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**Is Trade Governance Changing?**  
A governança comercial está mudando?

Alberto do Amaral Júnior

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# Is Trade Governance Changing?\*

## A governança comercial está mudando?

Alberto do Amaral Júnior\*\*

### ABSTRACT

A constellation of PTAS either increases the scope of the WTO rules or regulates subject-matters not belonging to the multilateral trading system. More recently, negotiations of the mega-agreements, a label coined to mean agreements encompassing a vast majority of the world wealth, has brought together effects not yet fully assessed. This article investigates the impact of those shifts for trade governance. I argue that there is an ongoing shift in the governance of the world trade. Its most relevant aspects will be analyzed below.

**Keywords:** Governance. Trade. WTO. Mega-agreements. Preferential trade agreements.

### RESUMO

Uma constelação de PTAS aumenta tanto no âmbito de aplicação das regras da OMC como regula os assuntos que não pertencem ao sistema de comércio multilateral. Mais recentemente, as negociações dos mega-acordos, um rótulo cunhado para significar acordos que abrangem a grande maioria da riqueza mundial, reuniu efeitos ainda não totalmente avaliados. Este artigo investiga o impacto dessas mudanças para a governança do comércio. Eu argumento que há uma mudança em curso na governação do comércio mundial.

**Palavras-chave:** Governança. Comércio. OMC. Mega-acordos. Acordos comerciais preferenciais.

### 1. INTRODUCTION

It is a common place to say that the WTO's creation during the Uruguay Round had crucial importance for the world trading system. Indeed, a rudimentary institutional apparatus in force in the GATT age was too feeble to grapple with a great deal of transformation that the international trade confronted in the early 90's. At its inception, WTO signified the apogee of a long process initiated in the 40's, when policy-makers of more than twenty countries attributed to the GATT the role of third pillar of the newly international economic order. In 1995, WTO achieved to figure as the institutional landmark of a carefully cherished ideal. It crystallizes the hope of governing a globalized world in accordance with multilateral legal

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rules. Over time, preferential trade agreements (PTAs) disseminated too fast in all corners of the globe. A constellation of PTAs either increases the scope of the WTO rules or regulates subject-matters not belonging to multilateral trading system. More recently, negotiations of the mega-agreements, a label coined to mean agreements encompassing a vast majority of the world wealth, has brought together effects not yet fully assessed. This article investigates the impact of those shifts for trade governance. I argue that there is an ongoing shift in the governance of world trade. Its most relevant aspects will be analyzed below.

## 2. GLOBAL GOVERNANCE IN PERSPECTIVE

The meaning of the concept of governance is equated with: “all that happens or would have to happen in order to resolve the collective problems of a set of actors in satisfactory ways”<sup>1</sup>. In accordance with Claus Offe “governance would be a game without losers leading to achievement of good results. Questions of power, distribution and conflict are cast aside in the pursuit of depoliticization. Participants in the discourse on governance scorn the significance of conflicts of interest and values that take place in the public outside the negotiation room”<sup>2</sup>.

We must take a step forward to grasp in Andrew Hurrell’s words about the hybrid nature of the present international society. According to the author, we are witnessing:

[...] a huge increase in the scope, density and intrusiveness of rules and norms that are made at international level but affects how domestic societies are organized; the ever-greater involvement of new actors in global governance; the move toward the coercive enforcement of global rules; and a fundamental changes in political, legal, and moral understandings of state sovereignty and of the relationship between the state and the citizen, and the international community. A large number of factors have disturbed this picture and have pushed global order back from a broadly Westphalian direction<sup>3</sup>.

1 OFFE, Claus. Governance: an empty signifier? *Constellations*, New York, v. 16, n. 4, p. 550-562, Dec. 2009. p. 557.

2 OFFE, Claus. Governance: an empty signifier? *Constellations*, New York, v. 16, n. 4, p. 550-562, Dec. 2009. p. 557-558.

3 HURRELL, Andrew. International law 1989-2010: a performance appraisal. In: CRAWFORD, James; NOUWEN, Sarah (Ed.). *Select proceedings of the European Society of International Law*. Oxford:

These included: (1) the renewed salience of security, the re-valorization of national security as a value that can and - for a dispiritingly large number of people - should trump ideas of universal human rights, and a renewed preoccupation with war-fighting and counter-insurgency; (2) the continued or renewed power of nationalism, no longer potentially containable politically or analytically in a box marked ethnic conflict but manifest in the identity politics and foreign policy actions of the major states in the system; (3) the renewed importance of nuclear weapons as central to major power relations, to the structure of regional security complexes, and in the construction of great power hierarchies and the distribution of seats at top tables; (4) the national and transnational power of religion (both aspects matter); and (5) the quiet return of balance of power as both a motivation for state policy (as with US policies in Asia) and as an element in the foreign policy of all second-tier states - not hard balancing and the building up of hard power; but soft balancing either in the form of attempts explicitly to de-legitimize US hegemony, to argue for alternative conceptions of legitimacy, and to reflect demands for status and recognition<sup>4</sup>.

## 3. WTO AND GOVERNANCE OF WORLD TRADE

Created at the end of the Uruguay Round, the World Trade Organization (WTO) strengthened governance in world trade. Protectionism in the early 80’s took countries to fear the erosion of benefits obtained through the multilateral trading system. Governments needed to overcome unilateral actions derived from unsuitable use of trade defense measures, highly noxious for a stable international economy. To this end, the Uruguay Round was lunched in 1986, in Punta del Este. It lasted 8 years, being successfully finished in April 1994, in Morocco. The fall of the Berlin wall and the breakup of the Soviet Union set the stage for WTO to come to the fore. From an institutional angle, a full-fledged centralization of the world trading system was necessary. The limited GATT Secretariat hosted in Geneva was no longer congenial for the new demands from developed and developing countries. In this view, the WTO implies, simultaneously, continuity and break with the past. On the one hand, continuity is noticeable in the reception of GATT principles and acceptance of economic liberalization agree-

Hart Publishing, 2012. v. 3. p. 4.

4 HURRELL, Andrew. International law 1989-2010: a performance appraisal. In: CRAWFORD, James; NOUWEN, Sarah (Ed.). *Select proceedings of the European Society of International Law*. Oxford: Hart Publishing, 2012. v. 3. p. 9.



ments previously negotiated. On the other hand, break occurs when the GATT rules are not sufficient to cope with tensions generated by globalization.

The acceleration of interdependence and interpenetration of markets shifted the trade agenda and demanded a new institutional apparatus. Agreements negotiated in the Uruguay Round on agriculture, trade in services, intellectual property rights and investment measures related to trade are evidences of the enlargement and the deepening of the world trading system.

WTO differs from the Bretton Woods institutions. The IMF and the World Bank deal with financial resources and their decision-making process is based on the weighted vote. The WTO, on the contrary, is a set of rules wherein the financial contribution of each member does not count. Devised shortly after the upshot of the Cold War, WTO symbolizes a joint effort of the vast majority of states to govern international trade through primary and secondary rules. The former provide for rights and obligations of members and the latter indicate criteria for a rule to belong to the multilateral trading system, grant power to institutional bodies for changing rules and adjudicating disputes. However, in the course of the Uruguay Round negotiators aimed at thickening of decision-making process and the diplomatic initiative. Ministerial conferences are in charge of making new agreements, amending existing treaties and providing binding interpretations for WTO rules. The Dispute Settlement Body and the Mechanism for Trade Policy Review are composed of diplomats performing the functions of settling disputes and scrutinizing domestic trade policies. Even after having begun a dispute, a political solution can always bring it to an end. Concomitantly, secondary rules regulated in detail procedures to be followed for settling a dispute. Composed of jurists, the Appellate Body was entrusted with the mission to revise the dispute from a legal perspective. The legal thickening of the Dispute Settlement Understanding in the Uruguay Round is a measure of confidence building essential to guarantee security and predictability of the world trading system.

The WTO law presents two simultaneous processes: unification and primacy of the WTO rules. Unification has to do with the enlarging of the validity domain of the WTO agreements. With the time passing, it has become a nearly universal organization. At the same time, the principle of single undertaking irradiates effects on

a global scale as opposed to the fragmentation resulted from the Tokyo Round. The most-favored nation clause and the national treatment principle, particular expression of non-discrimination in international trade, go in the same direction. Banning unilateralism support efforts for unification of rules. The aspiration of primacy of the multilateral trading system comes from controlling protectionist behaviors that eventually arise out of regional trade agreements. In the same vein, the WTO provisions are in search of making the world trade law consistent with normative subsystems under the WTO supervision. There would be an economic coherence to the extent that open regionalism served as an intermediary phase of the globalization process.

#### **4. WTO COMMITTEE ON REGIONAL TRADE AGREEMENTS**

Under the GATT 1947, Contracting Parties had to notify the Secretariat that they have concluded a regional trade agreement. Thereafter, a working group would be created to ascertain its consistency with Article XXIV and eventually recommend any change. However, these working groups did not reach to fulfill their functions for the sake of lacking parameters for judgment. Hence, the verification on whether a regional agreement was compatible with the multilateral trading system normally failed. In order to resolve this inconvenience, the General Council decided, on February 6, 1996, that the Committee on Regional Trade Agreements ought to play the following functions: (i) to examine the compatibility of regional trade agreements with WTO provisions in conformity with rules, procedures and terms of reference adopted by the Council on Trade in Goods (Article XXIV of GATT), the Council on Trade in Services (Article V of GATS), or the Committee on Trade and Development (enabling clause), and to present its report to pertinent body for appropriate action; (ii) to consider how due reports must be prepared on such agreements and formulate recommendations; (iii) to develop, if necessary, procedures to facilitate and enhance the examination process; (iv) to take account of systemic implications of these agreements and regional initiatives for international trade; (v) to issue suitable recommendations to the General Council; (vi) to accomplish any additional function that the General Council assigned to it and to prepare annual reports on

its activities to the General Council. As far as systemic issues were concerned, the Secretariat elaborated proposals and documents. The Committee had to examine them taking into consideration the WTO provisions by means of horizontal analysis of the regional trade agreements' economic aspects.

At 1998 Geneva Ministerial Conference, the WTO members expressed their concern about excessive cases notified to the Committee on Regional Agreements and its incapacity to perform a compatibility analysis. In the Checklist Issues document for the 1999 Seattle Ministerial Conference, the lack of substantive progress in the work of the Committee on Regional Agreement was discussed. In the Doha Round, a new text about the compatibility analysis of Regional Trade agreements came to be debated and approved. However, its entry into force will only take place at the end of the Doha Round. The WTO members designed a transparency mechanism for regional trade agreements that tends to streamline the compatibility verification procedure of regional trade agreements with WTO rules. The inherent weakness of that procedure makes it incapable to suitably perform its function.

## 5. MEGA-AGREEMENTS AND A NEW CONFIGURATION OF INTERNATIONAL TRADE

Among plentiful preferential trade agreements concluded over the last decades, negotiations involving the Mega-Regional Trade Agreements have gained even greater strength. Such agreements could be defined as deep integration partnerships between countries or regions with large participation in both world trade and foreign direct investment and in which two or more parties serve as logistic centers for global value chains<sup>5</sup>. For Draper, Lancey and Ramkolowan the mega-agreements are trade partnerships negotiated by three or more countries or regional groupings whose member collectively account for at least 25% of world trade<sup>6</sup>. Further,

those agreements intend to regulate themes that have not yet been addressed at the WTO level. If successfully adopted, those agreements will significantly impact the international trade regime. In order to cast light on the regulation of international trade in the XXI century, I briefly analyze the three most important agreements under negotiation. Those agreements are, respectively, the Trans-Pacific Partnership (TPP), the Trans-Atlantic Trade and Investment Partnership (TTIP) and the Regional Comprehensive Economic Partnership (RCEP).

The Trans-Pacific Partnership – TPP – connects 11 economies of Asia and the Pacific to the US economy<sup>7</sup>. Currently, the TPP encompasses the following countries: Brunei, New Zealand, Chile, the United States, Australia, Canada, Japan, Malaysia, Mexico, Peru, and Vietnam. Despite the huge economic, demographic and strategic differences, the adoption of a broad trade agreement that comprised all those countries has always been the common target that guided the negotiations. After five years of consultations, states signed a final version of the treaty on the October 5, 2015. The TPP has been the deepest plurilateral trade agreement made since the Uruguay Round in 1994. It will account for 36.3% of the world GDP and 25.5% of the world trade.

From the US perspective, the TPP means a commitment to Asian countries and a strong decision to maintain the American influence in the region. Once implemented, the TPP will reaffirm the US status as one of the largest players in the global trade with the ability to dictate terms that will conduct trade in the coming decades. The greatest advances of TPP are in the regulatory field. Initiatives devoted to fostering regulatory coherence amongst countries received special attention. In this perspective, the TPP aims to be the legal and institutional framework that will guide the creation of global value chains in the Asia and Pacific region<sup>8</sup>.

International Political Economy, 2014. Available at: <[http://www.ecipe.org/app/uploads/2014/12/OCC22014\\_pdf](http://www.ecipe.org/app/uploads/2014/12/OCC22014_pdf)>. Accessed: 25 nov. 2015.

7 THORSTENSEN, Vera; FERRAZ, Lucas (Coord.). *A multiplicação dos acordos preferenciais de comércio e o isolamento do Brasil*. Instituto de Estudos para o Desenvolvimento Industrial: junho, 2013. Disponível em: <<http://retaguarda.iedi.org.br/midias/artigos/51d18e9168afa9d0.pdf>>. Acesso em: 25 nov. 2015.

8 JANK, Marcos. *Impacto do TPP no Brasil será profundo e exige uma reação*. Folha de São Paulo, São Paulo, 7 out. 2015. Disponível em: <<http://www1.folha.uol.com.br/mercado/2015/10/1691040-impacto-do-ttp-no-brasil-sera-profundo-e-exige-uma-reacao.shtml>>. Acesso em: 25 nov. 2015.

5 MELÉNDEZ-ORTIZ, Ricardo. Mega-regionals: what is going on? In: WORLD ECONOMIC FORUM. *Mega-regional trade agreements: game-changers or costly distractions for the World Trading System?* Global Agenda Council on Trade and Foreign Direct Investment, Report 160414, jul. 2014. p. 6.

6 DRAPER, Peter; LACEY, Simon; RAMKOLOWAN, Yash. *Mega-regional trade agreements: implications for the African, Caribbean, and the Pacific Countries*. ECIPE. Brussels: European Centre for

The TPP agreement is divided into 30 chapters covering a wide range of issues such as: trade in goods, trade defense, customs cooperation, rules of origin, sanitary and phytosanitary measures, technical barriers to trade, market access, trade in services, financial services, e-commerce, telecommunication, temporary entry for business agents, protection of foreign investments, intellectual property, labor and environmental standards, government procurement, competition, trade facilitation, regulatory coherence, regional integration, transparency and anticorruption.

Due to the nature of this article, my intention is not to detail all regulatory changes at issue, but simply to underline their importance for the governance of the multilateral trading system. The chapter on dispute settlement, for instance, created a fast mechanism whereby both complainants and respondents are allowed to resort, at any time, to alternative dispute settlement methods, namely good offices, mediation and arbitration. The TPP Dispute Settlement mechanism was based on the Dispute Settlement Understanding at the WTO level. Retaliation is a recourse that is at disposal to disputants if one of them breaches its obligations. When a dispute arises from violation of a common obligation between the TPP and other trade agreement, including those belonging to multilateral trading system, parties are free to choose which rules will be employed to settle their dispute. In principle, the TPP mechanism for dispute settlement does not take primacy over others. However, the choice for one system implies necessarily the exclusion of other possibilities. In case of disputes concerning common obligations between WTO agreements and the TPP provisions, the TPP panel may invoke the WTO Appellate Body consolidated jurisprudence. The TPP panels may be composed not only of experts in international trade but also of experts in the litigation subject. In this connection, there is a likelihood for a more balanced dispute settlement, without a commercial bias, on labor and environmental standards as well as in the sphere of anticorruption measures. It is noteworthy that TPP Dispute Settlement mechanism only regulates disputes between States whilst Investor-State Dispute Settlement applies exclusively to the commitments under the TPP Investment Chapter<sup>9</sup>.

9 UNITED STATES TRADE REPRESENTATIVE. *The Trans-Pacific Partnership: leveling the playing field for American workers and American Business*. USTR. Available at: <<https://ustr.gov/tpp/>>. Accessed: 25 nov. 2015.

The TPP contains safeguards that grant governments the capacity to enact legal norms about public health, security and the environment. Measures taken to protect such values do not constitute indirect expropriation. As for rules of origin, 45% of imported cars and 40% of spare parts ought to be manufactured in one TPP country to benefit from tariff exemption within the bloc. In NAFTA, those requirements are, respectively, of 62,5% and 60%<sup>10</sup>. Undeniably, the TPP countries are pursuing a more deep productive integration. With respect to labor standards are concerned, States Parties reaffirmed the right to form trade unions, to a minimum wage, to safe labor and decided to prohibit forced and children labor. In other words, the TPP obliges states parties to accept and safeguard fundamental labor rights recognized by the International Labor Organization (ILO)<sup>11</sup>. The Environment Chapter embraces norms on climate change, subsidies to fishery, conservation of fauna and flora, trade in environmental services and goods etc. Of note is the specific procedure to settle disputes about environmental obligations.

Finally, the chapter on intellectual property received a decisive influence of the US domestic law. In reality, there was no direct increase in the period of protection established in the TRIPs agreement. Nevertheless, as states parties should adjust the patent term to compensate unexpected delays in its concession, the period of protection may surpasses 20 years. The TPP is the first trade agreement that protected biological medicines such as: vaccines, bloody products, allergenic extracts, human tissues and cells for transplantation. For such cases, negotiators provided two ways of protection. The first one ensures a minimum period of 8 years for data and undisclosed information protection. The second one is formed by a combination of the protection of 5 years of data and undisclosed information plus other administrative and regulatory procedures. On the basis of considerations above, a conclusion is unavoidable: the TPP advanced in comparison to any other preferential trade agreement already made. To enter into force, the Trans-Pacific Partnership still needs to be approved

10 BRIGES WEEKLY. After TPP Deal Reached in Atlanta, Focus Shifts to Ratification. *BRIDGES*, v. 19, n. 33, 8 Oct. 2015. Available at: <<http://www.ictsd.org/sites/default/files/review/bridgesweekly19-33.pdf>>. Accessed: 25 nov. 2015.

11 UNITED STATES TRADE REPRESENTATIVE. *The Trans-Pacific Partnership: leveling the playing field for American workers and American Business*. USTR. Available at: <<https://ustr.gov/tpp/>>. Accessed: 25 nov. 2015.

by the Legislative Power of all signatories. South Korea, Taiwan, Philippines and Colombia have demonstrated interest in adhering to TPP.

The Trans-Atlantic Trade and Investment Partnership (TTIP) is an attempt to harmonize trade relations between the US and the EU. As the most important mega-agreement in negotiation, the TTIP accounts for 45% of world GDP<sup>12</sup>. Both the United States and the European Union strive to set in motion a comprehensive trade agreement aimed at liberalizing trade and eliminating non-tariff barriers. Diplomats and policy-makers are in pursuit of high standards to make compatible and possibly to harmonize rules on trade in goods and services, investments and bidding procedures on both sides of the Atlantic<sup>13</sup>. Negotiations are divided into three baskets: market access; regulation and non-tariff barriers; and norms. The market access takes priority to rules of origin, removal of all duties and customs charges on industrial and agricultural products with special treatment to the most sensitive sectors and liberalization of trade in services<sup>14</sup>. Since the basket on rules has dealt with measures of trade defense; regarding investments there is a concern with guarantees of protection against expropriation, free transfer of funds, fair and equitable treatment; government procurement; financial regulation; the deepening of the international regime on intellectual property rights and an increase in the effectiveness of coercive measures either against acts related to physical products or actions perpetrated in the digital environment. A goal carefully nourished is reconciling the US and the EU regimes of geographical indications as well as labor and environmental standards. Innovations include provisions to forbid the

exploitation of both illegal timber and fishery<sup>15</sup>. Discussions related to non-tariff barriers embrace measures to harmonize existing rules in both parties with a view to simplifying procedures and design a permanent regime for regulatory cooperation. Shifts shall occur in cyber security, information technology, nanotechnology and electrical cars<sup>16</sup>.

Foreign direct investments have aroused great interest in the European society, principally in the investor-state dispute settlement terrain. The European Commission lunched a public consultation on this matter with the scope to define solid basis for negotiations<sup>17</sup>. Around 150.000 people took part in the public consultation that occurred from March to July 2015. The main target consisted in achieving a balance between the investors' interests and the right to regulate investments in favor of public interest<sup>18</sup>. Afterwards, on September 16, 2015, the European Commission proposed a new mechanism for dispute settlement on investments. It was recommended an investments tribunal composed of a first instance chamber and a chamber of appeal. Investors could sole lodge complaints founded on three arguments: (i) expropriation without compensation; (ii) denial to justice; or (III) specific discrimination on the grounds of race, gender etc<sup>19</sup>.

12 MELÉNDEZ-ORTIZ, Ricardo. Mega-regionals: what is going on? In: WORLD ECONOMIC FORUM. *Mega-regional trade agreements: game-changers or costly distractions for the World Trading System?* Global Agenda Council on Trade and Foreign Direct Investment, Report 160414, jul. 2014.

13 DRAPER, Peter; MÉLENDEZ-ORTIZ, Ricardo. The Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP): key issues and potential impact on members. In: WORLD ECONOMIC FORUM. *Mega-Regional Trade Agreements: game-changers or costly distractions for the World Trading System?* Global Agenda Council on Trade and Foreign Direct Investment, Report 160414, jul. 2014.

14 DRAPER, Peter; MÉLENDEZ-ORTIZ, Ricardo. The Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP): key issues and potential impact on members. In: WORLD ECONOMIC FORUM. *Mega-Regional Trade Agreements: game-changers or costly distractions for the World Trading System?* Global Agenda Council on Trade and Foreign Direct Investment, Report 160414, jul. 2014. p. 16.

15 DRAPER, Peter; MÉLENDEZ-ORTIZ, Ricardo. The Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP): key issues and potential impact on members. In: WORLD ECONOMIC FORUM. *Mega-Regional Trade Agreements: game-changers or costly distractions for the World Trading System?* Global Agenda Council on Trade and Foreign Direct Investment, Report 160414, jul. 2014. p. 16.

16 DRAPER, Peter; MÉLENDEZ-ORTIZ, Ricardo. The Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP): key issues and potential impact on members. In: WORLD ECONOMIC FORUM. *Mega-Regional Trade Agreements: game-changers or costly distractions for the World Trading System?* Global Agenda Council on Trade and Foreign Direct Investment, Report 160414, jul. 2014. p. 24.

17 EUROPEAN COMMISSION. *Preliminary report: online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and investment partnership agreement*. EC. 2014a. Available at: <[http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc\\_152693.pdf](http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152693.pdf)>. Accessed: 25 nov. 2015.

18 EUROPEAN COMMISSION. *Consultations: online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and investment partnership agreement*. EC. 2014b. Available at: <[http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179)>. Accessed: 25 nov. 2015.

19 EUROPEAN COMMISSION. *Commission proposes new investment court system for TTIP and other EU trade and investment negotiations*. EC. 2015. Available at: <<http://trade.ec.europa.eu/doclib/press/index>>.

That proposal runs the risk of not being accepted after the inclusion in the TPP of a proposal creating an investor-state dispute settlement mechanism, at the US initiative. Moreover, groups of civil society will likely contest the negative effects of such agreement on food security, public health and human rights protection. Birbeck and Botwright argue that the recent public wave of preoccupation over the TTIP echoes themes hotly discussed in the 1999 WTO Ministerial Conference held in Seattle<sup>20</sup>. Initially aimed for completion by end 2014, the TTIP negotiations are still in course. Surely, the TPP's adoption will give a new impetus to the TTIP and RCEP negotiations.

The Regional Comprehensive Economic Partnership (RCEP) gathers the ten member countries of the Association of Southeast Asian Nation (ASEAN) and six countries with which that association has free trade agreements (Australia, China, India, Japan, New Zealand and South Korea). The RCEP is the more populous mega-agreement comprising more than half of world population<sup>21</sup>. India and China, two key members of BRICS, only participate in this mega-agreement<sup>22</sup>. Similar partnership seeks to give rise to a modern, wide and mutually beneficial agreement which regulates trade in goods and services, investment, technical and economic cooperation, intellectual property, competition, dispute settlement and further topics identified in the course of negotiations<sup>23</sup>. The RCEP negotiations find support in the Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic

Partnership, adopted on November 20, 2012. According to this document, such an agreement shall respect the following guidelines:

1. The RCEP will be consistent with WTO, notably with GATS article V and GATT article XXIV;
2. The RCEP will maintain a profound engagement with ASEAN and simultaneously recognize peculiarities surrounding each participant;
3. The RCEP will contribute to increase the degree of transparency of trade and investments amongst countries and promote their insertion in global and regional supply chains;
4. Taking into account the different levels of development, the RCEP will foresee appropriate forms of flexibility, including provisions for special and differential treatment;
5. The ASEAN Free Trade Agreements (FTAs) and the bilateral/plurilateral Free Trade Agreements between and among participating countries will continue to exist and no provision in the RCEP agreement will detract from the terms and the conditions in them;
6. Any state that had made a free trade agreement with ASEAN is permitted to participate in the RCEP negotiations as long as it complies with terms and conditions previously established. The RCEP agreement will also have an open accession clause to enable the participation of any ASEAN FTA partner that did not participate in the RCEP negotiations and any other external economic partners after the completion of the RCEP negotiations;
7. Provisions for technical assistance and capacity building may be available to developing and least-developed countries that are participating in the RCEP. This is done in order enable all parties to fully participate in negotiations, implement obligations and enjoy the RCEP benefits.
8. The negotiations on trade in goods, trade in services, investments and other areas will be conducted to secure a balanced and comprehensive result<sup>24</sup>

In the light of those principles, it is worth noting that both the RCEP and TPP fabric indicate two different concepts toward integration project. As noted by Dupont, the RCEP incorporates the nesting dynamic concept whose purpose is to push for economic integration without setting a clear priority among treaties concluded by states parties. The TPP, on the contrary, follows the concept of multilateralization dynamics

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20 BIRKBECK, Carolyn; BOTWRIGHT, Kimberly. *The future of the global trade and investment architecture*: pursuing sustainable development in the global economy: overview of issues, challenges and debates. e15initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. Available at: <<http://e15initiative.org/publications/the-future-of-the-global-trade-and-investment-architecture/>> Accessed: 25 nov. 2015.

21 UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *World Investment Report 2014*. UNCTAD. Available at: <[http://unctad.org/en/PublicationsLibrary/wir2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf)>. Accessed: 25 nov. 2015.

22 STEPHENSON, Sherry. Impact of Mega-Regionals on the Asia-Pacific Region. In: WORLD ECONOMIC FORUM. *Mega-Regional Trade Agreements: game-changers or costly distractions for the World Trading System?* Global Agenda Council on Trade and Foreign Direct Investment, Report 160414, jul. 2014. p. 34.

23 AUSTRALIAN DEPARTMENT OF FOREIGN AFFAIRS AND TRADE. *Regional comprehensive economic partnership negotiations*. DFTA. Available at: <[www.dfat.gov.au/fta/rcep/](http://www.dfat.gov.au/fta/rcep/)>. Accessed: 25 nov. 2015.

24 ASSOCIATION OF SOUTHEAST ASIAN NATIONS. *Guiding principles and objectives for negotiating the regional comprehensive economic partnership*. ASEAN. Available at: <<http://www10.iadb.org/intal/intaledi/PE/CM%202013/11581.pdf>>. Accessed: 25 nov. 2015.

whereby the new agreement must replace those in force. Both concepts aim to harmonize economic integration among countries approaches, but whereas the nesting dynamic preserves regulatory diversity, multilateralization dynamics tend to eliminate it<sup>25</sup>. Countries like Brunei, Malaysia, Singapore, Vietnam, Australia, Japan and New Zealand participate in both TPP and RCEP. Due to this conceptual discrepancy, Dupont alerts for a clash between North American and Chinese interests in the region<sup>26</sup>.

Since the RCEP has been launched in 2012, nine negotiations rounds happened. During this time, eleven working groups and subgroups have been created in order to advance themes such as: investments; trade in goods and services; intellectual property, competition; legal and institutional issues; rules of origin; customs procedures; trade facilitation, sanitary and phytosanitary measures; technical barriers to trade and economic cooperation<sup>27</sup>.

In recent negotiations, governments sought to integrate intellectual property to investments towards better protecting the investors' rights. Delicate issues arise in themes such as: tariff reduction for goods; methodology to liberalize services and investments; the level of investor's protection and the enlargement of the partnership's scope<sup>28</sup>. A successful RCEP would help expand even more the added-value chains in the Southeast Asia by means of integrating India and Asian

members<sup>29</sup>. Nonetheless, the RCEP negotiations will of course take time until it is completed. The table below summarizes the main characteristics of the regional trade mega-agreements in relation to membership, global coverage and purposes.

**Tableau 1 –**

Mega Regional Trade Agreements				
Nome	Members	Global Coverage	Scope	Timeline
Trans-Pacific Partnership (TPP)	Australia, Brunei, Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, United States.	3.6% of world GDP, 25.5% of the world trade (2014)	Comprehensive market access; trade in goods; trade in defense, rules of origin; SPS; TBT; trade in services; investment, intellectual property; government procurement; State-owned Enterprises; environment; labor; capacity building; horizontal issues; including regulatory coherence, regional integration, transparency, and development.	Based on the 2005 Trans-Pacific Strategic Economic Partnership. The United Nations joins in 2008. First round TPP negotiations were held in 2010. On 5, October 2015, participants concluded negotiations. The Parts need now to secure ratification in their respective domestic legislatures before entry into force

25 DUPONT, Cedric. Asian +, RCEP and TPP: a clash of integration concepts. In: BALDWIN, Richard; KAWAI, Mashiro; WIGNARAJA, Ganeshan. *The future of the world trading system: asian perspectives*. London: Center For Economic Policy Research (CEPR), 2013. Available at: <[http://www.voxeu.org/sites/default/files/Future\\_World\\_Trading\\_System.pdf](http://www.voxeu.org/sites/default/files/Future_World_Trading_System.pdf)>. Accessed: 25 nov. 2015.

26 DUPONT, Cedric. Asian +, RCEP and TPP: a clash of integration concepts. In: BALDWIN, Richard; KAWAI, Mashiro; WIGNARAJA, Ganeshan. *The future of the world trading system: asian perspectives*. London: Center For Economic Policy Research (CEPR), 2013. p. 115. Available at: <[http://www.voxeu.org/sites/default/files/Future\\_World\\_Trading\\_System.pdf](http://www.voxeu.org/sites/default/files/Future_World_Trading_System.pdf)>. Accessed: 25 nov. 2015.

27 NEW ZEALAND. Ministry of Foreign Affairs and Trade. *Regional Comprehensive Economic Partnership (RCEP)*. MFAT. Available at: <<http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/RCEP/>>. Accessed: 25 nov. 2015.

28 XIAO, Yifei. *Competitive Mega-regional Trade Agreements: Regional Comprehensive Economic Partnership (RCEP) vs. Trans-Pacific Partnership (TPP)*. College Undergraduate Research Electronic Journal – CUREJ. University of Pennsylvania, 2015. Available at: <<http://repository.upenn.edu/cgi/viewcontent.cgi?article=1227&context=curej>>. Accessed: 25 nov. 2015.

29 STEPHENSON, Sherry. Impact of Mega-Regionals on the Asia-Pacific Region. In: WORLD ECONOMIC FORUM. *Mega-Regional Trade Agreements: game-changers or costly distractions for the World Trading System?* Global Agenda Council on Trade and Foreign Direct Investment, Report 160414, jul. 2014. p. 35.

Trans-atlantic Trade and Investment Partnership (TTIP)	United States and European Union	30% global merchandise trade, 40% world trade in services; nearly half of global GDP (2013)	Market access; services, public procurement, rules of origin, regulatory coherence, standards, mutual recognition, TBTs, sustainable development; energy; intellectual property, geographical indications; completion; investment.	Negotiations launched in July 2013. Initially aimed for completion by end 2014.
Regional Comprehensive Economic Partnership (RCEP)	Australia, Brunei, China, Myanmar, Cambodia, India, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, Vietnam, Japan, South Korea and New Zealand.	Almost half the world population, 30% of global GDP, over 25% world exports.	Goods, trade in services, investment, economic and technical cooperation, intellectual property, competition and dispute settlement.	Launched in November 2012. Negotiations ongoing.

Source: BIRKBECK, Carolyn; BOTWRIGHT, Kimberly<sup>30</sup>

## 6. GOVERNANCE IN THE WORLD TRADE

A new way of governing world trade appears to be emerging. The WTO creation in 1994 signaled a process of centralization of world trading system that started with the GATT's adoption in 1947. The system experienced a gradual increase in its complexity that culminated with the concentration of the main international trade rules under the WTO framework. However, over the last twenty years that trend has moved at the oppo-

site direction. Initially, an extraordinary expansion of preferential trade agreements and later an uncommon negotiation of mega-agreements have reconfigured the governance in world trade. Nowadays, the current decentralization of the world trading system sounds to exhibit some of the following features:

1. A multi-level governance. Three levels seem outright visible. In the multilateral field, WTO is the major guardian of economic liberalization rules approved in several trade rounds. It successfully shaped the legal framework for the international trade in the 90's. Since then, its strength has been progressively undermined. This legacy rendered obsolete insofar as a gulf has been formed between a plethora of regulatory demands, notably from developed and developing countries, and the capacity of the WTO system to respond them. That profound paralysis lies in factors such as: the large amount of WTO members, the prevailing mechanism of single understanding that requires an overall consensus as a condition for a trade round to finish and the rise of short-term interest to the detriment of long-term goals. In the aftermath of second World War, for example, the new international economic order founded on the US attitude in emphasizing long-term interests. In the late 40's, the US consented protectionism in Europe prior to consolidation of a full liberal order, as the European Payment Union displays. The WTO function tends to be limited to what has been already accorded. Trade rounds with broad agendas seem unlikely to happen in the near future. The Doha Round was perhaps the last gasp of a cycle that experienced an ever greater sophistication.

The second layer of trade governance finds expression in the so-called mega-agreements which gather developed and developing countries and concentrate the most relevant share of the world economy. They are shaped to institute new regulatory spaces that harmonize rules at a threshold hitherto unknown. The third level of governance encompasses a multitude of preferential trade agreements, of a lesser scale, that may be of distinct size and varied degrees of normative deepness.

2. Centralization and decentralization. As regards world trade, I discern low-intensity and high-intensity regulation. A low-intensity regulation addresses traditional topics of international trade, albeit financial positive results are evident. A high-intensity regulation focuses on matters not yet regulated at multilateral level or deepened in an unprecedented way those already regulated. The World Trade Organization has become the venue of low-intensity regulation whilst PTAs and mega-agreements enact high-intensity regulation.

30 BIRKBECK, Carolyn; BOTWRIGHT, Kimberly. *The future of the global trade and investment architecture: pursuing sustainable development in the global economy: overview of issues, challenges and debates.* e15initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015. Available at: <<http://e15initiative.org/publications/the-future-of-the-global-trade-and-investment-architecture/>> Accessed: 25 nov. 2015. p. 25.

Centralization and decentralization coexist at different speed and eventually play a complementary role. The DSB is required to settle disputes that may arise between states that are Parties of diverse agreements.

3. Fragmentation. On the contrary of the supposed coherence that should be governing the world trade system at the end of the Uruguay Round, the situation now is much more diversified. A plurality of rules endowed with no coincidental domains of spatial validity and emanated from different governments depicts an intricate portrait where disparities and normative collision coexist without a superior instance to settle disputes. A conflict between a decision made by the WTO Body and a mechanism for settling disputes instituted by a preferential trade agreement or mega-agreement will not ensure prevalence of the former as observers were used to believe. The WTO itself has witnessed a fragmentation while regulatory coherence is being negotiated at the level of mega-agreements. Not always conflicts between primary and secondary norms can take place. Sometimes, rules may coexist through a mutual recognition. In the realm of Trans-Atlantic Partnership the mutual recognition of technical rules is on the agenda.
4. The clash between an instrumental and a solidaristic logic. Multinational enterprises unsatisfied with meager advances in the liberalization process after the Uruguay Round put pressure on national governments to negotiate the constitution of far-flung markets for their goods and services. PTAs and mega-agreements somewhat reflect that plea. Even though the instrumental logic has been the dominant one, the solidaristic logic manifests itself in the claim for environmental and labor standards. The former is top-down while the latter is bottom-up opened to a grassroots social participation.
5. A power imbalance. In the vast majority of cases, PTAs and mega-agreements join developed and developing countries. It is usual that the most powerful export its rules to a broader context in a way that the other states parties will incorporate them.
6. Inequality among insiders and outsiders. Developing and least developed countries which do not participate in PTAs and mega-agreements will have their difficulties increased when they try to export to nations where tariff and non-tariff barriers have been reduced drastically or wholly eliminated.
7. An exacerbation of political power. Even though no one doubts that only a few countries actually took part in the rule making-process in the WTO, this International Organization partially neutralized political power of

developed states through the single-undertaking principle. A trade round sole finishes by means of a general consent of the WTO members. In smaller groups of countries, like PTAs and some mega-agreements, huge discrepancies in political power operate on behalf of developed states. The Trans-Atlantic Trade and Investment Partnership is the most prominent exception.

8. The strengthening of global value chains. PTAs and mega-agreements encourage and are encouraged by global value chains. In a world where production is increasingly deterritorialised, goods and services depend on a close cooperation of economic agents located in different countries.

## 7. FINAL CONSIDERATIONS

This article intends to show the change in governance of world trade. My assumption is that it is of a structural nature and has far-reaching consequences. It affects, at the same time, international law and politics on a world scale. I deemed fundamental not only to expose the main traits of the TTIP and RCEP ongoing negotiations as well as the TPP's conclusion, but also to draw remarks on this process that is powerfully shifting the system originally crafted more than six decades ago.

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