured under the chapter's scope and the number of government ministries/agencies and sub-federal/provincial regions/districts that is bound by the chapter's rules; the value thresholds at which the chapter's provisions kick in; and the recourse and dispute settlement procedures the chapter ultimately provides to losing bidders and their governments.

Leaked information on the negotiations reveals that these negotiations seem to have run into some trouble. This is largely due to the difficulties that US negotiators are having both in convincing members of the US Congress to forfeit longstanding 'Buy American' provisions in potentially important areas of government procurement (such as construction services for public infrastructure projects at the district level)³³ and in convincing a significant number of US states to be bound by the rules that will eventually ensue. As the Congressional Research Service has pointed out, US states' enthusiasm for participating in the government procurement chapters of the stream of FTAs the US has been concluding has been steadily diminishing, down from 39 in NAFTA to just seven in

the KORUS FTA.³⁴ The 2011 update of the WTO GPA almost faltered when the US seemed unable to get a number of big states to commit to being bound by the new rules.³⁵

With the exception of a few countries such as Japan, Singapore, South Korea, Australia and New Zealand, Asia has engaged only very reluctantly in the opening of government procurement markets,³⁶ so much so that, by way of example, corresponding disciplines and commitments are completely lacking under the ASEAN texts.³⁷

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

Competition policy

The November 2011 framework describes the objective of the TPP chapter on competition policy as being ‘to promote a competitive business environment, protect consumers and ensure a level playing field for TPP companies’.³⁸ The commitments reportedly being envisaged are those on the enactment and enforcement of competition laws and relevant institutional frameworks, due process provisions in the enforcement of competition laws, transparency obligations, consumer protection, affording standing to private parties to initiate legal action under competition laws, and technical co-operation for the benefit of developing country partners that have not yet or only recently enacted legislation in the area of competition policy.³⁹ Very little is known about the draft TPP text on competition, although some commentators have speculated that the provisions in the US FTAs with South Korea and possibly Singapore will set the tone at the TPP.⁴⁰

The KORUS FTA chapter on competition (Chapter 16)⁴¹ contains nine articles, including on the enactment of competition laws and the establishment of the relevant authorities; non-discrimination obligations and other requirements intended to guarantee procedural fairness and judicial review of competition authority actions and decisions; designated monopolies and SOEs, seeking to ensure that any entities captured under these provisions are restrained from acting in a manner that would run contrary to their obligations under the agreement or would otherwise distort conditions of competition; and far-reaching transparency obligations in terms of both the competition laws and how they are enforced, requiring parties to provide information on these policies and related enforcement actions on request. The obligation to enact or enforce competition laws is, however, carved out of the dispute settlement provision. Nevertheless, the important provisions on designated monopolies and SOEs are not explicitly carved out from the dispute settlement provisions, so presumably each party could be taken to task for failing to take action against those anticompetitive practices.

The provisions of Chapter 9 of the Trans-Pacific Strategic Economic Partnership,⁴² on the other hand, specifically name a number of anticompetitive practices that are to be proscribed under parties’ respective competition laws, such as ‘anticompetitive agreements, concerted practices or arrangements by competitors and abusive behaviour resulting from single or joint dominant positions in a market’.⁴³ However, the entire chapter is carved out from the agreement’s dispute settlement provisions, which goes considerably further than the limited albeit significant carve-out in effect under the KORUS FTA.⁴⁴ The agreement

also provides for exemptions from competition rules for specific measures or sectors, with the proviso that such exemptions are transparent and carried out on grounds of public policy or public interest.⁴⁵ Such exemptions are to be listed in an annex to the competition chapter (Annex 9A) and new sectors or measures can be added to the list in future, subject to the obligation to notify and consult with other potentially affected parties.⁴⁶

The TPP negotiations are unlikely to result in the kind of centralised competition watchdog authority established under regional integration initiatives such as the EU, the Andean Pact, the West African Economic and Monetary Union, or the Common Market for Eastern and Southern Africa (COMESA). Rather, there will likely be a list of proscribed behaviour with some degree of carve-out from the dispute settlement chapter or competition rules, provided such exemptions have a recognised public policy rationale. Nonetheless, this will still represent a giant leap forward for a number of developing countries, particularly those that adopt some form of these rules in subsequent FTAs further down the road. This is even more the case when one combines these rules with the ones being contemplated on SOEs.

With regard to the TTIP, negotiations could be influenced by the EU–South Korea FTA, whose competition chapter proscribes certain kinds of state behaviour, specifically banning unlimited and non-time-bound subsidies that cover the debts or liabilities of enterprises. It also proscribes the provision of subsidies in the absence of a credible restructuring plan. These subsidies are subject to the agreement’s dispute settlement provisions. Consequently, it is possible that the TTIP will elaborate more stringent standards in this area than the TPP may achieve.⁴⁷

Investment

Investment appears to be one of those chapters in the talks where a negotiating text is reported to have been largely completed, albeit with a number of systemically important sticking points that need to be resolved at the political level. Not least of these is the exemption from investor-state dispute settlement that Australia is seeking, despite its having such a clause in many of its earlier FTAs.⁴⁸ Given the robust offensive the global tobacco industry has mounted against Australia’s tobacco control laws, it seems unlikely that Australia will be willing to concede this point in the TPP, unless it can insert a carve-out elsewhere in the treaty text that will shelter it specifically from such challenges in future.⁴⁹

The EC has only recently acquired competence to negotiate investment in FTAs, but it has made it clear that it will support investor-state dispute settlement, and is already doing so in the Canada–EU FTA. However, the EC seems to be aware of problems in the system, and so it expressly wishes to seek improvement in how the dispute settlement system works. This objective includes preventing frivolous investor claims by obliging investors who lose claims to pay all litigation costs; promoting transparency in the litigation process by making documents public and opening up hearings to interested parties, extending to the possibility of making submissions; dealing with conflicts of interest, for example by obliging arbitrators to sign a binding code of conduct; and introducing safeguards for parties to the agreement – for example, in the Canada–EU FTA there are clauses that allow signatories to agree jointly on how they interpret the agreement.⁵⁰ Consequently the US and the EU do not appear to be far apart on this issue.

A leaked copy of an earlier draft text of the TPP's investment chapter seems to consolidate what has already been achieved by the US in many of its bilateral FTAs,⁵¹ namely the right of establishment of foreign goods and services providers in the markets of FTA partners, non-discriminatory treatment of US investors and their investments, minimum guarantees of fair and equitable treatment, disciplines on expropriation, capital controls, exemptions for scheduled non-conforming measures, state-to-state and investor-to-state dispute settlement provisions, and a ban on imposing performance requirements on US investments, such as minimum export thresholds and local content requirements.⁵² However, in the KORUS FTA both the US and the Koreans were able to carve out a number of non-conforming measures. Therefore restrictions on foreign investment in the TPP could still be possible, depending on the degree to which negotiating countries are able to negotiate such policy space for themselves.

E-commerce

The 2011 outline document states that⁵³

[the] e-commerce text will enhance the viability of the digital economy by ensuring that impediments to both consumer and businesses embracing this medium of trade are addressed. Negotiators have made encouraging progress, including on provisions addressing customs duties in the digital environment, authentication of electronic transactions, and consumer protection. Additional proposals on information flows and treatment of digital products are also under discussion.

The US' objectives in these negotiations are the same as in the proposals put forward at the WTO and can also be deduced from the FTAs it has already concluded with partners such as South Korea and Australia. In addition, US-based industry groups such as the Business Software Alliance, the Coalition of Services Industries, Citi, Google, IBM, MasterCard, Microsoft and Visa have been very open about the kind of protectionist practices they wish to see addressed in the TPP negotiations.⁵⁴ The US Trade Representative (USTR) is unlikely to be able to ignore their concerns when negotiating the TPP, given that these groups contribute a significant share of US export earnings. Thus they constitute an important element of the calculus that must be undertaken on whether or not the market access gains the TPP ultimately brings with it are sufficient to offset the short-term adjustment costs of relatively less efficient import competing sectors that stand to lose the most from the talks (particularly footwear).

Over the course of the TPP negotiations, the USTR has submitted two proposals on the issue of the free flow of data over the Internet. The first proposal would commit TPP countries to refrain from blocking cross-border transfers of data.⁵⁵ The second proposal would bar countries from putting in place requirements that a company store all of its data for local use on a server located in-country. These proposals, however, are reportedly meeting with some resistance from countries such as Australia and New Zealand⁵⁶ due to domestic data protection and privacy laws, with Australia tabling an alternative text during the May 2012 Dallas round.⁵⁷ Concerns over privacy are likely to have been exacerbated by the revelations by Edward Snowden of the electronic surveillance conducted by the US' National Security Agency and the degree to which it has compelled the operators of major

Internet and e-commerce businesses to grant it access to users' personal information. This is also shaping up to be a major potential sticking point in the TTIP negotiations, where many governments have gone on record as having to re-think their policies on sharing the personal and private information of their citizens with US-based entities.⁵⁸

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

Environment

While the WTO has steered clear of creating commitments on trade and environment that go beyond best endeavour, environmental provisions have started to figure consistently in preferential trading agreements over the last decade and a half, albeit mostly in the form of hortatory language, vaguely formulated understandings or best endeavour commitments.⁵⁹

The so-called 2007 May 10th Agreement between the US congressional leadership and the Administration of President George W Bush⁶⁰ set the broad outlines with which US trade negotiations must comply in the absence of Fast Track Negotiating Authority. Thus, the FTAs that have been concluded since then⁶¹ go a long way to informing the objectives being pursued by the US in the TPP and the negotiating outcomes that are likely to ensue from this process. These commitments involve incorporating a specific list of multilateral environmental agreements (MEAs) into FTAs, namely:⁶²

- the Convention on International Trade in Endangered Species;
- the Montreal Protocol on Ozone Depleting Substances;
- the International Convention for the Prevention of Pollution from Ships;
- the Inter-American Tropical Tuna Convention;
- the Ramsar Convention on Wetlands;
- the International Whaling Convention; and
- the Convention on Conservation of Antarctic Marine Living Resources.

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

The US' position on inserting environmental provisions has evolved slightly since the May 10th Agreement, and is reported to represent a three-pronged approach in the TPP negotiations:⁶³

- to have parties to the TPP consent to adopting and enforcing national laws that prohibit trade in protected wildlife or illicitly harvested plant materials (including timber in particular), as well as in marine fisheries;⁶⁴
- the adoption of ‘core commitments’ that oblige TPP partner countries to comply with their obligations under the MEAs listed in the May 10th Agreement,⁶⁵ and encourage input and participation from various stakeholders; and
- the creation of a mechanism by which they could file a notification where a TPP country fails to comply fully with its obligations under the environmental provisions of the agreement.⁶⁶

Procedural provisions similar to those proposed by the US under the TPP already exist in a number of FTAs concluded by it since the May 10th Agreement.⁶⁷

Given the very different degrees of importance that various TPP countries place on including or excluding environmental provisions in their FTAs, and given the very different approaches TPP countries take in enacting and enforcing environmental protection legislation in their own domestic legal systems, these negotiations were always going to be characterised by vast differences in perceived interests and desired outcomes.

Most of the discussion and controversy that have ensued over the US proposals have focused on the issue of enforceability of environmental commitments.⁶⁸ Most other TPP parties are reportedly rejecting the notion that environmental provisions should be subject to the same dispute settlement procedures as commercial commitments, whereas this issue is equally reported as being a so-called ‘red line’ for the US, with the US Congress unlikely to accept anything less than full enforceability of these commitments.⁶⁹ This stand-off is something that is only likely to be resolved at the highest political levels and in the closing days of the talks as key trade-offs between different countries’ most sensitive political–economy red lines emerge. Otherwise, it is relatively clear that proper implementation of the commitments set forth in the seven MEAs listed above is likely to emerge as an issue on which TPP partners will largely be able to agree.

How this issue plays out in the TTIP is also likely to accentuate existing differences in approach between the EU and the US with regard to trade and environment. The EU is an aggressive proponent of trade measures intended to combat climate change,⁷⁰ whereas many lawmakers in the US still seem to be ambiguous on whether or not climate change is even happening and if so, whether it is caused by human activity or is merely a naturally recurring phenomenon.⁷¹ Regardless of these ideological differences, progress is likely to be achieved in the TTIP on a number of technical issues such as harmonising standards in the area of e-mobility or lowering tariffs and market access barriers to environmentally friendly goods and services.⁷² The kind of consensus that is likely to emerge on this issue is bound to be of the ‘lowest common denominator’ kind, so that one should not expect far-reaching breakthroughs but rather a consolidation of views and principles that are broadly shared at the international level.

Labour

The interface between international trade and labour standards (not to be confused with issues such as employment or the free movement of labour) has been around for some time. The 1996 Singapore Ministerial Declaration contained language on core labour

standards⁷³ affirming the competence of the International Labour Organization (ILO) as the primary multilateral forum where these issues are to be discussed, and rejecting the use of labour standards for protectionist purposes.⁷⁴ The US, and more recently Canada, stand alone as the only countries that feel the need to include labour commitments in their trade agreements.⁷⁵

The May 10th Agreement and the FTAs concluded in its wake with Peru, South Korea, Colombia and Panama also seem to have informed the US' position on these issues in the TPP. The May 10th Agreement requires that the USTR obtain commitments from trading partners on matters such as freedom of association, the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour, effective abolition of child labour and elimination of discrimination in respect of employment and occupation.⁷⁶ It also requires that violations of these commitments be actionable through dispute settlement procedures and remedies, with the available remedies being fines and trade sanctions based on the amount of trade injury caused. The ultimate effectiveness of these commitments is, however, tempered by a caveat to the agreement stating that the enforceability of labour provisions in FTAs will be limited to the principles set forth in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.⁷⁷

In the course of the TPP negotiations, the USTR has reportedly tabled two proposals on labour,⁷⁸ with Canada also submitting proposals on the enforcement of these obligations.⁷⁹ The US proposals reportedly require countries to enact labour laws stipulating minimum wage requirements, working hours, and occupational health and safety.⁸⁰ In the face of opposition to its proposals, the US' position seems to have softened somewhat⁸¹ and may start to pivot towards 'improving the labour-related capacity building provisions in past trade agreements'.⁸² Whether or not the US' position does eventually gravitate away from the incorporation of harder treaty obligations on core labour standards towards softer commitments on technical assistance and capacity building, the fact that organised labour and business interests are at such odds over this issue is likely to ensure that the US will be unable to escape the reality that its negotiating partners in the TPP are equally ambiguous about the utility of incorporating hard disciplines on these issues in the trade rules that ultimately emerge from this process.

Vietnam seems to be the country to watch in these negotiations, given that it is currently the furthest from compliance with international norms on labour rights among all the countries negotiating the TPP, and because it exports a lot of labour-intensive manufactures to the US, particularly footwear and textiles.⁸³ Vietnam's political leadership is reported to be suspicious of any text imposing the obligation to uphold the right to freedom of association and to allow the establishment of independent workers' associations. It is probably safe to say that a face-saving compromise will be found to limit some of the most intrusive effects of direct enforceability of labour provisions in the TPP, coupled with binding commitments on all members to ratify the ILO conventions and effectively implement the standards contained therein, perhaps subject to transition periods. Because the TPP is purportedly being negotiated as a single undertaking, it is unlikely that countries such as Vietnam or Singapore will successfully negotiate to opt out from these rules. However, they might be able to extract concessions from the US in terms of capacity building and technical assistance to implement these standards. Also conceivable is some form of built-in agenda that might revisit commitments after a suitable implementation period and oblige members to return to the negotiating table to

finish the job of agreeing to binding commitments on core labour standards, as has been a key US demand in its trade agreements since 2007.

OTHER AREAS EXPECTED TO PUSH THE STATUS QUO

In areas that have long been part of or were recently brought within the purview of multilateral trade rules, the TPP seems to promise more far-reaching commitments with regard to contracting parties' policy space and regulatory autonomy, particularly in policy areas such as market access, SPS measures, trade in services, and intellectual property rights.

Market access for goods

So far the talks have been characterised by two general approaches that are largely mutually exclusive. The first is that taken by the US (and reportedly Peru⁸⁴ as well), which seems to only have made goods offers to those TPP partners with which it does not have an FTA currently in force (Brunei, Malaysia, New Zealand and Vietnam).⁸⁵ This approach would create a separate set of tariff schedules for each bilateral trade relationship under the TPP. The second approach, seemingly favoured by the rest of the TPP members, would be to have a single tariff schedule that sets out each and every tariff concession agreed to by members, and that extends these concessions to other TPP members. If this second approach were to be adopted, it would arguably be the most trade-liberalising approach and it would certainly be easier for members of the trading community to use, although it could devolve into a lowest common denominator approach.

Issues to watch out for in the market access negotiations include rules of origin, where the US is coming under intense pressure from Vietnam to abandon its long-held yarn forward rule for textiles and apparel. This would be a game-changer in terms of access to the massive US textiles market, and could revolutionise international supply chains across the entire textiles and apparel industries. Despite strong domestic opposition from on-shore textiles and footwear manufacturers and the politically powerful cotton growers, it does seem remotely possible that US market access gains in areas such as beef, financial services and government procurement may finally be enough to begin the process of opening up the clothing and textiles market.

Market access commitments under the TPP could also bring an end to supply management schemes in countries such as Canada and New Zealand for products such as dairy, and open up the US sugar market. Other commodities in which trade has suffered from tightly regulated import regimes include rice, where Japan has already committed to liberalise the sector.⁸⁶ This will likely encourage the dismantlement of similar regimes in places such as South Korea and Indonesia.

Agricultural tariffs and subsidies will be another contentious issue. Tariff reductions are unlikely to be comprehensive and subsidies will probably remain untouched. However, Japan's decision on rice subsidies could inject some momentum into agricultural subsidy negotiations in the context of the TPP that may find its way into the TTIP and ultimately the WTO.

Sanitary and phytosanitary measures

Despite the adoption of the WTO Agreement on SPS in 1995, the incidence of food safety concerns being used as effective barriers to international trade in agricultural products has increased over the last two decades.⁸⁷ Although the WTO SPS Agreement represents progress on tackling import restrictions disguised as food safety concerns, there is nevertheless still room for improvement. The TPP is thus a unique opportunity to address a number of perceived shortcomings in the current system. Proposals by US industry groups and lawmakers under this heading in the TPP negotiations have focused on a number of measures designed to facilitate cross-border trade in these products, such as equivalence, mutual recognition of inspection procedures, and the harmonisation of documentary requirements.⁸⁸ One area where parties seem to have converged is the issue of increased transparency and strengthening requirements for the use of science-based risk assessments, particularly the definition of what exactly constitutes ‘sound science’.⁸⁹

However, while there may be convergence on this issue in the TPP, the TTIP is another matter altogether, for the simple reason that the EU still adheres to the precautionary principle. Consequently, whatever is agreed to in the TPP will not easily translate into the TTIP, since there is likely to be strong resistance in the EU to adopting ‘sound science’ without reference to consumer and other preferences in areas such as biotechnology and genetically modified organisms.⁹⁰

Still contentious is whether new rules will be subject to binding dispute settlement or some form of ‘consultative mechanism’. No matter what improvements emerge, these are likely to be incremental at best. Governments are sure to retain a large degree of regulatory autonomy when it comes to an issue as important and politically sensitive as national food safety systems.

Trade in services

The in-built agenda contained in Article XIX of the General Agreement on Trade in Services (GATS) was designed to address the limited degree of actual liberalisation achieved in trade and services during the Uruguay Round.⁹¹ The mandate contained in para. 15 of the Doha Ministerial Declaration on negotiating deeper access to members’ services markets has also proved elusive, so that certain members have abandoned the single undertaking and moved towards a plurilateral Trade in Services Agreement (TISA). Most if not all the action on deeper integration of global services markets over the last two decades has thus been achieved in the context of preferential trade agreements,⁹² and the TPP will be another significant step in this direction given the size of the services markets in, and export dominance of, some TPP members.

The most systemically important gains are likely to be made in areas such as financial services, professional services, education services, telecommunications services, express delivery and e-commerce. This applies equally to the TTIP negotiations. Furthermore, the TPP will reinforce the trend away from positive list scheduling to the negative list approach, which is rightly perceived as far more trade liberalising. However, in the TTIP the EU is not likely to be so keen on negative listing across the board, and may instead opt for using this approach to national treatment while retaining a positive list approach to market access.⁹³ The TPP is also reported to have a specific chapter on the cross-border

supply of services, which is already largely unconstrained by limitations on market access and national treatment in members' schedules in those sectors where commitments have been made. Financial services are also to get their own separate chapter, with deeper commitments envisaged than hitherto contemplated, particularly in financial services markets that are still relatively protected or dominated by incumbents. The broader systemic implications of this are difficult to contemplate, since the world of international finance is already deeply interconnected. However, the combined effect of the TPP, TTIP and the WTO TISA process will usher in a new generation of more open international services markets from which more reluctant liberalisers will ultimately be unable to hide.

Intellectual property rights

A draft of the TPP text on intellectual property was published by WikiLeaks on 13 November 2013,⁹⁴ and the leaked text reveals that there is a huge difference in positions between the US and its negotiating partners in areas affecting access to medicines and the use of medical devices and procedures, as well as those that affect the digital environment. The US position seems to have been dictated by an overly zealous and aggressive pharmaceutical lobby and has almost no chance of prevailing over almost unified opposition from its TPP partners.⁹⁵

Although these are still early days for the intellectual property chapter of the TPP, the most likely final scenario is a mixed approach combining elements of the outcomes achieved under the KORUS FTA (and applying these standards to developed TPP partners) with the outcomes achieved under the FTAs negotiated with Peru, Colombia and Panama (and applying these standards to developing TPP countries).⁹⁶ This is the approach envisaged under the US' May 10th Agreement. What this ultimately means for the trading system as a whole is that some variation of Trade-Related Aspects of Intellectual Property Rights-Plus (TRIPS+) is likely to establish itself under the TPP/TTIP processes, without going so far as to erect major or insurmountable barriers to affordable access to essential medicines, since the needs of public health systems in countries such as Australia, New Zealand, Canada and many European countries would never allow this to happen.

There are still differences between the US and the EU on certain issues, particularly concerning geographic indications (GIs). The EU has a longstanding agenda of extending protection over many names as part of its trademark strategy, and this remains a central objective in the EU's FTA negotiating strategy. The US has equally resisted this agenda, beyond signing up to those GIs covered in the TRIPS agreement.⁹⁷ Consequently, the Transatlantic High Level Working Group, which was appointed by the EC and US to put forward recommendations for taking the TTIP forward, advised caution with respect to the level of ambition in intellectual property rights.⁹⁸

Concluding remarks

While many of the negotiating texts that have been tabled, and even the overall dynamic driving the TPP negotiations, are the products of US trade policy interests, a number of other parties to the talks have been equally forceful in asserting and defending their national economic interests. As a result, unlike the process of bilateral FTAs where the US was able to act as a hegemon, it is much more constrained in the TPP context. The

fact that these talks involve a number of advanced industrialised countries as well as a small handful of developing countries with a very sophisticated grasp on the technicalities and underlying geopolitical realities of these negotiations, also bodes well for outcomes that will ultimately be palatable to a broad majority of countries already participating at various degrees in the global trading system. Clearly, the best place to negotiate WTO+ commitments in many if not most systemically important areas of policymaking is the WTO itself. However, given the reluctance of a small handful of members to negotiate new issues and/or engage meaningfully with new market access openings for goods and services, and given the unwieldiness of decision-making in an organisation that is approaching 160 members, it is no surprise that progress on these issues is taking place elsewhere and will likely continue to do so, at least in the short to medium term.

OUTCOME SCENARIOS AND THEIR IMPLICATIONS

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

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

Full success

One free trade zone spanning the Asia-Pacific region and covering 40% of global GDP, with tariffs eliminated and barriers to investment removed, and another covering the transatlantic space and of similar shape and magnitude, is probably the scenario that one would envisage under 'full success'. However, this scenario is also commonly referred to as 'utopia', since some tariffs and barriers to investment will inevitably remain on the most politically sensitive items, and both are likely to go only so far in tackling the now much more important issue of behind-the-border trade barriers in the form of domestic regulation. The protectionist intent lurking behind many such regulations is best

unmasked in the context of dispute settlement, and for this the WTO is likely to remain the forum of choice for most if not all parties to the TPP and TTIP.

Partial success

This is the more likely scenario of the three, since trade agreements always involve trade-offs and compromises, and both mega-regionals are almost certain to fall somewhat short of the lofty and ambitious goals aspired to in their founding declarations. This is simply a manifestation of the age-old maxim that trade agreements involve a set of second- or even third-best policy choices (the best scenario always being free trade). Be that as it may, even if the TPP manages to consolidate the existing liberalisation efforts undertaken by all the parties to it, and 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 while involving numerous regulatory compromises. Nonetheless, this would still be a significant outcome from the standpoint of promoting global trade liberalisation and regulatory convergence. If it operates primarily through an MRA modality, in terms of which outsiders' access to both markets is enhanced, the result could be positive for the ACP.

Failure

Given the advanced stage of the talks and the enormous amount of political capital that has been spent by leaders in such countries as the US and Japan (for the TPP), it is unlikely that either negotiation will be allowed to fail. Instead, negotiators may do what the General Agreement on Tariffs and Trade (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.⁹⁹ Here one envisages a much more modest agreement that fails to provide a single tariff schedule for goods among all parties to the TPP, significant exclusions in the TTIP, and with both limited to a set of largely hortatory declarations on achieving future progress in areas where the talks have proven difficult (eg, intellectual property rights, environment and labour). The domestic political economy constraints are formidable in a number of countries, particularly the US, which is at the centre of both negotiations. The Republican-dominated House of Representatives seems determined to deny President Barack Obama any kind of positive outcomes whatsoever; the Obama Administration's commitment to trade and investment liberalisation is lukewarm at most (and predicated solely on the objective of increasing US exports); and the president faces hostile opposition from much of his political supporters in the Democratic Party. The US electorate – currently in somewhat of a declining competitiveness and income equality funk – has admittedly lost much of its appetite for these kinds of deals, particularly with the dominant political narrative regarding NAFTA still being that it ultimately moved a lot of US jobs offshore. One could argue that for the US, the electoral maths for a sweeping trade deal like this one is just not there, which is now being played out in the difficulties the Obama Administration is having in just obtaining trade promotion authority. This will equally constrain both the TPP's and the TTIP's ultimate scope and effects. As a result, this is a scenario we might realistically be facing.

POLICY OPTIONS FOR SOUTH AFRICA

Calibrate to the potential outcome scenarios

South Africa's policy options are rooted in the outcome scenarios just described. If one adheres to the full success scenario, then 'competitive liberalisation' will roll across the planet and wrap up everything in its path.¹⁰⁰ Already, China is closely watching the TPP process and calibrating its own domestic economic reform programme to mirror potential negotiating outcomes to the extent possible.¹⁰¹ Similar albeit more embryonic discussions are taking place in other significant developing countries such as India and Brazil. If China moves to join the TPP, as it has in the case of the TISA negotiations, the pressure on other developing countries, including South Africa, will rise enormously.

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

Should the negotiations fail, the immediate pressure will be off. However, there could well be a backlash from the US and the EU, since this scenario would hasten China's potential leadership in the global trading system. In the interregnum, positioning among the major powers would probably be intense, and therefore pressure on developing countries generally to yield reciprocity in their trade relations with these powers could escalate substantially beyond current levels. Furthermore, this scenario would likely mean that the WTO would be stuck in the doldrums with no leadership from any quarter, as the major powers would move to shore up regional alliances. In the medium term South Africa would need to adjust to a multipolar trading system. This may present some opportunities to play the major powers off against each other in order to bolster domestic economic priorities, although that can be a risky strategy. However, since the China card would be very much in play, South Africa would need to ask serious questions about Chinese trade diplomacy, its underlying interests and its associated strategies for pursuing those interests. At the very least China is likely to pursue a more hard-headed approach in securing its interests. If properly harnessed, this could be very beneficial to South Africa and other developing countries not negotiating these mega-regionals.¹⁰²

The thread that runs through all three scenarios is that the pressure on South Africa and other countries to adhere to rigorous behind-the-border regulatory norms and to liberalise trade policies is very unlikely to disappear. It may fluctuate depending on the scenario, but sticking one's head in the sand and hoping it will not return does not seem to be a viable strategy.

Policy options

Because South Africa is not party to either the TPP or the TTIP, the country's options in influencing the final outcomes of these talks are ultimately somewhat limited. We do not see much fruit in pursuing this, through playing the 'guilt card' in particular. Of course developing countries should continue to push for increased and more targeted aid for trade, and should bolster their domestic systems for receiving and utilising this assistance. Beyond this, developing country options are already well known, although opinion on them is understandably divided. Much depends on the stance taken towards harnessing trade liberalisation and regulatory reform to support domestic reform efforts. The approach in this paper is that these tools should be harnessed to the extent possible, catering for the country's domestic institutional, political economy, and governance constraints.

Unilateral reforms: the first best option

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

Deeper regional integration

In accepting that unilateral reforms can be fraught politically, external props need to be found. The first recourse should be regional economic integration, not least because neighbouring countries tend to be similar in size, development challenges and economic structure. Furthermore, enlarging the regional economic space will provide some attraction to outside investors, particularly if the transaction costs of accessing regional markets can be made less burdensome or, even better, attractive. For South Africa, this can be achieved through the Southern African Development Community (SADC) and the tripartite FTA comprising SADC, COMESA and the East African Community (EAC). In these regional groupings South Africa can experiment with negotiations on behind-the-border issues, using the forum as a testing ground for the much more exacting trials with bigger developed and developing countries that lie ahead. Given the many problems with regional integration initiatives in sub-Saharan Africa, getting this right is a daunting task on its own.

Nevertheless, as in most things the best defence is a good offence, with a number of possible scenarios suggesting themselves. Firstly, African countries will need to get beyond the EPA impasse with the EU and confront the growing likelihood that AGOA will be replaced by the 'offer' of reciprocal FTAs. Sub-regional economic powers such as South

Africa that are not LDCs and therefore do not qualify for EBA non-reciprocal access are particularly important since they will have the most to lose. While it is true that, currently, most export commodities from these countries do not attract duties, all African countries want to move up the value chain and export the proceeds into large markets such as the EU and US. FTAs could be very useful tools for aiding that process of diversification, since those are precisely the goods that attract duties in otherwise low-tariff markets. Furthermore, by agreeing to regulatory reforms their own markets would become more attractive to multinational companies, which would be more inclined to incorporate the country or region concerned into global value chains.¹⁰³

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

If corresponding negotiations in the WTO were to become bogged down, the same approach as has been taken with the TISA talks could be adopted, namely just proceeding with a like-minded group of countries. This plurilateral option is undoubtedly controversial from the standpoint of many developing countries, since it contains the possibility of isolation in the negotiations and the spectre of the subsequent imposition of unpopular regulatory preferences. However, it also offers the prospect of forging new multilateral rules, thereby retaining the centrality of the WTO at the heart of the global trading system. This is an outcome that developing countries should strive for given the power asymmetries from which they otherwise suffer. A way around this dilemma is to commit to negotiating a plurilateral 'code of conduct' to govern how plurilaterals will be managed, in the interests of all WTO members.¹⁰⁴ Given the successful outcome of the Bali ministerial conference, now would be a good time to take the initiative on this issue, not least because the trade facilitation agreement that lies at the heart of the Bali compromise may represent a significant recalibration of the single undertaking.

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

CONCLUSION

The agenda for the mega-regionals is complex and wide-ranging, and is no doubt stretching the capacities of Asia-Pacific countries participating in the TPP in particular. Countries in sub-Saharan Africa are still a long way from being able to absorb such complexity, never mind implementing the outcomes. Therefore, it is an agenda that bears close watching. The key to understanding how it may unfold is undoubtedly the TPP negotiations, since these are far ahead of the TTIP negotiations. While the US by no means has its own way in every instance in the TPP negotiations, and the final outcome will not be as ambitious as those found in a 'typical' US bilateral FTA, the US will undoubtedly press its negotiating template on the EU to the extent possible. It is highly likely that the prevailing outcome will be the partial success scenario, under which the important aspects of the regulatory agenda described above would manifest, but Western hegemony over the global trading system would not have been decisively reasserted. This would offer a 'balance of power' prospect to countries such as South Africa, nuanced according to sub-region and the degree of exposure to Chinese influence in particular.

It is important for South Africa to grasp the regulatory and trade reform nettle at unilateral, regional and multilateral levels, with the key being the unilateral level. Through this process South Africa can lock in existing trade reforms, engage with new regulatory issues in trade and negotiate them in regional groupings, thus preparing the ground for future negotiations with developed countries in FTAs and at the WTO. Finally, in the WTO, this paper advocates a policy of constructive engagement for South Africa through participating in working groups established to explore new regulatory issues, and preparing the groundwork for their subsequent incorporation by negotiation into the multilateral trading system. That process of incorporation is most likely to involve plurilateral approaches, so that the single undertaking principle will have to be revisited and potentially abandoned. Since the WTO remains central to defending developing country trade interests, South Africa should conditionally support plurilateral negotiations, ensuring that its interests will be accommodated by withholding consent, together with other developing countries, until such time as concrete and enforceable undertakings are in place.

ENDNOTES

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- 99 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.
- 100 This notion is associated particularly with Fred Bergsten, former Director of the Petersen Institute for International Economics, and Richard Baldwin. The former argues that as the US secures FTAs with other countries, so those countries seek to form FTAs along similar lines with third parties. Soon those left outside emulate the FTAs, and ultimately the logic finds its way back into the WTO in the form of new agreements. See Bergsten CF, 'Competitive Liberalization and Global Trade: A Vision for the Early 21st Century', Peterson Institute for International Economics, Working Paper 96–15, <http://www.iie.com/publications/wp/wp.cfm?ResearchID=171>, accessed 14 January 2014. Baldwin identified the 'juggernaut' effect, whereby major multinational companies seek regulatory convergence in order to smooth the operation of their global value chains, and lobby host governments to provide it through mutual recognition, in particular. This pressure finds its way into FTAs, thereby creating a juggernaut effect reinforced by competitive liberalisation. See Baldwin R, 'A Domino Theory of Regionalism', National Bureau for Economic Research, Working Paper 4465, 1993.
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