

TPP, BREXIT, AND AFTER: THE UNEASY FUTURE OF DEEP ECONOMIC AGREEMENTS

This panel was convened at 11:00 a.m., Thursday, April 13, 2017, by its moderator, Benedict Kingsbury of New York University School of Law, who introduced the panelists: Rohini Acharya of the Regional Trade Agreements Section of the World Trade Organization; Kathleen Claussen of the University of Miami School of Law; Christina Davis of Princeton University; and Markus Gehring of the International Legal Research Program at the Centre for International Governance Innovation.*

WTO PROCEDURES TO MONITOR RTAs

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By Rohini Acharya†

Ten years ago, in December 2006, the WTO created a new Transparency Mechanism for Regional Trade Agreements, an early harvest of the Doha Development Round of trade negotiations. The objective was to try to understand RTAs better and permit the Committee on Regional Trade Agreements (CRTA) to perform one of its key functions of monitoring RTAs in a more efficient manner.

The Mechanism, which has been functioning provisionally since it was adopted by the WTO's General Council in December 2006, charges the WTO Secretariat with preparing a detailed "factual presentation" of each RTA that is notified to the WTO. Contrary to the past, when RTAs between developing countries that were notified under the Enabling Clause were not examined by WTO members, all RTAs that are notified to the WTO must now undergo the same procedures. The factual presentation provides a detailed analysis of the main provisions in the RTA and how the RTA is to be implemented over time. Once the factual presentation is completed the agreement is examined by the committee using the factual presentation to ask questions of the parties to the RTA. The Transparency Mechanism requires that all agreements notified under GATT Article XXIV and GATT Article V be considered by the CRTA, while RTAs falling under the Enabling Clause are considered in the Committee on Trade and Development.

Thus, an important change brought about by the Transparency Mechanism on RTAs is that all RTAs are treated in the same way and subject to the same procedures, regardless of whom they are negotiated by and under which WTO provisions they are notified. The Mechanism also clarifies exactly when the RTA should be notified to the WTO, a clarification that has played an important role in improving the notification record of members. The Transparency Mechanism has also permitted WTO members to understand better the potential impact of RTAs on their own trade. The WTO Secretariat has also used the information collected through its factual presentations and its

* Mr. Kingsbury and Mr. Gehring did not contribute remarks for the *Proceedings*.

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RTA database to better understand the evolution of RTAs. The secretariat has recently published a book that examines certain provisions across all RTAs notified to the WTO and in force.¹

The growth in RTAs has of course also brought about broader concerns about their potential impact on the multilateral trading system. However, this debate has moved beyond concerns limited to trade creation and trade diversion due to preferential tariff and services concessions among the RTA parties. The discussion is now also focused on the impact of behind-the-border measures taken by RTAs, which can often be trade-creating, as they tend to be implemented in a nondiscriminatory manner. The gap between some RTA provisions and those under WTO Agreements is also a cause of some concern to some countries, as is the suggestion that standards negotiated in RTAs can become more widespread through WTO negotiations.

FOREIGN POLICY AND TRADE LAW: JAPAN'S UNEXPECTED LEADERSHIP IN TPP NEGOTIATIONS

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*By Christina L. Davis**

After decades of focusing largely on multilateral trade rules, the past fifteen years witnessed a surge of free trade agreements by East Asian governments. Regional production networks benefit from harmonization of rules and lowering trade barriers. Yet several features stand out in these agreements—they focus on goods trade and are not embedded in strong regional institutions for shared decision making. This reflects both the divergent preferences among widely different countries and the reluctance of Japan or China to advocate any policies beyond liberalization of trade and investment. The TPP broke the mold of East Asian PTAs largely due to the leadership of the United States, which pushed others to adopt new rules on labor, environment, digital trade, state-owned enterprises, and competition policy. Yet, surprisingly, these features may persist in trade law despite the exit of the United States from the agreement. A key reason is the transformation of Japan, which began as a bystander to the agreement and now stands as one of its strongest advocates. A second reason is the use of templates in trade agreements, which can transfer the negotiated terms from one deal into subsequent agreements.

JAPAN'S ROLE IN THE TPP

Prime Minister Abe supported joining the TPP and pushed through its ratification even as the United States was reversing course, largely on the basis of geopolitical framing. Joining the negotiations for liberalization with the United States was portrayed as a signal of alliance, partnership, and solidarity with regional neighbors confronting China. Conservative politicians with close ties to agricultural districts harmed by trade liberalization also represent strong supporters of the U.S.-Japan alliance and hawkish views toward China's growing power in the region. Consequently, the geopolitical logic represented a strong lever to overcome any opposition to the agreement within the ruling Liberal Democratic Party.

At the same time, Prime Minister Abe also presented an economic rationale for the TPP by tying the agreement to his domestic economic reform agenda, known as *Abenomics*. The TPP was framed as part of deregulating the economy and increasing competitiveness. Indeed, the largest

¹ REGIONAL TRADE AGREEMENTS AND THE MULTILATERAL TRADING SYSTEM (Rohini Acharya ed., 2016).

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economic benefits to accrue to Japan arise from these domestic reforms rather than market access gains from trade partner concessions. Moreover, supporters hold expectations that the TPP could serve as stepping-stone to a larger regional agreement that would bring substantial economic benefits to Japan. The foreign policy benefits, domestic reform stimulus, and value as an entry-point for future agreements remain attainable without U.S. participation. Therefore, even as the United States was turning against the TPP during the 2016 presidential election, Prime Minister Abe pushed forward to gain ratification of the agreement in the Japanese Diet in December 2016 and now leads negotiations with other participants on next steps for completing the agreement among the remaining parties. This highlights a more general point that trade agreements often hold significance that reaches well beyond the terms on market access because they form a pillar of foreign policy and serve as a catalyst for other reforms at home and in the trading network.

Now more than ever, Japan needs to link trade with foreign policy in the hopes that the anti-China sentiments of some within the Trump administration may override their protectionist views on trade. Support for the TPP provides Japan with a shield against demands from the Trump administration for new trade concessions. At the same time, the TPP forms a backdrop to Japanese demands on China and others that alternative regional economic agreements must achieve high standards and broaden into a free trade area for the Asia Pacific.

GEOPOLITICAL AND ECONOMIC UNDERPINNINGS OF TRADE AGREEMENTS

The TPP is not the first trade agreement to have been sold partly on the basis of strategic value. Many preferential trade agreements by the United States focus on critical partners in its foreign relations. Even regional economic integration in Europe arose alongside security imperatives for cooperation among Western allies during the Cold War. Leaders hoping that economic integration will yield benefits for security cooperation prioritize allies when selecting partners for economic agreements. Opposition to liberalization can be more easily overcome through appeals to national interest.

Yet there are also risks to using foreign policy benefits as part of the rationale for trade agreements. Linking geopolitical and economic interests can help to overcome domestic opposition to a trade agreement, but also risks dissatisfaction with trade agreements building over time. Agreements can be sold as part of a combined economic and strategic package, but their evaluation within domestic political groups will force a bottom-line assessment of economic wins and losses. Furthermore, the symbolism raises the prospect that the failure to conclude the trade agreement signals weakening political commitment. This is the reality of East Asia today as the decision by the United States to withdraw from the TPP also raises uncertainty about broader commitment to the region by the United States.

TEMPLATE BARGAINING AND THE LEGACY OF PAST NEGOTIATIONS

What is the legacy of the TPP? While Japan and other states may go forward to ratify the agreement, the departure of the United States leaves a large question mark about the future of the agreement. Yet there is the possibility that this agreement could influence trade talks well beyond the span of its own membership.

Trade negotiations can be a cumulative process as each trade agreement builds on those that have been concluded. Although not the explicit model treaty process applied to bilateral investment treaties, there is a strong similarity across trade agreements. Legal consistency and informal most-favored-nation principles in the structure of PTAs lead officials to start from the template of the most recent and highest-level agreement. Since there is no binding commitment to carry over the terms in one agreement in the terms subsequently negotiated, this practice of plagiarizing

text from other agreements need not be limited to ratified treaties. To the extent that TPP represents the gold standard agreement, its provisions may be incorporated into subsequent draft negotiation proposals. How does an agreement shaped by inclusion of the United States and exclusion of China travel to other contexts? Will the poor fit lead to its rejection so that all of the unique provisions of TPP end?

The key novelty of TPP terms of agreement relates to provisions for labor, digital trade, environmental protection, and state-owned enterprises. The TPP brought an unprecedented commitment by Vietnam to protect core standards of the International Labor Organization and support collective bargaining rights with an action plan backed up by potential trade sanctions in enforcement. The mobilization of trade agreements to enforce international labor law has had a mixed record, but the Vietnamese government has shown serious intention to make reforms as part of negotiations for the TPP and appears set to continue with the changes even amid uncertainty over the agreement. The commitments for restraint of fishery subsidies and illegal trade of wildlife were praised by environmental groups and went beyond those in prior trade deals. As the first agreement to regulate digital trade, the TPP introduced terms to counter data localization and customs duties on digital products while protecting intellectual property rights for source code and other aspects of digital commerce. The United States led efforts to include these terms in the TPP, but e-commerce had already been raised within APEC and placed on the agenda for ASEAN. The TPP terms may become a new benchmark for the rapidly growing area of trade in digital services where the supply chains of East Asia would benefit from transparency of rules.

Although some parties may wish to leave behind these new terms negotiated at the behest of strong U.S. demands, Japanese officials have argued that retaining the original terms would hold open the door for the United States to later reenter TPP. Furthermore, governments across the region recognize the value of high standards for attracting investment and may fear that removal of these provisions would tarnish the meaning of TPP as a seal of approval for high-level regulations. Despite its own uncertain fate, the TPP could still become a benchmark for moving forward in other agreements.

STOCKTAKING AND GLIMPING AT TRADE LAW'S NEXT GENERATION

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*By Kathleen Claussen**

These remarks are derived from a forthcoming work considering the future of international trade law.¹ Compared with most features of the international legal system, the regional and bilateral trade law system is in the early stages of its evolution. For example, the United States is a party to fourteen free trade agreements currently in force, all but two of which have entered into force since 2000. The recent proliferation of agreements, particularly bilateral and regional agreements, is not unique to the United States. The European Union recently concluded trade agreement negotiations with Canada, Singapore, and Vietnam to add to its twenty-seven agreements in force and is negotiating approximately ten additional bilateral or multilateral agreements.² In the Asia-Pacific Region, the number of regional and bilateral free trade agreements has grown exponentially since the conclusion of the Association of Southeast Asian Nations (ASEAN) Free Trade Area of 1992.

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¹ Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT'L L. __ (forthcoming, 2018).

² *The State of EU Trade* (2017), at http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149622.pdf.

At that time, the region counted five such agreements in force.³ Today, the number totals 140 with another seventy-nine under negotiation or awaiting entry into force.⁴ The People's Republic of China is negotiating half a dozen bilateral trade agreements at present to top off the sixteen already in effect.⁵ India likewise is engaged in at least ten trade agreement negotiations.⁶ The World Trade Organization (WTO) reports 267 agreements of this sort in force among its members as of July 1, 2016.⁷

These statistics leave no doubt that regional and bilateral trade agreement negotiation is alive and well, and that this trend is the most important trade law development since the creation of the WTO. Regional and bilateral agreements have eclipsed the WTO in some elements of importance, not all economic.

While public discussion has focused on certain world events and in some cases construed those events as signaling an end to trade agreements with multiple participants, there are not clear signs of significant retreat. If anything, there may be an interest in increased dynamism and experimentation, alongside continued proliferation. Contrary to the premise underlying this roundtable, however, the emphasis on "regionalism" and regional agreements is overstated. The press and some of the academic literature have focused on the Obama administration's efforts to negotiate a twelve-country regionally focused agreement, the Trans-Pacific Partnership (TPP) Agreement, as a watershed moment in trade agreement negotiation. While an important landmark in the development of trade agreements, the TPP was hardly the first. During the early 2000s, many countries of the Western Hemisphere spent time and resources negotiating a Free Trade Agreement of the Americas that never came to fruition. Regional economic arrangements in Africa, Asia, Europe, and South America long predated the TPP. Certainly, Mexico, Canada, and the United States negotiated the North American Free Trade Agreement nearly twenty years before the United States joined the TPP discussions.⁸ Thus, it is difficult to conclude that regional agreements are a novel policy choice or preferred as such, even if the TPP purports to cover more subject areas.

REGULATORY REGIONS?

Where agreements have successfully formed, have they created "regulatory regions," as some scholars and practitioners have suggested? I maintain that while free trade agreements (FTAs) undoubtedly have a framework role in harmonizing regulatory processes and standards, and while that role is important, these far-reaching claims are overemphasized, particularly when referring to the effect of the agreement once in force.

There is no doubt as to the expansion in scope of the agreements to wide-ranging principles for how states regulate. However, evidence suggests that the WTO committee and dispute settlement system has had a greater effect in shaping regulatory decisions than FTAs have had once they have entered into force. At the WTO, intense discussion takes place within the committees and in dispute settlement regarding draft regulations or laws that fall within the scope of the WTO subject area. The contribution of FTA-based committees and exchanges is less partly as a result of the fact that the "WTO-plus" space that FTAs occupy is smaller.

³ Asian Regional Integration Center, *Free Trade Agreements*, at <https://aric.adb.org/fta>.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ World Trade Organization, *Regional Trade Agreements*, at https://www.wto.org/english/tratop_e/region_e/region_e.htm.

⁸ The precursor to the TPP, the Trans-Pacific Strategic Economic Partnership, was initiated in 2003 by Singapore, New Zealand, and Chile. Brunei joined negotiations in 2005, and the partnership among those states came into force in 2006. In March 2008, the United States joined the negotiations.

By contrast, one of the significant values of the FTA negotiation process is the exchange that occurs during the negotiation period to seek agreement on standards. That period appears to contribute significantly to harmonizing not just regulatory standards but also good governance principles. Thus, an important outcome from the FTA process is the conversation on regulatory matters that occurs in the lead-up to entry into force: the domestic legwork on the margins of agreement negotiation. In this area where additional scholarship is needed, it is possible that the international community both under- and overestimates the significance of these processes.

In addition to understanding the contributions of transnational engagement under FTAs, further study will be required upon the development of FTA jurisprudence. To date, FTAs remain largely untested, whereas the WTO dispute settlement mechanism has had an important influence on member rulemaking. Until more FTA disputes arise, it is difficult to calculate their impact. Thus, while FTAs make an important contribution to transnational legal ordering and create semi-permanent institutions with law-making potential, claims regarding their regional regulatory impact so far have been overemphasized or at least may be premature.

A DISPARATE FUTURE

In the next twenty years, what form will trade agreements take? If current trends continue, the major economies of the world will maintain a mix of bilateral and plurilateral agreements. These agreements likely will continue to converge around and toward shared principles not just on non-protectionist provisions but also in respect of regulatory issues ancillary to trade such as labor and environment.

Commentators have referred to the present generation as a “spaghetti bowl”—a mass of regional or bilateral agreements concluded without consideration for each other or their implications for investment, potentially increasing costs, increasing regulation, and distorting conditions of competition for traders. The concern is not only economic, but also legal: the “spaghetti bowl” can garble the coherence of the trade law system. In today’s domain with so many agreements coming into force around the world, it is challenging to trace the source of each provision.

Contrary to this perception, evidence indicates convergence within the current spaghetti bowl rather than distortions in legal norms. Importantly, European and Asian trade agreements have adopted some of the language and chapter ideas from U.S. agreements. For example, the same labor obligations in the TPP form part of the recently concluded Canada-EU Comprehensive Economic Trade Agreement. It is not surprising that U.S.-initiated language appears in what I will call “third-party agreements” concluded by states that already have FTAs with the United States. What is more surprising, however, is the appearance of U.S.-initiated language in agreements between states neither of which shares an FTA with the United States. For example, the same labor chapter language from TPP appears also in Article 15.10 of the Sustainable Development Chapter of the EU-Vietnam Free Trade Agreement. At the time the European Union and Vietnam concluded their agreement, the United States did not have a trade agreement with either country and yet the language appeared in almost every U.S. agreement in force at the time. In general, the repeated use of the same language in U.S. agreements appears to have influenced at least the EU’s trade agreements such that the EU has adopted the same language and now incorporates it into its own trade agreements.

Borrowing language from other legislation or international instruments is not a new phenomenon. Here, there is more than “borrowing” at play, however. The race to conclude regional and preferential trade agreements is leading to a normative cascade in certain areas, with legal resonance. This convergence contributes to a constitutionalization of trade norms through which multilateral advances are made even in the absence of a multilateral instrument.

While it is difficult to predict whether the current trend will necessarily continue, the influence of the United States in the normative space lends support for the conclusion that change or a meaningful new direction will be difficult. Despite calls for change to the U.S. default model trade agreement by commentators and during the period leading up to the 2016 U.S. presidential election, the constitutional constraints in trade lawmaking in the United States and the challenges of creating a new political compromise for trade agreements may prove prohibitive.

By most measures, trade agreements seem poised to follow in the footsteps of investment treaties—becoming so ubiquitous that they become universal in participation—while they continue to grow in substantive scope. Thus, the future of regional and bilateral trade agreements is likely to direct significant public policy choices for many years to come.