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Mega-regional Trade Agreements and South Africa's Trade Strategy: Implications for the Tripartite Free Trade Area Negotiations

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ABSTRACT

In a world where the World Trade Organization (WTO) has lost much of its momentum, attention has been focused on regional and bilateral trade agreements. Two of these agreements are considered to be 'mega-regional' whereby groupings of the largest developed economies make declarations of co-operation and possible integration. They are the Trans-Pacific Partnership (TPP) between the US and many of the Asian-Pacific countries, and the Transatlantic Trade and Investment Partnership (TTIP) between the US and the European Union (EU). At the same time, South Africa is evaluating many of its unilateral and regional policies in the context of the Tripartite Free Trade Area (TFTA) for Eastern and Southern Africa.

This paper assesses the mega regionals and their implications for South Africa. The difficulty is that these mega regionals are engaged in negotiations and little real information on this negotiation process, let alone a possible outcome, is available. As a result, assessing the final implications, even assuming that there will be agreed final negotiated settlements, involves a great deal of speculation. We do know, however, that the eventual agreements will be 'WTO-plus' in that they will be comprehensive in scope and go beyond the agreements reached in the multilateral WTO global benchmarks for trade and trade-related liberalisation. This will reinforce South Africa's realisation that it must similarly move forward with its unilateral and regional policies in order to keep abreast of international developments and best practices.

In this paper the main focus is on the TPP, as it is the most advanced both in its negotiations and in the economic and development status diversity of its members. Its potential outcome also holds the most interest and important lessons for South Africa and the TFTA.

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ABBREVIATIONS AND ACRONYMS

AfDB	African Development Bank
AGOA	African Growth and Opportunity Act
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
BRICS	Brazil, Russia, India, China, South Africa
CITES	Convention on International Trade in Endangered Species
CTE	Committee on Trade and Environment
EAC	East African Community
EPA	Economic Partnership Agreement
EU	European Union
FDI	foreign direct investment
FTA	free trade agreement
GATS	General Agreement on Trade and Services
GDP	gross domestic product
GIs	geographic indications
GPA	government procurement agreement
GSP	Generalised System of Preferences
IP	intellectual property
MFN	most favoured nation
NTB	non-tariff barriers
OECD	Organisation for Economic Co-operation and Development
PTA	preferential trade agreement
RoO	rules of origin
SACU	Southern African Customs Union
SADC	Southern African Development Community
SPS	sanitary and phytosanitary standards
SOEs	state-owned enterprises
TBT	technical barrier to trade
TDCA	Trade, Development and Co-operation Agreement
TF	trade facilitation
TFTA	Tripartite Free Trade Area
tralac	Trade Law Centre
TPP	Trans-Pacific Partnership
TRIPs	trade-related aspects of intellectual property
TTIP	Transatlantic Trade and Investment Partnership
USTR	US Trade Representative
WTO	World Trade Organization

INTRODUCTION

This paper draws heavily on the 2014 report by Draper *et al.* on mega-regional trade agreements.¹ The mandate for this current paper has been to use that paper as a basis from which to assess the implications of the Trans-Pacific Partnership (TPP), in particular for South Africa and the region, against the background of the Tripartite Free Trade Area (TFTA) negotiations. We accordingly use Draper *et al.*² to provide a starting point and constantly quote segments and concepts from that report for this analysis.

Currently, there are two major initiatives or 'mega regionals' in play. These are the Transatlantic Trade and Investment Partnership (TTIP) between the US and the European Union (EU), and the TPP between the US and a number of American and Asian states³. In addition to encompassing a significant proportion of global trade, these agreements aim to promote deep integration between members, focusing not only on substantial and near-complete tariff liberalisation but also on significantly reducing non-tariff barriers and providing harmonised and consistent rules for a range of issues. These issues include services, intellectual property regulations and government procurement. In essence, they aim to be comprehensive, 'new generation' trade agreements. Within the negotiating process there is potentially enough manoeuvring room for the larger parties to reach conformity on their views and domestic interests in what Petrie and Plummer⁴ call 'the battle of templates'.

While these initiatives are a progression of the global liberalisation and integration that has been occurring for a long time,⁵ they could also reshape the landscape. This will make it even more difficult for others to advance their trade and economic regimes through regional integration in a world increasingly altered by transnational investment, production and marketing.

To counter this trend there is, of course, the almost-moribund World Trade Organization (WTO) and a proliferation of bilateral and regional trade initiatives either extant or being negotiated. Foremost among the latter is the so-called Eastern and Southern African TFTA, an amalgam that includes many poor and sometimes not well-governed African states. Dominating this amalgam is the industrial might of South Africa, a mixed economy that has many aspects of a developed country in terms of infrastructure and industrial capacity. A fundamental question for South African policymakers is how to position the country in an environment where the TTIP and TPP have become serious possibilities in the same period in which the TFTA has become a realistic possibility, albeit in a somewhat watered-down form from what may have been envisaged originally. How far can South Africa take its 'battle of templates' regionally and how much will it have to compromise in forthcoming negotiations?

The crucial question then revolves around whether South Africa, and other negotiating parties in the TFTA, needs to re-evaluate and reposition TFTA priorities. In particular:

- Assuming the two mega regionals are successful, should TFTA member states recalibrate their overall approach to the negotiations?
- If so, should this evolve in the direction of deeper, regulatory integration?
- If so, what should be the key negotiating issues on such an agenda?
- If not, then why not?

This paper will address these issues. Mwanza⁶ placed the African problem in perspective when reporting from the WTO Summit in Bali in late 2013. He showed that Africa has problems in ensuring that growth is inclusive and sustainable, despite its recording impressive statistics that include having six out of the ten fastest growing economies in the world. Africa's population is expected to double to 2 billion by 2050, when it will be home to a quarter of the global workforce. This could represent either an opportunity or a threat, and the continent's top priorities must be job creation and ensuring that growth is inclusive. This will require, *inter alia*, increasing intra-African trade from the currently low rates through infrastructural development; investment in education; macroeconomic stability; political stability; and good governance – all to provide a platform for enabling private sector growth. Crucially, the natural resource sector must be managed in such a manner that it becomes an engine for growth and development. Mwanza is essentially advocating the well-known growth strategies that have driven many of the Asian economies to middle-income status or above over the last few decades. Will Africa accept the recipe?

Most of this paper will focus on the TPP rather than the TTIP. There are several reasons for this, the first being that the TPP is actively being negotiated while the TTIP is at a much more formative stage. Secondly, and more importantly, the TPP contains a cross-section of countries, from economically powerful countries such as the US, Japan, Canada and Australia, to Mexico and Malaysia (both emerging industrial countries) to New Zealand, Singapore and Chile (the group of smaller to medium-sized, relatively rich countries that champion regional and bilateral free trade agreements, or FTAs). Peru and Vietnam, two less developed countries, are also taking part, along with the small but oil-rich state of Brunei (the possible outlier).

This means the TPP is not a negotiation between equals. Large differences will have to be negotiated – differences that will inevitably lead to compromises and a less-than-complete outcome. This disparate mix has much in common with the TFTA, despite the fact that the TFTA consists of countries from only one continent (Africa), and there may be some pointers emerging from the TPP that will hold lessons for the TFTA. In particular, the US has traditionally used its economic might when pursuing trade agreements, which has been the case even with strong economies such as Australia. The TPP seems to be shaping differently in so far as the US now finds that this no longer automatically translates into its favoured outcome. Does this suggest a parallel situation within the TFTA, whereby South Africa may need to become more yielding in order to accommodate partner views? Effectively handling asymmetry among negotiating partners may be the first lesson to be learnt from the mega regionals.

Conversely, the TTIP is a negotiation between highly developed, rich equals with mostly impeccable infrastructural and governance credentials, albeit equals who are both used to being the top dog on their respective playgrounds. The EU is experienced at administering the accession process whereby (usually) less-developed member states are smoothly integrated on the incumbent's terms, while the US tends to view its trade agreement negotiations as a process whereby the partner is given the opportunity to sign the US template.

Merchandise goods access is the usual preoccupation of an FTA, but neither of these mega regionals will have that focus, with the possible exception being the WTO deal-stopper of agricultural supports and consequential access. Merchandise goods access

outcomes from the mega regionals will similarly be unlikely to have much direct effect on South Africa or Africa. This is because most African countries have tariff concessional access to both the US and the EU markets for merchandise goods under either the Trade, Development and Co-operation Agreement (TDCA) or the Economic Partnership Agreements (EPAs) / Generalised System of Preferences (GSP) for South Africa and the Southern African Customs Union (SACU) for the EU, and virtually all of Africa under the African Growth and Opportunity Act (AGOA) for the US (albeit with less under AGOA for South Africa). There will, however, inevitably be preference erosion undermining these concessions.

This in turn redirects the focus of this paper to the other components of the TTIP and the TPP. Here the baseline has to be the WTO, as any agreement has to be WTO-plus.⁷ Several of the negotiating components fall under the jurisdiction of the WTO, while others such as the so-called Singapore and 'trade-and' issues have remained outside the WTO. However, both see the US and EU knocking on the side door through bilateral and regional agreements.⁸ This paper will examine these components sequentially, with much of the attention on the TPP.

Since these mega regionals are about significantly more than trade access, this report will focus primarily on what may be referred to as the flanking policies of trade and economic institutions and governance infrastructure. With the exception of Peru and possibly Vietnam, all prospective members of mega regionals have very strong institutional frameworks. Unfortunately, except for South Africa with its strong frameworks, the TFTA must be seen against a background of institutionally weak states with several of failed or near-failed status. Questionable governance and poor infrastructure will severely limit the ambitions of the TFTA. It would seem therefore that the fundamental issue is not the impact of the mega regionals on African institutional frameworks, but rather the fact that African countries must develop these institutional frameworks and flanking policies themselves. Will the mega regionals make this harder for South Africa and the continent? Standing still is not an option.

Against this background there are two other (quasi-)mega regionals. The first is the Asia-Pacific Economic Cooperation (APEC), while the second is a quasi-mega-regional *country* in the sense that China is almost large enough in its own right to qualify in this category. Associated with China's dramatic economic growth in recent years are its equally dramatic strides in regulatory reforms that tend to go unnoticed, with the causality of this growth and regulatory reforms pointing both ways. China will loom as a backdrop to these negotiations. Its recent economic growth will soon project it into a developed state status, and its absolute GDP is already challenging that of the US. China is the dragon in the negotiating room, as key participants recognise that they must adjust to the Chinese challenge.

In both configuration and ambition APEC is similar to the TPP but with China, Russia, Taiwan (also known as Chinese Taipei) and several Association of Southeast Asian Nations (ASEAN) members, although both Korea and Taiwan have indicated their willingness join the TPP process. The trade liberalisation agenda of APEC is based on the Bogor Goals of free and open trade and investment for developed members by 2010 and for developing members by 2020. The APEC Secretariat⁹ reported that the average Most Favoured Nation (MFN)-applied tariff across the APEC region fell from 16.9% in 1989 to 6.6% in 2008, with average tariffs at 3.9% for the five industrialised economies and 6.4% for the eight so-called volunteering economies. This compares with the WTO world average of

10.4% in 2008. However, it may be misleading to credit much of this and other purported reforms to APEC *per se*, as factors such as the adoption of many regional FTAs and the overall impact of both unilateral and WTO-instigated reforms in China play a large part.

The focus of the TPP process is ‘regulatory coherence’, a cause pushed by both APEC and the Organisation for Economic Co-operation and Development (OECD). This regulatory coherence relates to co-ordinating domestic inside-the-border regulations and processes with international trade (and investment) rules beyond the border. While it is being negotiated as a separate chapter its influence is pervasive, especially in areas such as sanitary and phytosanitary standards (SPS) and technical barriers to trade (TBT). All TPP members signed on to the output from the APEC leaders’ meeting¹⁰ in Honolulu 2011, which affirms that they agree to work to

improve regulatory practices, eliminate unnecessary barriers, reduce regional divergence in standards, promote transparency, conduct ... regulatory processes in a more trade-facilitative manner, eliminate redundancies in testing and certification, and promote cooperation on specific regulatory issues.

Negotiators are working on those directives, but have already missed the deadline of the beginning of 2014 for agreement. Meanwhile, many see regulatory coherence as a desirable outcome as long as others adhere to their regulations. This leads to a lowest common denominator problem that would be acute in the TFTA.

Thus, while critics may suggest that APEC has succeeded in little other than providing photo opportunities for leaders who selectively attend the annual summits, there is a symbiotic relationship between APEC and the TPP. There has been regional progress in trade and investment liberalisation and facilitation, and it may well be that this progress has been a determining factor in helping to move trade facilitation firmly onto an otherwise rather bare WTO agenda. If so, it provides an example of how a mega-regional success can translate into wider global action. APEC is about consensus and never about negotiation. The TPP, with almost all its members also members of APEC (except Chile and Peru), is about negotiations and a binding outcome. Will the rigorous negotiation process result in a more meaningful regional outcome?

Interestingly, in assessing APEC’s progress a Price Waterhouse Coopers report¹¹ notes that ‘most countries in the Asia–Pacific actually boast much stronger economic fundamentals and significantly improved supervision of their financial institutions’. It states that many of these fundamentals were developed in response to the 1997–98 Asian financial crisis, which prompted many countries to build their foreign exchange reserves, deepen regional economic integration and strengthen government balance sheets. Interestingly, the Asian countries responded to their 1997–98 crisis, whereas only some South American countries did so following their own financial crisis. It remains to be seen how the recalcitrant EU members will emerge from their economic debacle.

OVERALL ECONOMIC WELFARE IMPACT

Computer trade modelling suggests that the effects of tariff liberalisation from the TPP may be low as a result of both the declining regional unilateral tariffs and the proliferation

of bilateral and regional arrangements. Cheong¹² finds that the gains for member states from TPP goods trade liberalisation are likely to be negligible in most cases. All countries, with the exception of the US, Chile and Peru, are likely to experience a marginal increase in their gross domestic product (GDP), but this is always less than 1% (New Zealand has the highest increase at 0.97% and Canada the lowest at 0.02%). The US is unlikely to experience any change, while Chile and Peru have minor GDP declines of 0.13% and 0.04% respectively. As with the Trade Law Centre's (tralac) modelling research on the TFTA, the Peterson Institute for International Economics¹³ suggests that when the impact of reducing non-tariff measures is taken into account the gains are somewhat larger, with overall real GDP increases in 2025 of 0.75% for members over and above what it would otherwise have been. This ranges from a 0.4% gain for the US to a (perhaps unrealistic) 13.6% gain for Vietnam. Overall exports increase significantly, from 2.5% for Chile (which is closely integrated through a series of regional FTAs) to 37% for Vietnam, which is not so well integrated. Vietnam's gains are expected to come from the clothing and textile sectors; this sounds the largest warning bell for TFTA members. These studies both suggest that the overall impact of the TPP on non-member states will be small. Cheong suggests a 0.07% reduction in the rest of the world's GDP, mainly as a result of trade diversion, while the Peterson Institute, which includes the impact of non-tariff measures, suggests a reduction of exactly the same magnitude.¹⁴

Similarly, a series of studies of the TTIP has found that the reduction of non-tariff measures and regulatory differences will produce significantly more economic gains for both the US and the EU than a reduction in traditional tariff duties would. This is supported by tralac's modelling, which shows that an assumed reduction of two percentage points in TFTA tariffs to proxy non-tariff adjustments is more important than simply tariff reductions. This is supported by Willenbockel¹⁵ in a 2013 paper that shows strong welfare gains to all TFTA partners from the elimination of intra-TFTA tariffs plus real transport and infrastructural transaction costs on intra-TFTA trade flows, in contrast to the tariff-only scenario, which shows some losses. The TFTA region has control over its own transport and infrastructural costs; it does not need an FTA to realise most of these gains.

While modelling an FTA between the US and the EU, tralac research by Sandrey *et al.*¹⁶ found a welfare loss of \$126 million for South Africa and losses of \$4 million and \$10 million respectively for Botswana and the rest of SACU. While there are gains to the EU and US of around \$3 billion and \$3.6 billion respectively, the overall outcome is a large welfare loss to the world of about \$9 billion. Assuming a Doha agreement based on the WTO proposal of the time, these large losses are mitigated for all the losers, while the gains to the two participants (and to the EU in particular) are reduced. As reported at the time, 'this post-Doha scenario outcome provides a salutary lesson if one was ever needed as to why it is important for the world to obtain an outcome from Doha rather than sit back and let the EU and US stitch up a deal'.¹⁷ Globally, about two-thirds of the welfare loss of \$9 billion is attributable to displacement losses from EU tariff reductions for US imports.

In the same publication tralac also reports on a China/EU FTA. This shows that for South Africa the welfare loss at \$56 million is less than half of that from the US–EU FTA. There are large gains to China from this FTA, and gains to the EU that are nearly twice those of the US–EU FTA results. Globally, the results for the world are strongly welfare enhancing, in direct contrast to the large welfare losses from the US–EU FTA. Similarly,

the gains to China (but not the EU) were reduced by more than half following the Doha outcome scenario. Again, all the African countries are better off following the potential Doha outcome.

The Singapore issues

In the WTO's first decade (from 1994), the so-called Singapore issues of investment, competition, government procurement and trade facilitation emerged. These Singapore issues were a priority for the EU in particular, while developing countries consistently opposed their inclusion in the negotiating agenda, arguing that their subject and scope were unclear and that they lacked the technical capacity to implement them.¹⁸

Following the WTO Cancún meetings, the Singapore issues became 'a bridge too far' for the WTO. Investment, competition policy and government procurement were seen as areas where developed countries were imposing their standards on developing countries in a one-way manner, since developing countries cannot be expected to have any influence on developed country markets. In this regard, only the issue of trade facilitation found common ground: developing members saw it as an opportunity to leverage aid for a chronic internal domestic problem, and developed members regarded reduced transaction costs as enabling their exporters to gain an advantage in these markets. However, are the EU and the US in particular attempting to reintroduce the Singapore issues 'through the back door' of regional trade agreements, where they are perceived to have a more asymmetrical negotiating position than in the WTO?

Several aspects of these mega regionals must be viewed in the context of an evolution of the Singapore issues, and we will draw on Sandrey at times to link these themes.

THE TPP

Fergusson *et al.*¹⁹ report that the TPP is currently being negotiated by the US and Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam, with the possibility of Korea and Taiwan (Chinese Taipei) joining at some stage. These negotiations are taking place across 29 chapters and as a single undertaking. There are reportedly about 20 negotiating groups that are focusing on achieving different legal texts and negotiating outcomes on, among others, 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 (RoO), SPS, TBTs, telecommunications, temporary entry, textiles and apparel, and trade remedies. This potentially lifts the bar on regional agreements, with emphasis on new or latent areas such as regulatory coherence, state-owned enterprises, government procurement, competition, investment, e-commerce, environment and labour.

To provide a framework this paper will assess the specific areas of the TPP against its component parts to address the questions raised above. We do, of course, recognise the interactions between these as being somewhat arbitrary categories, but regard them as the best framework from which to assess implications. These areas relate to the working groups that have been established in:

- market access;
- TBTs;
- SPS;
- RoO;
- customs co-operation;
- investment;
- services;
- non-conforming measures;
- financial services;
- telecommunications;
- e-commerce;
- business mobility;
- government procurement;
- competition;
- intellectual property;
- labour;
- environment;
- capacity building;
- trade remedies; and
- legal and institutional.

The TPP negotiating template for all aspects of the agreement is for all countries (regardless of whether or not they currently have bilateral agreements) to collectively negotiate as a whole. Conversely, the approach that is being adopted in the TFTA is that only countries that do not have bilateral agreements negotiate on market access. Thus, the TPP is more akin to the WTO process whereby nothing is agreed until everything is agreed.

Another important factor in trade agreements, whether they are bilateral, regional or multilateral, is the extent to which participants are able to use unilateral policies that are challengeable under the terms of their agreements. This is known as 'policy space', and can have far-reaching consequences as governments are either locked out of some options or obliged to conform in other areas. It is applicable to the more common areas of tariff and trade access regimes, but it applies equally across the whole suite of government policies and often also across business practices outlined in the TPP working parties. Arguably, reducing some of the policy space in many African countries would benefit their welfare.

Market access

Table 1, showing the average tariffs for agricultural and non-agricultural imports, gives some pointers as to how the battle lines for market access will be drawn in the TPP in particular. In general, non-agricultural tariffs are lower – often significantly so. Many of the agricultural tariffs understate the true access picture, as quantitative restrictions apply to several key trade lines in countries/configurations such as the EU, US, Canada and Japan. This has proved to be an intractable problem in the WTO and the key combatants from the WTO are involved in the mega-regional negotiations. Will the outcome be WTO-plus, and, if so, will that foreshadow a movement 'back home' at the WTO?

Table 1: Average applied tariffs for agricultural and non-agricultural imports, 2012

Economy	Agriculture (%)	Non-agriculture (%)
EU	13.9	4.0
US	5.0	3.3
Australia	1.4	2.1
New Zealand	1.4	3.1
Canada	18.1	2.5
Japan	23.3	2.6
Vietnam	17.0	8.7
Chile	6.0	6.0
Peru	4.1	3.6
Malaysia	10.8	5.8
Singapore	0.2	0.0
Brunei	0.1	2.9
Mexico	21.4	6.3

Source: WTO (World Trade Organization), Trade, www.wto.org

Trade liberalisation implications

By definition a preferential trade agreement (PTA) will result in at least some implications for those countries outside the agreement. This can come about in two ways, and the first is classic trade diversion in favour of PTA members when all sources were originally competing on the same terms. There will be increased bilateral and regional trade within an agreement, but often much of this may just be trade diversion away from other, non-preference partners. This can be negative in the sense that it has resulted from an artificial advantage under the PTA as one is not buying from the world's lowest cost supplier, a problem mitigated under a WTO agreement where all trading members of the WTO are treated equally. Direct trade diversion is not likely to be a major part of the TFTA merchandise goods shift from mega-regional agreements either, as the TFTA members, with exclusions mostly relating to South Africa, are operating under concessional and often duty-free access conditions to many of the mega-regional markets. Those exclusions generally focus on the agricultural exclusions for the TDCA, the phased and otherwise restricted sugar access under the proposed EPAs for the sugar-producing states in Africa, and the exclusion for South African access into the US.

The second is the more problematical preference erosion. This is simply the reverse side of trade diversion. Now participants in the new TPP will have the opportunity to turn back trade diversion against them in the earlier but equally distorted unequal trading field. There will be some examples of this in the agricultural product sector, with competition to South Africa for fruit exports to the EU being one. Preference erosion will be especially relevant in the clothing and textile sectors, as clothing is almost the only manufactured export from sub-Saharan Africa (excluding South Africa) and virtually the only market

for these products is the US, under significant AGOA preferences.²⁰ There are quotas for AGOA imports into the US, but Naumann²¹ reports that since the quota utilisation is so low this is not a barrier to trade.

How much of an issue will trade diversion be for South Africa and the other TFTA members? This depends on a number of factors, including how much the preferential access is utilised and the extent to which members and non-members compete across the same product lines. However, Africa's exports competition is low. Draper *et al.* cite Rollo *et al.* as reporting 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 LIC (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'.²² Also, apart from South Africa, the TFTA members mainly export fuels, minerals and other natural resources, most of which operate in an MFN tariff-free trading environment, and therefore concessions are irrelevant. This is rather a simplistic analysis, however, as many African states are making (belated) efforts to industrialise, and losing preferences accentuates the difficulty of competing against Asian markets in particular, some of which are in the TPP. Conversely, should the mega regionals spur growth in their economies (possibly at some cost to non-members) the overall impact should be globally welfare enhancing. This will, in turn, increase the demand for African resources, albeit with the result of locking Africa even more into resource exports/exploitation.

Can the mega regionals be 'WTO-plus' and enhance mega-regional members' access to agriculture's sensitive products? There are critical benchmark agricultural products for the TPP negotiations. These are rice (mainly to Japan), dairy (Canada), sugar (US) and beef. Raw cotton is not an issue for TPP exporters, so Africa (more specifically, Western Africa) is unlikely to obtain direct pointers from the TPP process. The implications for South Africa focus on sugar to both the EU and the US,²³ and this will in turn have second-round effects across the TFTA region with other major sugar producers such as Swaziland and Mozambique. In general, the TFTA agricultural exporters are not vitally interested in the other sensitive products (rice, dairy, eggs and some meats), but changes to agricultural market access in the US and Japan in particular will alter the TFTA export picture with further implications stemming from agricultural access negotiations in the TTIP. Will this provide impetus for the WTO process?

Related to market access in agriculture is the whole issue of agricultural subsidies, an associated area where the WTO, despite curbing export subsidies, has had limited success. A fracturing of resolve on agricultural subsidies through any mega-regional outcome will have repercussions for the WTO and could alter the access conditions for the affected African agricultural exporters (including sugar exporters) – particularly in the EU, where the African export focus is directed.

It is, however, more likely that market access changes will come from second-round effects from the related TBT measures such as RoO and SPS. The one area where trade diversion will be acute is the clothing and textile sector; the only manufacturing sector where non-South African Africa has some industrial capacity. Here the key is the final TPP outcome for Vietnam and the clothing RoO, and the discussion on this sector will be left to the RoO section.

The conclusions and implications from the merchandise goods perspective is that the mega regionals will indeed have some trade displacement effects as preference

erosion takes place. These could be severe in the US clothing and textile market if the RoO outcomes prove to be problematical for the TFTA region. There will be some compensatory gains as overall global welfare and hence global exports are enhanced, but this has a potentially negative aspect of further locking Africa into resources trade. Clearly, global welfare is higher under trading regimes where trade diversion is minimised, and that means a WTO outcome. It would be good news if the mega regionals should provide a spark to revive the Doha Round. Meanwhile, the region must double its efforts to finalise the EPA and the regional TFTA negotiations.

Rules of Origin

Abreu²⁴ analyses 192 regional trade agreements and concludes that while the *raison d'être* of preferential RoO is the avoidance of trade deflection, when these agreements are put in practice this objective is diluted. Preferential RoO thus are increasingly becoming an economic, political and trade instrument. There is a tendency to design stricter RoO, but in practice economic operators find it difficult to comply with and effectively implement the rules. This can lead to the phenomenon of 'regional trade agreement shopping' whereby a manufacturer looks for RoO compliance criteria instead of least-cost suppliers when locating globally. The author cites a damning 2009 report from the Inter-American Development Bank:²⁵

However, RoO are widely considered 'hidden protectionism', an obscure and opaque trade policy instrument that can work to offset the benefits of tariff liberalization. RoO in effect set up walls around RTA members that prevent them from using certain inputs in each final product. This limits the access of member country producers to inputs from the rest of the world, as well as extraregional input providers' sales to the RTA region. The more restrictive are the rules of origin, the higher are the walls they create, and the more difficult efficient allocation of resources becomes.

While many of the US FTAs are based on a yarn-forward RoO for textile and apparel products, they also include cut-and-sew RoO for some products. Cut and sew provides the maximum flexibility for sourcing as these garments may be made from fabric of any origin, and there is no requirement for the origin of the yarn used to make that fabric. The cutting or knitting-to-shape and assembly of all components must occur in the FTA country (or countries). Quantities are unlimited, and products that qualify do not require special paperwork at the time of entry. All US FTAs have some products that qualify for cut-and-sew RoO.

The yarn-forward rule means that all products in a garment from the yarn stage forward must be made in one of the countries that are party to the agreement. This means that the benefits of the agreement accrue to regional producers rather than outside players such as China. A disagreement over the yarn-forward RoO has generated intensive lobbying in the US. Although it may initially have provided some limited assistance for the exportation of US yarns and fabric to the region in exchange for the duty-free entry of the final finished apparel, it has more likely restricted trade through its cumbersome rules. While some vertical supply chains may be able to use yarn forward in limited circumstances, taking advantage of narrow product lines that use dedicated suppliers,

the vast majority of companies find the rules too burdensome and restrictive. As a result, many opt to pay tariffs while maintaining access to the most competitive textile supplies globally. The argument is that the restrictive yarn-forward RoO advocated by the US may even entrench trade with China, as imports from China do not incur the costs of meeting the yarn-forward rule and manufacturers can operate their entire supply chains more efficiently. Neither the US nor the EU is likely to be a beneficiary under any RoO scenario, as they mostly produce elsewhere while maintaining strong retail outlets, brand names and design houses domestically.

Draper *et al.*²⁶ suggest that the US is coming under intense pressure from Vietnam to abandon its long-held yarn-forward rule for textiles and apparel in support of the cut and sew. This would alter the access conditions to the US textiles market and may change international supply chains across the textiles and apparel industries. This is in spite of the fact that, in general, South-East Asian countries such as Vietnam have an advantage in being well integrated into these supply chains whereas African countries do not. The opposition comes from the remnants of the domestic US textile and footwear manufacturers and the politically powerful US cotton growers. Will the latter lose some of their power, and will this 1) be reflected in RoO changes and 2) for example, combine with the liberalisation of dairy in Canada and rice in Japan to form a deal breaker that revitalises the moribund WTO agricultural talks? Meanwhile, Vietnam is a major competitor of African clothing exports to the US. Data from the International Trade Centre (ITC)²⁷ shows that during 2012 the US imported some \$7.3 billion in the clothing trade lines HS 61 and HS 62 from Vietnam and a significantly lower \$2 billion from Africa as a whole (with an even split between sub-Saharan Africa and North Africa, with both exporting around \$800 million's worth to the US).

RoO in the Southern African region are complex, as the tralac publications by Naumann²⁸ attest. In general, the Southern African Development Community (SADC) RoO require double transformation, whereby garments must be made from regionally produced textiles while fabric must be made from regionally produced yarns, which must be made from uncarded and uncombed fibre or from chemical products. The SADC RoO may be designed to protect South African interests²⁹ rather than to promote intra-SADC trade, and as such it will do nothing to promote the global competitiveness of the South African or SADC's clothing sectors. Conversely, the AGOA RoO require that most garments enter the US under the fabric-forward rule or, more importantly, from the concessions available for fabric made in a less developed country.

Finally, there seems to be some movement in the EU RoO for the region's trade in this sector, although single-stage RoO in all African EPAs seem to have been settled in the regional EPA negotiations. Naumann reports that the EU has recently changed from requiring GSP-eligible exporters to fulfil a (loosely defined) two-stage transformation to only a single transformation requirement. This seems to harmonise the EU RoO with other major markets.

Whatever the RoO outcomes from the TPP are, they will have major implications for the TFTA members.³⁰ The RoO measure is a complicated nightmare for regional exporters. When a problem arises it is often useful to go back to first principles and examine the issue from a fresh perspective. This is the case with the RoO. While everyone can agree that the blatant re-exporting of goods 'through the back door' is unacceptable, the differing RoOs in themselves become an increasing barrier to trade that negate the very objective

of a supposedly 'free trade area'. Generally, as tariff barriers come down, the RoO become less relevant. This is especially true in regions such as Africa, where the costs associated with importing from China, for example, and re-exporting to preferential markets incur regionally excessive transaction costs resulting from uncompetitive infrastructure, and therefore negate trans-ship profits.

RoO are a minor problem in primary agriculture³¹ but could be a greater one in processed agriculture. RoO are mainly associated with clothing and textiles, as the efforts to liberalise trade and provide concessions to developing countries are negated by contorted RoOs supporting protectionism. In essence, RoO can be viewed as a mechanism to keep China out of the market. South Africa is acutely aware that quotas against China in this sector do not work, and that non-effective applied tariffs that run up against the bound tariffs only point out how inefficient the domestic sector is. For a country such as New Zealand, which has implemented a comprehensive FTA with China that includes duty- and quota-free access for clothing, RoO becomes irrelevant to virtually all trade. The same applies to Singapore with its zero tariffs and Chile with its standard 6% tariffs.

A change in tariff classification should be a very simple principle, but all non-originating materials must undergo the required change. A very low percentage of the materials may not undergo the tariff change, thus preventing the goods from originating. Therefore, a *de minimis* provision that allows goods to qualify as originating – provided such materials are not more than a certain percentage (7% in most cases) of the transaction value of the goods adjusted to a 'Free on Board' basis or, in some cases, of the total cost of the goods – seems to be a good basic principle.

Technical barriers to trade, including sanitary and phytosanitary measures

Background

Draper *et al.*³² emphasise how both of these mega regionals concentrate on regulatory coherence: the interface between behind-the-border regulatory frameworks on the one hand and international trade and investment rules on the other. It is a cross-cutting issue for the TPP, and both a stand-alone chapter and a prominent feature in negotiating groups such as SPS and TBT. The benchmark research and policy frameworks for regulatory coherence are being examined at the OECD and APEC, and most of the key mega-regional players belong to both institutions. The TTP's ambitions are focused 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. The TTIP has a similar focus. In both cases the relatively low gains from tariff liberalisation underscore the focus on regulations and emphasise their importance.

Draper *et al.*³³ consider that the regulatory agenda in the TTIP may be more contentious. US and EU regulatory approaches differ in key areas, which is why the TTIP is likely to rely heavily on mutual recognition agreements. In both agreements the regulatory coherence agenda will be complex and controversial.

The issues

Liberalisation in basic border tariffs is frustrated by the prominence of so-called non-tariff measures (NTMs) – also called non-tariff barriers (NTB). The RoO discussed above are

just one example, while the SPS measures are another subset. It is becoming increasingly clear that trade that should have been liberated by tariff agreements is frustrated by these measures. Regardless of whether the focus is on bilateral, regional or multilateral liberalisation, the pattern is the same. Many studies (including tralac research) have been undertaken in the region on these barriers. They all highlight the fact that NTBs are pervasive in both regional and external markets and that, as tariffs *per se* reduce NTBs, barriers/measures assume increasing importance. Importantly, these barriers are not always in export markets, as regulatory and infrastructural constraints are ubiquitous in Africa.

One grouping of TBTs consists of measures put in place to protect the health and safety of consumers and the environment in importing countries. When viewed from the exporter's perspective, these measures can be seen as inhibiting trade, while from the importer's perspective they are justifiable to protect the health and safety of citizens. The key issues here are unnecessary measures or standards that cannot be justified on scientific grounds. These include import and export bans, SPS requirements, and standards and conformance requirements.

A second group of TBTs comprises a wide range of trade-policy regulations. It includes the broader policy measures of export assistance, export taxes, import licences, import quotas, production subsidies, state trading and import monopolies, tax concessions and trade remedies practices (ie, anti-dumping, safeguard, and countervailing duty measures).

The third category entails not general regulations *per se*, but rather a wide grouping of procedures and factors that operate in a manner that generally inhibits trade flows. This category is classified as administrative disincentives to export. These include customs clearance delays, lack of transparency and consistency in customs procedures, overly bureaucratic (and often arbitrary) processing and documentation requirements for consignments, high freight-transport charges and services that are not user-friendly. This final category is of great importance within the region, as the infrastructural and administrative costs to both exporters and importers are well known.

In the wider framework, the WTO Agreement on Technical Barriers to Trade (the TBT Agreement) was one of the Uruguay Round outcomes. Its objective is to ensure that regulations, standards, testing and certification processes do not create unnecessary obstacles to trade. It does not prevent WTO member countries from adopting the standards they consider appropriate in areas such as product safety, labelling and environmental impacts, but it does encourage them to use international norms. It also sets out a code of good practice. The WTO Dispute Settlement Mechanism allows members to consult on matters relating to the agreement and, if necessary, working parties can be established to resolve differences.

Standards and conformance are important. Exporters face a general predicament in the diversity of standards among countries, whereby the need to adjust production processes to comply with different standards raises production costs. As the major trading nations tend to have at least some differences in standards, the concept of mutual recognition raises the question as to which set of standards one should recognise. Here the TPP and, to a lesser extent, the TTIP may provide some helpful pointers for the region.

An early draft of the TPP text on regulatory coherence was leaked, but it seems that most or even all of the obligations are formulated in language that would bind parties to little more than best endeavours. The main thrust of the leaked text seems to be the establishment of a body, process or mechanism to facilitate central co-ordination and

review of certain regulatory measures. This is merely a repetition of the obligations agreed upon in the OECD and APEC, meaning that, when it comes to NTMs, the TPP might also amount to little more than a best-practice club. It is difficult to do much more, which reinforces the fact that South Africa must move closer to that ‘best-practice’ club, as it should not be an exclusive club. This ‘semi-membership’ option is not open to many of the less developed TFTA states, but they must nonetheless improve their capabilities in these areas. The trade facilitation assistance being provided will assist with this.

Sanitary and phytosanitary measures

The focus here is on the first group of TBTs mentioned above, namely health and safety measures. The WTO SPS Agreement sets out the basic rules for food safety, and animal and plant health standards. Its objective is to protect life and health while preventing unnecessary trade barriers. Importantly, measures should:

- be applied only to the extent necessary to protect human, animal or plant life or health;
- not arbitrarily or unjustly discriminate between countries where identical or similar conditions prevail; and
- be based on science and must not be maintained without this scientific justification.

Measures must be transparent and not applied in a manner that constitutes a disguised restriction on international trade.

SPS proposals from US industry groups and lawmakers 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. Draper *et al.*³⁴ note that FTAs concluded since the end of the Uruguay Round have not pushed the envelope in terms of new substantive obligations in the SPS area, but rather have limited themselves to incorporating the existing set of rules by reference to the WTO SPS Agreement. They consider that the TPP therefore represents an opportunity to address a number of perceived shortcomings in the current system. One area where parties seem to agree is the issue of increased transparency and strengthening requirements for the use of science-based risk assessments, particular the definition of what exactly constitutes ‘sound science’.

However, while there may be convergence on this issue in the TPP, in the TTIP 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. There is, however, a benchmark for equivalence in SPS measures in the EU, namely the EU–New Zealand agreement of Council Decision 97/132/EC. This agreement establishes a mechanism for the recognition of equivalence of sanitary measures maintained by the two parties consistent with the protection of public and animal health, and for the improvement of communication and co-operation on sanitary measures. South Africa would be well advised to see how closely the TPP and TTIP agreements come to that benchmark and examine its own positions against such an outcome.

Draper *et al.* rightly consider that some form of incrementally expedited procedure for dealing with import restrictions imposed on SPS grounds³⁵ against perishable products is likely to emerge from the TPP. However, it is still contentious whether new rules will be subject to binding dispute settlement or some form of 'consultative mechanism'. In any event, governments will retain a large degree of regulatory autonomy when it comes to an issue as important and politically sensitive as upholding the integrity of national food safety systems.

Trade agreements cannot directly give preference to partners for most health and safety measures. However, they can endeavour to harmonise their regulations and administrative procedures and give priority to members in dispute settlement. This will have both direct and indirect effects on non-members, but again the best action for those outside any mega regional is to strengthen their own capacity to adjust to SPS and other requirements. African countries must match incremental moves towards coherence and possibly mutual recognised best practices.

Competition policies

Typically, competition laws provide remedies to deal with a range of anticompetitive practices, including price fixing, cartel arrangements, abuses of a dominant position or monopolisation, mergers that limit competition, and agreements between suppliers and distributors ('vertical agreements') that foreclose markets to new competitors. Competition provides the basic economic efficiency in a modern trading nation, but competition policies only become effective once they are based on an environment that has sound trade and investment policy regimes. In some respects, an international conflict has arisen that can be summarised as follows: exporting countries are trying to force open markets set against poorer importing countries, thus attempting to ensure economic development in their nations through industrial policy space. The extent to which this 'ex-Singapore issue' is being introduced into the African region through bilateral and regional agreements negotiated with the EU and the US becomes an important one. In general the EU seems to be pursuing such agreements with some vigour and rigour while the US is adopting a more benign approach.

The TPP in particular will hold some important pointers on how this issue will fit into future regional agreements. The objective of the TPP chapter on competition policy was outlined by APEC leaders as being 'to promote a competitive business environment, protect consumers and ensure a level playing field for TPP companies'.³⁶ This seems to involve 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 developing country partners with limited legislation and competence in this area.

This will be a contentious issue in the TPP. The original 'base' of the Trans-Pacific Strategic Economic Partnership specifically lists anticompetitive practices that are to be forbidden under parties' respective competition laws, such as 'anti-competitive agreements, concerted practices or arrangements by competitors and abusive behaviour resulting from single or joint dominant positions in a market'.³⁷ It also contains exemptions – provided that these exemptions are transparent and undertaken in public policy or public interests.

Specific TPP negotiations are likely to focus on New Zealand's pharmaceutical subsidies by Pharmac, Canada's agricultural producer boards and Singapore's public utility and transport services. There will also be fire directed at the US in areas such as its antitrust and associated laws pertaining to the generous treatment given to the US civil aviation industry (or even its maritime sector).

Draper *et al.*³⁸ consider that the TPP negotiations are unlikely to result in the kind of centralised competition watchdog authority established under regional integration initiatives such as the EU or the Common Market for Eastern and Southern Africa. Rather, it is more likely that there will be some agreements on the constraints to be imposed on the private sector in member countries and an associated agreement on exemptions based on public policy grounds. Even this may be difficult for some of the TPP developing country members and their policy space in terms of backing national winners in development strategies. The competition chapter of the EU–Korea FTA provides some clues to this, as it seems to offer some 'wriggle' room.

This is an active part of the trade policy agenda in South Africa and the region, although there is an asymmetry in enthusiasm, legislative support and administrative capacity. While South Africa has a competition policy framework and capability that are equal to or better than that of many developed countries, the same does not hold regionally. There is a need to bring more SADC countries into a functioning competition policy framework to enhance economic efficiency. The TPP in particular may highlight this and convince more developing states in the region that, associated with market access commitments, there is a need to have these policies aligned with policies that discipline that market. More widely, this should in turn reflect on opportunities to progress the issue through the WTO as the final policy convergence agency. Capacity building is once again a key factor.

Competition policy in the TPP cannot be viewed in isolation from the whole question of state-owned enterprises (SOEs). In the trade arena, rules are mitigating some of the more competitively distorting practices of SOEs, and the TPP is expected to be the first set of commitments negotiated between a broad range of different-sized economies with strongly diverging positions on the role and utility of SOEs. Two pointers for an outcome from the TPP are the US–Singapore FTA and the OECD where, for the latter, the focus is on 'competitive neutrality'.

The US–Singapore FTA and Rules on Government Enterprises require Singapore to ensure that any government enterprise acts solely in accordance with commercial considerations in its procurement and selling practices, and does not enter into agreements with competitors to restrain competition or engage in exclusionary practices. Draper *et al.* state that commitments being contemplated under the TPP are likely to be perceived as far more intrusive by Singapore and the regional economies that have followed its lead in letting government-owned or -controlled companies show the way in propelling them along a predefined path of economic development and industrialisation.

The main policy response of the OECD has been the development of so-called 'competitive neutrality frameworks', which a number of OECD member countries have implemented. These are required to ensure that government business activities do not have a net competitive advantage over private-sector competitors simply by virtue of public-sector ownership. These responses are closely related to those on competition policy. If TPP members look closely at their competition policy regimes some form of agreement should emerge. Vietnam and Malaysia in particular may find that commitments would

impinge on their 'Asian' economic development models, while Brunei and Singapore may also be reluctant to go very far down this path. As always, should China look at TPP membership further down the road, there would have to be a massive review of its regime.

For the TFTA members the main implication may well be a potential closing of available policy space, especially so in view of the number of states trying to implement industrial policies.

Government procurement

The role of government in the procurement of goods and services typically accounts for 10–15% of GDP in developed countries, and up to as much as 20% of GDP for developing countries. In an attempt to open this significant portion of the international economy to international competition, some (almost exclusively developed-country) WTO members signed the plurilateral Agreement on Government Procurement (GPA) in 1994. The intention of the GPA is to ensure that government decisions regarding government purchases of goods and services do not depend on where the good is produced or the service rendered, or on the supplier's foreign affiliations. 'Buy local' patriotic campaigns are widespread, but they do not seem to attract the same amount of censure and condemnation – at least until now, as this could be a factor in the TPP negotiations.

The Australian–US FTA gives some idea of the US template on government procurement with a country that is arguably closer to South Africa than some of the US' other recent FTA partners. The agreement required changes to the Australian government's procurement process, documentation and reporting at both federal and state levels. In general terms, the goal was to make government procurement more transparent, and governments are now required to treat Australian and US vendors equally. Australian agencies are also required to publish annual notices of their procurement plans, and response times must give vendors adequate time to prepare bids. Reporting on tenders and contracts has thus been made more complex.

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 GPA. In general, FTA commitments tend to incorporate the key provisions of the WTO GPA into the respective FTA texts, with additional annexes/appendices being negotiated between the respective FTA partners on sectoral coverage and the entities that fall within the chapter's scope. The US–Korean FTA (the most recent FTA) incorporates a number of the core obligations set forth in the WTO GPA.

Draper *et al.*³⁹ list four factors that 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 are:

- the range of sectoral coverage, ie, just goods, or goods and services, and whether some sectors are excluded;
- the level of government that is captured in the chapter's scope, the number of government ministries/agencies and the number of sub-federal/provincial regions/districts that are 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.

The negotiations seem to have run into trouble in that US negotiators are unable to convince the US Congress to mitigate 'Buy American' provisions or federal state governments to be bound by the rules. US states' lack of enthusiasm for participating in FTA measures on government procurement means the US' interest is also declining. With the exception of Japan and Singapore, Asia has also engaged only very reluctantly in the opening of government procurement markets. In particular, Malaysia may also need to change its preferential system of awarding contracts to ethnic Malay-owned companies.

Draper *et al.* also consider that TPP negotiations will be driven by efficient exporters of big-ticket items such as construction and big services exporters in sectors such as telecommunications. For countries with offensive interests such as the US, Australia and Singapore, the difficulty will be in getting countries with overriding defensive interests such as Vietnam, Malaysia and even Japan to go along with opening their government procurement markets. The TPP text on government procurement may mirror or incorporate some aspects or provisions of the WTO GPA. This means that the TPP will incorporate WTO government procurement disciplines without having to negotiate accession to the agreement in Geneva, which will only strengthen the GPA and indirectly the WTO. Although both the US and the EU are signatories to the WTO GPA, procurement has been identified as a major market access issue for the EU in the TTIP negotiations. Of particular concern to EU negotiators are the 'Buy American' provisions attached to federal contracts and the relative lack of access to sub-federal procurement markets in the US, since these remain largely closed to foreigners.

Meanwhile, South Africa will need to be cognisant of the fact that future FTAs may examine the practice of using procurement as a means of redressing the discrimination suffered by previously disadvantaged persons under the former apartheid regime.

Investment

The lessons learnt over the last three or four decades, from the dynamic regions of Asia in particular, show that a precondition for growth is putting domestic structures in place to foster investment and export-oriented trade. However, while investment is a necessary condition, it is certainly not a sufficient condition for export-led growth. There is a correlation between the two, but the main foundation is getting the basics, or that over-used term 'good governance', right. A country's government is in control of its own good governance, and it is unclear why domestic legislation and regimes need external control to maximise a country's welfare.

Following the Singapore investment approach, the WTO has only been peripherally involved with investment through the Agreement on Trade-Related Investment Measures, which deals with investment measures taken by governments that impact adversely on trade. Investment issues are, however, an essential component of the modern FTA, as partners seek to benefit from an increase in bilateral investment as well as from the exchange and transfer of knowledge, technology, ideas and export opportunities. Ways in which an FTA could contribute to these aims include:

- greater transparency of regulations or laws that affect foreign investments;
- more liberalised regimes, which will facilitate foreign investment;
- improvements that can make it easier for investors to resolve disputes; and
- promotion of bilateral or regional investment by strengthening investor confidence and thereby encouraging current partnerships into new areas of manufacturing and service industries through joint ventures and strategic alliances.

Much of the current foreign direct investment (FDI) into Africa is driven simply by the need to control the resource extraction sectors and has little in the way of linkage back to desired aspects of FDI, such as technology transfer and poverty alleviation. Until better governance regimes become the norm in Africa it is difficult to see how trade agreements will foster more desirable FDI.

Investment provisions have featured prominently in most preferential trading arrangements, including FTAs concluded over the last decade and a half, regardless of whether these agreements were being driven by the US, the EU, Japan, or even developing countries such as Chile or Mexico. The TPP is likely to consolidate much of the treaty language already agreed upon in terms of existing legal obligations. The difficult trade-offs will arise in the negotiations on schedules of non-conforming measures or excluded sectors that will be important for developing and developed countries alike in sectors where the political economy constraints are particularly acute.

Draper *et al.*⁴⁰ report that the TPP investment negotiations are largely completed, albeit with a number of very systemically important sticking points – one of which is an exemption from investor–state dispute settlement that Australia is seeking. This is related to the aggressive offensive the global tobacco industry has mounted against Australia's tobacco control laws, and Australia will demand shelter from these challenges. New Zealand in particular is closely watching this tobacco case and will undoubtedly support Australia.

A leaked draft text of the investment chapter seems to follow the US position in many of its bilateral FTAs, namely the right of establishment of foreign goods and service 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. Draper *et al.*⁴¹ also report that capital controls have eluded consensus thus far in the TPP negotiations. Most US FTAs have agreements constraining partners from imposing controls on capital outflows from investments. Singapore enacted an exception whereby it was allowed to impose capital controls in times of monetary crisis (but with compensation). This approach has been endorsed by the International Monetary Fund, and it remains to be seen if the clause flows through to the TPP against the general US position.

Capital controls could be an issue that the TFTA members will have to consider in the future, given the political uncertainty associated with many regimes in the region.

Finally, computer modelling usually shows that the main welfare outcome from an FTA results in a marginal change in investment flows towards the member countries at the expense of non-members. A successful outcome thus will result in a marginal shift in

investment flowing away from African TFTA states, and an equally successful outcome from the TFTA (and better regional governance) is required to counterbalance this shift.

Capacity building (including trade facilitation and customs co-operation)

Capacity building seems to be similar to trade facilitation, where trade facilitation can mean different things to different people. In the strict sense of the WTO agenda, trade facilitation deals with customs and border operational procedures. In a wider sense the OECD views it as helping the institutions, negotiators and processes that shape trade policy and the rules of international commerce. In its extreme but still accurate form it can be viewed as the complete infrastructural package that leads to international competitiveness in global trade. The latter is an area in which Africa is notoriously lagging, as there can be no question that general trading costs are very high in Africa.

Arguably, the only real outcome from the WTO since the Uruguay Round outcome was the Agreement on Trade Facilitation (TF) that emerged from the Bali talks. The African Development Bank (AfDB) has reported on the implications of the TF for Africa.⁴² The report notes that, firstly, a binding TF agreement will push countries to undertake trade facilitation reforms in keeping with their commitments, and that a number of countries have been lethargic in undertaking customs reforms and other trade facilitation measures. This has impeded the efficient operation of their infrastructure, including the regional transport corridors. In some instances key African government agencies show little inclination to undertake reforms, and a binding commitment on TF would help initiate and lock in reforms. In addition, the TF contains obligations on the publication of information on issues such as documentation for imports; export and transit procedures; duties and taxes; fees imposed by governments regarding importation or exportation; import, export or transit restrictions; and appeal procedures.

The AfDB acknowledges that it could be argued that the TF benefits are heavily tilted in favour of exporting countries and regards it as an 'import-facilitating agreement' that will worsen Africa's trade balance and does little to address the productive and export constraints facing developing countries. To directly benefit, African exporters must increase value-adding activities by promoting investment in areas such as value chains, otherwise the benefits of the TF deal will be marginal and African countries will miss out on the supposed \$1 trillion Bali trade boost. Meanwhile, issues such as NTBs, compliance with SPS, tariff escalation and tariff peaks on products of interest continue to stifle Africa's potential to reach international markets and upgrade along the value chain. Parallel efforts to the TF are required in addressing these issues in both regional and global markets.

The US Trade Representative (USTR) reported that the TPP countries initially agreed that capacity building and other forms of co-operation were critical both during the negotiations and post conclusion, to support TPP countries' ability to implement and take advantage of the agreement. Developing countries will need help to meet the high standards to which the TPP countries aspire. To this end, several co-operation and capacity-building activities have already been implemented and more are planned. The TPP countries are also discussing specific texts that will establish a demand-driven and flexible institutional mechanism to effectively facilitate co-operation and capacity-building assistance after the TPP is implemented.

Whatever the direct outcome of the TPP or the TTIP, the outcome of the Bali talks and the mega-regionals package will mean more capacity-building resources are devoted to helping African countries. If these resources are effectively utilised, this has to be of benefit to the TFTA region in enhancing its governance competitiveness, including its confidence and competence to implement the TFTA.

Customs co-operation is an ongoing process in Africa, and there does not seem to be any direct policy implications from mega regionals in this area other than a general exhortation to continue related efforts. Its importance is recognised in the region.

Environment

The WTO Committee on Trade and Environment (CTE) has been in existence since 1994, with, among others, the mandate to identify the relationships between the EU and the US that promote sustainable development. Its discussions have been more narrowly confined than either the US or the EU in particular would have wished; this is because developing countries usually reject efforts to broaden trade disciplines to include commitments on the protection and conservation of the environment. However, the WTO is not an environmental agency and care must be taken to obtain a balance in the CTE work between developed and developing members. The WTO philosophy is that trade liberalisation and environmental protection are complementary goals as long as all externalities are recognised. Regional and bilateral trade agreements have only recently found some room for environmental concerns, and it is a component in the most recent US–Singapore and Japan–Singapore agreements and in recent New Zealand agreements. In the New Zealand–China FTA, an Environment Co-operation Agreement seeks to encourage sound environmental practices and to improve the capacity of each country to address environmental matters through co-operation and dialogue.

International agreements have been along the lines of the Convention on International Trade in Endangered Species (CITES) and related conventions. Draper *et al.*⁴³ consider that, given the different degrees of importance that various TPP countries place on including or excluding environmental provisions in their FTAs, and given the different approaches TPP countries take to enacting and enforcing environmental protection legislation in their domestic legal systems, TPP negotiations were always going to be characterised by vast differences in perceived interests and desired outcomes.

An important issue to watch will be proposals on limiting fisheries subsidies, designed to limit overfishing and halt the depletion of global fisheries stocks (reduced from a total ban on subsidies to fisheries). It seems unlikely that environmental provisions will be subject to binding dispute settlement, although this is certainly an outcome to watch for. It does, however, seem likely that there will be agreement on general protocols relating to environmental protection, and this is likely to set the tone for future trade agreements. As with the rejected core WTO Singapore agreements, regionally negotiated rules may revert to the WTO and become the accepted norm; this is happening in the trade and environment field.

Meanwhile, climate change is emphasising the critical need for environment-related agreements. This reality seems to have been confirmed by the most recently leaked document from the TPP process, which is a report from the chairpersons of the working group negotiating this issue. The US seems to accept that not all TPP members are willing

to adopt US environmental standards on issues such as tuna or shark fin (to name just two), and that in order to get the deal done it will need to retreat from some of its most fervent demands in this chapter.

Meanwhile, along with several other chapters, the draft environment chapter has been leaked. It is noteworthy for the absence of mandated clauses or meaningful enforcement measures. The dispute settlement mechanisms suggested are co-operative instead of binding; there are no required penalties and no proposed criminal sanctions. With the exception of fisheries, trade in 'environmental' goods and the disputed inclusion of other multilateral agreements, the chapter appears to function as a public relations exercise. This leaves the US in particular with a political dilemma, as it falls far below the standards it has insisted be included in all US FTAs.

Trade remedies

Viljoen⁴⁴ outlines how trade remedies are legal instruments that countries use to protect their domestic industries against foreign imports. The traditional trade remedies are anti-dumping measures, countervailing duties and safeguards. Over the last few decades there has been a significant change in which countries implement and are affected by these measures. Earlier, the primary users of these instruments were developed countries, but since the formation of the WTO in 1994 developing countries have become the main users of both anti-dumping measures and safeguards. Developed countries have always been the main users of countervailing duties. It also seems that developing country exports remain the main target of anti-dumping and countervailing investigations by other WTO members.

A pointer to trade remedy outcomes in Asian–Pacific regional best practices in negotiated agreements is the New Zealand–China FTA. Sandrey⁴⁵ outlines how the FTA does not affect New Zealand's rights to apply anti-dumping, countervailing and global safeguard measures to trade with China, consistent with WTO rights and obligations. Neither party is permitted to introduce or maintain any form of export subsidy on goods destined for the other party, and both parties are required to advise each other of 1) the initiation of any safeguard investigation and the reasons for it, and 2) the initiation of any anti-dumping investigation in respect of goods from the other party. Either party taking a global safeguard action may exclude imports of originating goods from the FTA partner if such imports are non-injurious, and temporary bilateral transitional safeguards under strict conditions (including compensation) are permitted. It is difficult to see any TPP safeguard outcomes going beyond this.

Meanwhile, Africa must be cognisant of the fact that in many instances its trade remedies competence and regimes are seriously lacking, and this leaves some economies vulnerable to import surges from a successful TFTA outcome. Similar to the related competition policies, trade remedies must be applied in a correct and consistent manner. They are not a generic fallback position to shelter uncompetitive industries in the longer term.

This is supported by Illy,⁴⁶ who assesses the experiences and constraints of African countries in trade remedies, and raises the question of the eventual role of these instruments in the backing of industrial policy on the continent. The author concludes that trade remedies are important for African countries, although many challenges lie ahead on the way to their use by the vast majority of these countries. Similarly, Helena-

Hanauer⁴⁷ asks whether South Africa, the leading economy of the continent and the role model in legal developments, is taking a healthy route in deciding the international trade policy of these countries. On the one hand, South Africa is an enthusiastic producer and enforcer of competition laws and policies that apply only locally, and gladly agrees to the international commitments of free trade. On the other hand, domestic institutions are using the WTO remedies (mainly anti-dumping) to prevent competition from international rivals. The author asks whether South Africa is using trade remedies anti-competitively and whether the way in which the biggest economy in Africa deals with trade remedies is useful in seeking anti-competitive trade remedies that are in the interests of Africa.

Trade and labour⁴⁸

Despite attempts by some of the developed economies, trade and labour never became part of the Doha Development Agenda negotiating agenda. The US in particular has gradually escalated obligatory labour standards in its bilateral FTAs, and has labour standards embodied in its GSP and AGOA preferences. The EU sought to pursue a similar agenda bilaterally, though its approach has placed less emphasis on sanctions and more on co-operative activities. The US is clearly advancing its agenda on trade and labour through the 'back door', while the EU may be more neutral.

Draper *et al.* outline⁴⁹ how the US champions 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. The US' TPP ambitions initially required countries to enact labour laws stipulating minimum wage requirements, working hours and occupational health and safety standards, but these may have softened as organised labour and business interests conflicted on the US position. In general, Vietnam, Malaysia and Brunei are reported as opposing enforceable labour provisions in any form, whereas Australia and New Zealand are at best ambivalent on this issue. Vietnam is the flash point. It is currently the furthest from compliance with international norms on labour rights among all TPP countries, and it exports a lot of labour-intensive textile, clothing and footwear to the US. The country is also suspicious of any text that would impose an obligation to uphold the right to freedom of association. Brunei may have reservations as well, but it is a rich economy with a very limited manufacturing base.

We agree with Draper *et al.* that the most likely outcome is a face-saving compromise that includes binding commitments to ratify the International Labour Organisation conventions and implement its standards – possibly subject to transition periods, with Vietnam obtaining concessions from the US for capacity building and technical assistance for implementation. Since the TPP negotiations are a single undertaking, Vietnam in particular may not be able to opt out. The TTIP negotiations will almost certainly culminate in enforceable rules on core labour standards, as both developed trading blocs already enforce these norms. The degree to which the rule framework that emerges from these mega-talks can be imposed on less developed countries in future trade agreements is questionable at best; Draper *et al.*⁵⁰ consider that the TPP is likely to represent the lowest common denominator in progressing to what is achievable when developed and developing countries negotiate trade disciplines on labour-right issues.

E-commerce

Many of the TPP chapters are about synchronising positions and exploring some cutting-edge increments, whereas the e-commerce agreement will be exploring new ground in international agreements. This chapter raises potentially significant privacy implications, but leaked position papers suggest that the participants are close to consensus on at least two privacy-related provisions. The US remains the only holdout on privacy obligations that include information exchanges, as all other negotiating countries seem to be agreeing to the provision. This provision may need privacy-law reforms to facilitate cross-border privacy disclosures. There also seems to be an emerging consensus on a provision related to local server requirements, with only Vietnam opposing while New Zealand and Chile reserve their positions. Local server requirements envision establishing limits on countries' ability to enact legislation restricting data transfers to cloud-based services. This is in response to widely published surveillance concerns. The leaked document suggests that the TPP may contain a modified prohibition based on an unknown 'necessity test'. This could have implications for Canadian privacy law in particular.

Again we turn to Draper *et al.*, who outline how the US objectives in the TPP are consistent with those pushed in the WTO and its recent FTAs. These US objectives follow the protectionist practices the US domestic industry is seeking and Draper *et al.* cite the original US 2011 outline document that states⁵¹

[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.

At the behest of domestic interests, the US government is seeking commitments that would prohibit restrictions on legitimate cross-border information flows; prohibit local infrastructure or investment mandates; promote international standards, dialogues and best practices; improve transparency and predictability; and address legal and policy issues involving the digital economy.

The electronic commerce chapters in both the Australian and Korean FTAs with the US are largely similar and have linkages to the respective chapters on investment, and cross-border supply of services and financial services, as well as the respective annexes on nonconforming measures. While being very US oriented they may serve as a template for TPP outcomes. However, it is likely that the final outcome will be short of US business ambitions and provide enough regulatory autonomy for members in terms of legitimate public policy without imposing discrimination or restrictions on trade.

Intellectual property

Whatever the final outcome, the TPP is likely to push further than the WTO agreement on Trade-Related Aspects of Intellectual Property (TRIPs), which covers copyright and related rights such as the rights of performers, producers of sound recordings and broadcasting

organisations; trademarks; geographical indications; industrial designs; patents, including the protection of new varieties of plants; the layout designs of integrated circuits. The main feature of the agreement is standards, and, in keeping with WTO principles, developing countries have longer phase-in periods and some special transition arrangements.

The TPP text covers a wide range of topics, including definitions, its relationship to other international agreements, and issues of patents, trademarks, copyright and industrial design. The leaked text suggests that Australia at the time seemed to support the hard-line position of the US against Vietnam; Chile and Malaysia were more likely to be in opposition; and countries that already had bilateral accords with the US would be reluctant to expand their intellectual property (IP) commitments. The Australian position, however, seems to have changed, partially in response to a comprehensive report from the highly regarded Australian Productivity Commission.⁵² This report is cautious of bilateral and regional arrangements, partially on the basis that unilateral liberalisation brings the most gains and that the complexities of the RoO can actually inhibit trade. Both points are well known. The text also presented evidence showing that extending IP protection and enforcement in trade agreements does not benefit countries that are net IP importers. All members of the TPP are net importers besides the US, and the Australian Productivity Commission found that when net importers extend IP rights under a bilateral or regional agreement, they impose a net cost to their economy. The Commission encouraged Australia not to 'carry the water' for the US by extending IP rights in the TPP.

According to Wikileaks,⁵³ commenting on an earlier draft, the enforcement is a major issue and the chapter 'is devoted to detailing new policing measures, with far-reaching implications for individual rights, civil liberties, publishers, internet service providers and internet privacy, as well as for the creative, intellectual, biological and environmental commons'. The leaked text also reveals that in areas such as access to medicines and the use of medical devices and procedures the US position has almost no chance of prevailing over almost unified opposition from its TPP partners, particularly from Australia, New Zealand and Canada with their public health care systems. This is connected to parallel importing, where New Zealand and Singapore in particular are resisting US demands.⁵⁴

Elsewhere, there are still differences between the US and the EU on some areas such as geographic indications (GIs). The EU has a longstanding agenda of extending protection over many names, as part of its trademark strategy, to new-world countries such as the US, and this position will be central to the EU's FTA negotiating strategy. Conversely, the US has equally resisted this agenda beyond signing up to those GIs on wines and spirits that are covered in the TRIPS agreement.

South Africa will need to monitor the outcome in this chapter, as any movement from a fiercely negotiated outcome between the US, a group of equally determined developed countries with strategic ground to defend, and some developing countries may set new benchmarks for the WTO TRIPS.

Services (including financial services and telecommunications)

Globally, the WTO General Agreement on Trade in Services (GATS) is the benchmark agreement setting a credible and reliable system of trade rules along the WTO principles of non-discrimination in policy bindings designed to promote fair and open trade and progressive liberalisation of the various sectors. Unlike the trade in goods agreement,

however, there are several important sectors such as tourism and air transport that are not covered by GATS. For many countries in the region, including South Africa, tourism in particular is the most important service sector import.

GATS distinguishes between four modes of supplying services: cross-border trade, consumption abroad, commercial presence, and presence of natural persons. Cross-border trade covers services flows from the territory of one member into the territory of another (eg, banking, through mail or electronic supply). Consumption abroad refers to situations where a service consumer (eg, a hospital patient) moves into another member's territory to obtain a service. Commercial presence implies that a service supplier of one member establishes a territorial presence in another member's territory to provide a service (eg, insurance companies or a hotel chain). Presence of natural persons consists of persons of one member state entering the territory of another member state to supply a service (eg, accountants or teachers). This last mode is addressed specifically in the TPP under the chapter heading of Business Mobility. A GATS Annex on Movement of Natural Persons specifies, however, that members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.

Draper *et al.*⁵⁵ note that most of the deeper integration in services trade has been made through preferential trading agreements and not the WTO; and it is important to consider that in the TPP (and the TTIP) gains are likely to be made in areas such as financial services, professional services, education services, telecommunications services and e-commerce, as discussed earlier. The TPP will reinforce the trend away from the restrictive positive list ('we will only liberalise these sectors') to the more open negative-list approach ('we will not liberalise these sectors') in trade negotiations, whereas in the TTIP the EU seems to want the best of both worlds with a negative-list approach for its own market and a positive-list approach for its access to its partners' markets. Financial services, an important sector for South African businesses, have their own separate chapter in the TPP. However, this sector is already interconnected in the region, so it is difficult to see from where advances may come. In the final analysis we agree with Draper *et al.* that the mega-regional process will introduce more liberalisation (but perhaps not 'a new generation'), further opening up international services markets. Again, South Africa with its asymmetrical market power will be the beneficiary of any impetus that can be injected into the TFTA, while the recalcitrant African states cannot escape liberalisation forever.

CONCLUSIONS AND RECOMMENDATIONS

Of the two mega regionals under consideration, the TPP will have the most policy-related implications for South Africa and Southern Africa. This is because the TPP is a mixture ranging from both large and small developed countries with strong institutional and governance capabilities through middle-income states to the developing Asian economy of Vietnam with less institutional capacity. To date the US, as the dominant partner with asymmetrical power, has generally been negotiating agreements that adhere to its template. This is changing in the TPP with 'a battle of the templates'. A parallel situation can be drawn in the TFTA with South Africa's regional dominance and asymmetrical institutional frameworks and negotiation abilities. Effectively handling asymmetry among negotiating partners may be the first lesson for South Africa from the mega regionals.

In general, computer modelling suggests that the real welfare losses to South Africa and Southern Africa will be modest. Modelling work by tralac on related agreements agrees with the assessments cited and advances marginal changes in investment flows to the negotiating parties as the main second-round impact. There will be some collateral damage to South Africa and the region from a likely merchandise goods outcome from both the TPP and the TTIP. This will result from trade diversion in favour of the mega-regional partners as the value of the preferential access granted to South Africa and Southern Africa in the US and EU in particular is eroded. This will be minimal except in the potential case of regional clothing exports to the US, where concessional access for Vietnam to the US looms as a real threat. This threat will be assessed against the RoO outcome for the TPP partners. There may, however, be some trade displacement for sugar exporters in the TPP, with enhanced Australian access to the US the key element here.

Overall, the policy implications are clear: South Africa and the region must continue to accelerate reforms of their governance structures to counter investment deflection and advance their own negotiations, both regionally with the TFTA and internationally with the EU through the EPA process. At the same time they must expend effort to preserve and possibly extend access conditions to the US. Standstill is not an option, as the region will be further isolated in terms of both market access and the ability to influence, let alone keep up with global best practices. There appears to be a worrying tendency in South Africa to subtly move back from some of its previously negotiated positions, both regionally and in the WTO. The old adage that trade policy is like riding a bicycle holds true: you either go forward or fall off, but you cannot stand still.

An important point emerging from the analysis of regional and bilateral trade agreements is that, in general, benefits from tariff liberalisation accrue to members, either directly through increases in trade but often indirectly through the advantages of enforced competition in the home market. This is in addition to consumer access to better and cheaper goods, notwithstanding issues of trade diversion, border tax reductions and labour market adjustments. In terms of the clothing sector, the African industrial sector is most likely to feel the impacts of TPP liberalisation. An important point to suggest regionally is that a more open African market may allow some countries to emerge with more competitive sectors regionally. These 'regional champions' could, of course, operate at the expense of other countries in the region, but the alternative is that all regional producers suffer under the TPP with no regional champions at least getting some chance to become internationally competitive. In a situation where all TFTA countries lose out, is it thus preferable to let regional competition introduce possible regional winners?

Related to this regional competitiveness is the issue of goods access conditions for TFTA partners into South Africa. Currently, there is effectively duty-free access for all imports from SADC. An analysis of TFTA regional trading patterns outside SADC highlights that South African bilateral trade is important to virtually all members, and is often the dominant trading relationship. In order to progress the TFTA in a meaningful way, South Africa should seriously consider granting all the non-SADC TFTA members the same access conditions as SADC. This would have some implications for the SACU revenue pool but have only a limited downside for South Africa's domestic industry, and would set a benchmark for negotiation partners to consider. With a dominant position comes leadership responsibility.

Another factor silently present in the negotiations is the relentlessly increasing trade and economic might of China. Although not a TPP party, China is a member of its close relative, the APEC group. A successful outcome for the TPP is likely to filter back into enhanced APEC co-operation with outside members, including China and its fellow BRICS member, Russia. This would marginally erode South Africa's advantages stemming from its membership of the BRICS club, and emphasises the issues surrounding South Africa and the BRICS trade-related agenda going forward. To date, the big fear for South Africa in a closer trading preference integration with China has been the clothing sector, and while this fear remains valid there is an Asian movement in the clothing industry away from China to countries such as Vietnam, which is a TPP partner. Again, the world is evolving.

This paper examines the reported progress to date by the TPP working parties against the implications of the agreements, and concludes that several outcomes need to be closely monitored. These include the non-tariff measures such as the vexing RoO and SPS measures, along with the general infrastructural and specific trade support measures such as investment regimes, government procurement and trade remedies. In the region many of these issues fall short of international best practices. It will be instructive to see the outcomes from the TPP, in particular where there are also asymmetrical situations, as some lessons may be gleaned for the TFTA. However, the main reason why the outcomes should be monitored is that the region will have to intensify its endeavours to upgrade whole suites of infrastructural and support-policy regimes unilaterally. It will not be able to influence TPP outcomes, but it must at least try to stay abreast of new developments.

Will a successful outcome in the TPP be sufficient to revitalise the WTO? This remains a key question, and if a glimmer of hope exists, Africa, as representing one-third of WTO members, must support this rekindling. Multilateral rules and negotiations are the best vehicle to advance co-operative regimes and mitigate trade and investment deflections. While the WTO does contain many developing-country exemptions and concessions, these can only be viewed as temporary space providers and not permanent havens. Related to this is the symbiotic linkage between the TPP and APEC, as a strong outcome from the TPP will be reflected back into APEC, home of even more of South Africa's new trading partners.

The fundamental negotiating approach in the TPP is dramatically different from that in the TFTA. In the TPP there is a single chapter-oriented negotiation between all parties regardless of current preferential arrangements, with an approach of 'nothing settled until all is settled'. In direct contrast, tariff liberalisation negotiations in the TFTA are only sets of bilateral agreements among member states that currently have no preferential arrangements in place. This creates an enormous asymmetry. There are five TFTA member countries that are requested to negotiate with only four partner countries,⁵⁶ while, conversely, these four TFTA countries are in turn asked to negotiate with the full suite of 25 TFTA member countries. Even with progress in the bilateral agreements it is unclear how the TFTA process will move to incorporate bilateral changes into a comprehensive tariff-reduction process under these conditions.

This raises the final question of the next steps in the (likely) event of a less-than-comprehensive member 'buy-in' for the TFTA, and the related abilities/advisability for a TPP member to walk out on the agreement.⁵⁷ The TPP would likely go ahead with less-than-comprehensive member coverage, while the future of the TFTA would be uncertain.

Here the best alternative way forward is not to look at current mega-regional negotiations but at the genesis of the EU itself – it started in 1960 with only six members and gradually followed an accession process whereby countries became eligible to join on the current member terms and conditions. This EU approach of ‘partnerships of the willing’ may be the way forward for the TFTA. The tralac modelling shows that the overall gains for both the major countries and the region overall are just as significant from this more pragmatic approach to regionalism in Africa. While an asymmetry exists in the TPP in terms of economic power and infrastructural and governance capacities, this is nowhere near as acute as in Africa.

ENDNOTES

- 1 Draper P, Lacey S & Y Ramkolowan, *Mega-regional Trade Agreements: Implications for the African, Caribbean, and Pacific Countries*. Report submitted to the ACP MTS Programme (African, Caribbean, Pacific Group of States Multilateral Trading System programme), 2014.
- 2 Draper P *et al.*, *op. cit.*
- 3 These countries are Canada, Australia, Japan, Mexico, Chile, Peru, New Zealand, Singapore, Malaysia, Vietnam and Brunei.
- 4 Petri PA & MG Plummer, *The Trans-Pacific Partnership and Asia-Pacific Integration: Policy Implications*, June 2012, <http://www.iie.com/publications/pb/pb12-16.pdf>.
- 5 In particular, the EU has been widening and deepening for over half a century since the original six members joined in 1960.
- 6 Mwanza W, ‘Africa in a Constantly Evolving Global Economic Landscape: Reflections from Davos’, tralac, Hot Seat, 29 January 2014.
- 7 Given that all negotiating parties are members of the WTO, the starting point for negotiations has to be to advance past this base. Hence we use the term ‘WTO-plus’.
- 8 Sandrey R, ‘WTO and the Singapore Issues’, tralac Working Paper, 18. Stellenbosch: tralac November 2006, http://www.tralac.org/wp-content/.../20061114_Sandrey_SingaporeIssues.pdf.
- 9 APEC (Asia-Pacific Economic Cooperation), *Perspectives towards the APEC Bogor Goals: Perspectives of the APEC Policy Support Unit*, November 2010, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/APEC/0-highlights-bogor-report.php>.
- 10 TPP (Trans-Pacific Partnership), *Trans-Pacific Partnership (TPP) Trade Ministers’ Report to Leaders*, November 2011, <http://www.ustr.gov/about-us/press-office/press-releases/2011/november/trans-pacific-partnership-tpp-trade-ministers-re>.
- 11 PriceWaterHouseCoopers International, *The Asian Engine for Global Growth*. Report prepared for the APEC CEO Summit, November 2010, <http://www.pwc.com/jp/ja/japan-info/assets/pdf/apec2010.pdf>.
- 12 Cheong I, ‘Negotiations for the Trans-Pacific Partnership Agreement: Evaluation and Implications for East Asian Regionalism’, Working Paper Series, 428. Tokyo: Asian Development Bank Institute, July 2013, <http://www.adbi.org/files/20o13.07.11.wp428.trans.pacific.partnership.east.asian.regionalism.pdf>.
- 13 Petri PA & MG Plummer, ‘The Trans-Pacific Partnership and Asia-Pacific Integration: Policy Implications’, Policy Brief, 12-16. Massachusetts: Peterson Institute for International Economics, June 2012, <http://www.iie.com/publications/pb/pb12-16.pdf>.
- 14 Cheong uses a dynamic Global Trade Analysis Project (GTAP) model, and dynamic models

always produce larger gains than the more basic static GTAP model. Petrie and Plummer do not directly seem to use the widely accepted GTAP model and provide few (if any) details about their model. tralac uses the GTAP model.

- 15 Willenbockel D, *General Equilibrium Assessment of the COMESA-EAC-SADC Tripartite FTA*, report. Brighton: Institute of Development Studies, University of Sussex, September 2013.
- 16 Sandrey R, Jensen HG, Vink N & T Fundira, *South Africa's Way Ahead: Trade Policy Options*. Stellenbosch: tralac, 2007, www.tralac.org.
- 17 *Ibid.*
- 18 Sandrey R, November 2006, *op. cit.*
- 19 Congressional Research Service, *The Trans-Pacific Partnership Negotiations and Issues for Congress*. April 2013, <http://www.fas.org/sgp/crs/row/R42694.pdf>.
- 20 Sandrey R & E Hannah, *African Industrialization and Trade: Rhetoric and Reality*, blog article, 2013, <http://www.afdb.org/en/blogs/integrating-africa/post/african-industrialization-and-trade-rhetorical-and-reality-12604/>.
- 21 Personal communication, Eckart Naumann by email.
- 22 Rollo J *et al.*, *Potential Effects of the Proposed Transatlantic Trade and Investment Partnership on Selected Developing Countries*. University of Sussex, Institute of Development Studies, InterAnalysis Ltd and ITEAS Consulting, nd.
- 23 Mexico has direct access to the US under NAFTA (the North American Free Trade Agreement), and over the last three years (including 2013) Mexico has exported around \$1 billion' worth of sugar to the US. This is around 40% of the US sugar import. The US is the world's largest sugar importer.
- 24 Abrea MD, 'Preferential Rules Of Origin in Regional Trade Agreements', Staff Working Paper. Geneva: Economic Research and Statistics Division, WTO (World Trade Organization), 2013.
- 25 Estevadeordal A *et al.*, *Bridging Regional Trade Agreements in the Americas*. New York: Inter-American Development Bank, 2009.
- 26 Draper P *et al.*, *op. cit.*
- 27 See <http://www.itc.org>.
- 28 Naumann E, *op. cit.*
- 29 Naumann E *op. cit.* points out that this also protects some of the BLNS countries' interests. Many South African firms have relocated to Lesotho, where they operate off a lower cost base and are able to fully access the South African market without any RoO implications. This provides an advantage over non-SACU countries that need to fulfil the double transformation rule or pay the 45% duty.
- 30 Although China is not a TPP party, the recent FTA between China and New Zealand is a comprehensive agreement that may provide some pointers for RoO should China later become a TPP member. The FTA mostly uses a change of tariff classification (CTC) approach whereby a good will qualify if all third-party inputs used in its production have undergone a specified change of tariff classification. For some products, however, there are additional regional value content (RVC) rules where the product must meet the CTC plus an additional RVC requirement (mostly around 40%). Other products require either a standalone RVC or an RVC, or either a standalone process rule or an alternative process rule. In addition, there are strict rules on transshipping that only allow simple logistical processes or an operation to keep them in good condition.
- 31 Although it is an ongoing issue in the EPA negotiations for Namibia in the ocean fisheries harvest sector.

- 32 Draper P *et al.*, *op. cit.*, p. 21.
- 33 *Ibid.*, p. 12.
- 34 *Ibid.*, p. 46.
- 35 *Ibid.*, p. 47.
- 36 APEC, Perspectives Towards the APEC Bogor Goals: Perspectives of the APEC Policy Support Unit. November 2010, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/APEC/0-highlights-bogor-report.php>.
- 37 The text of the agreement can be downloaded from the website of the MFAT (New Zealand Ministry of Foreign Affairs and Trade), <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/0-P4-Text-of-Agreement.php>. It is originally cited in Draper P *et al.*, *op. cit.*, p. 30.
- 38 Draper P *et al.*, *op. cit.*, p. 31.
- 39 Draper P *et al.*, *op. cit.*, p. 27.
- 40 Draper P *et al.*, *op. cit.*, p. 32.
- 41 Draper P *et al.*, *op. cit.*, p. 33.
- 42 See <http://www.afdb.org/en/blogs/integrating-africa/post/trade-facilitation-in-the-bali-package-whats-in-it-for-africa-12698/>.
- 43 Draper P *et al.*, *op. cit.*, p. 39.
- 44 Viljoen W, 'Trade Remedies and Safeguards in BRICS Countries', tralac Working Paper. Stellenbosch: tralac, February 2013, http://www.namc.co.za/upload/other_trade_publications/Anti-dumping%20and%20trade%20remedies%20in%20BRICS%2020130222.pdf.
- 45 Sandrey R, 'New Zealand–China FTA – Implications for South Africa', tralac Working Paper. Stellenbosch: tralac, 2013.
- 46 Illy O, 'Trade Remedies in Africa: Experience, Challenges and Prospects', GEG (Global Economic Governance) Working Paper, 2012/70. Oxford: GEG, June 2012.
- 47 Helena-Hanauer L, 'Is South Africa Using Trade Remedies as a Protectionist Measure? Reflections on a Court Case: International Trade Administration Commission v SCAW South Africa', *Contexto Revista de Derecho y Economía*, 34, 2011.
- 48 This is not to be confused with the issue of free movement of labour under services.
- 49 Draper P *et al.*, *op. cit.*, p. 42.
- 50 Draper P *et al.*, *op. cit.*, p. 44.
- 51 Draper P *et al.*, *op. cit.*, p. 35.
- 52 Australian Productivity Commission, *Bilateral and Regional Trade Agreements*, Research Report. Canberra: Productivity Commission, November 2010, http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf.
- 53 'Secret TPP treaty: Advanced Intellectual Property chapter for all 12 nations with negotiating positions', WikiLeaks, 13 November 2013.
- 54 While Wikileaks may have presented a reasonable assessment at the time, negotiations have moved on from that point.
- 55 Draper P *et al.*, *op. cit.*, p. 47.
- 56 These are generally countries with which they have limited trade relationships and, in the case of Angola and the Democratic Republic of the Congo in particular, countries that have limited trade-negotiation capacity and/or appetite for trade liberalisation.
- 57 New Zealand, the FTA purist, has 'walked' in the past from a less than fully comprehensive FTA.

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