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TTIP: THE RISE OF 'MEGA-MARKET' TRADE AGREEMENTS AND  
ITS POTENTIAL IMPLICATIONS FOR THE GLOBAL SOUTH

**AOIFE O'DONOGHUE\* & NTINA TZOUVALA†**

*This article intervenes in the growing academic discussion about the potential impact of currently negotiated trade and investment agreements such as the TTIP, the CETA, and the TPP. To do so, our contribution focuses on the rarely asked question of how these agreements will impact the Global South. After showing that there is no stable and clear international legal definition of a 'developing' state, this contribution argues that the EU already has a number of legal obligations towards the Global South (for example, the Cotonou Agreement) that need to inform the debate about the objectives and potential impact of the TTIP. Further, our argument emanates from the position that it was the failure of the Doha Development Round of negotiations in the WTO that paved way for what we understand to be a 'strategic bilateralism' of the Global North. The second part of this article attempts to evaluate the potential impact of this strategic bilateralism on three distinct fields, first, on the relations between the West and emerging peripheral powers, such as China or Brazil; second, on the economic stability and viability of the Least Developed Countries; and third, on the most marginalised and vulnerable sections of the society regardless of their nationality. Our tentative conclusion is that given the potential adverse impact on all these three fronts, it is essential for the EU to re-evaluate its strategy.*

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## I. INTRODUCTION

Despite its illusive and presently unsettled content, the Transatlantic Trade and Investment Partnership (TTIP) has attracted considerable debate and criticism. This article joins the fray, concentrating on what the TTIP, as well as the recently concluded Trans-Pacific Partnership (TPP), and the Canadian-EU Comprehensive Economic and Trade Agreement (CETA), may mean for the Global South. This group of trade treaties offer a new form of mega regional treaty that moves far beyond World Trade Organization standards in the removal of both tariff and non-tariff barriers. The TTIP is a mega regional treaty between the EU and the US. Reflecting on the potential impact of regional trade and investment agreements on the Global South, this article centres itself in the context of an international economic legal order where trade, development, and investment are intertwined and where the Global North no longer controls global economics to the extent necessary to ignore the rest of the world.

This article is structured around four principal themes. First, we critically reflect on the premises of our own analysis engaging with the contradictory and elusive attempt to define the Global South in international law. Second, we provide a background to current negotiations by focusing on three elements; existing trade relations between the EU with the Global South, the gradual collapse of the Doha (Development) Round and the determination of Global North leaders to push forward the expansion of international trade and investment law even in the absence of their Global South counterparts. Third, we attempt an analysis of the potential impact of these agreements on the Global South distinguishing between the Developing Countries (DCs) like China, which are likely to challenge this 'strategic bilateralism' and the Least-Developed Countries (LDCs) that are in an economically weaker negotiating position. In doing so, the article asks whether in ploughing ahead with negotiations without considering their wider impact, the Global North and the EU in particular, underestimate the power of the Global South now to place obstacles in the way of perceived progress. Our contribution also focuses on the LDCs being caught between competing trading camps with potentially devastating outcomes to their trade flows alongside attempts by the Global South to utilize current international trade structures to their advantage. Finally, the article challenges the state-centric outlook of the mainstream debate on international trade and economic law. To do so, this contribution elaborates on the potential impact of the TPP/TTIP/CETA on the subalterns by focusing on the effects of the TTIP on access to medicine and the fruit trade. Given that much of the content of these agreements are available only through leaks as their negotiations are not publicly accessible, the purpose of this contribution is to highlight two potential impacts of negotiation. First, the effect of these agreements on actors who remain invisible to international lawyers and second, the attempts of the Global North to circumnavigate the growing influence of the Global South on the structures of trade agreements and development. By questioning the analytical purchase placed on contractualism and sovereign equality, often to the detriment of a clear understanding of how international law shapes the world, our analysis provides the underlying basis to comprehend the contemporary trend toward 'mega-markets' and their actual effect on the globe. In doing so, the article attempts to broaden the scope of inquiry regarding the potential impact of the TTIP. The piece moves beyond the formal criterion of contracting parties, examining how international economic law has the potential to shape the world in ways that surpasses the narrow cycle of parties nominally bound by international treaties.

## II. DEFINING THE GLOBAL SOUTH THROUGH DEVELOPMENT

The TTIP negotiations are amongst the Global North, indeed amongst two of the world's largest markets with the aim of creating a super or mega-market. This fulcrum suggests a conviction that beyond the borders of this supermarket there is

little need for concern from either the negotiators or commentators. Yet, it already has a global impact. Such impacts include the proportion of the world's trade market the TTIP will encompass, the new global trade treaty standards that it (alongside the TPP and the CETA) is setting and the enhancement of the power these markets already possess. The form that the TTIP is taking requires consideration of how the interests of the Global South are affected, the nature of engagement, the manner in which the contestation emerging from the Global South is occurring and the effect of these factors on its implementation. Yet, in discussing the Global South, it is necessary to emphasize the considerable internal differentiations within that nomenclature, in order to decipher accurately the capricious implications of the TTIP.

*A. (Under) development and the Persistence of Hierarchies in International Law*

The multiplicity of standards utilized to describe Developing Countries (DC), Least Developed Countries (LDC), Heavily Indebted Poorer Countries, and High Income Developing Countries amongst a plethora of other terms, singularly fails to capture the multiplicity of interests in and the impact of trade agreements such as the TTIP or the TPP on states as diverse as China, Brazil, Angola, Bangladesh or the Solomon Islands. Categorizing states on a linear, progressive spectrum of economic development is the bedrock of international trade and international economic and more generally, development law. Indeed, their intertwining is key in understanding the operations of both the Global North and South in negotiation.<sup>1</sup> Whilst the contemporary notion of development centers on economic criteria with some geographic input, it also forms part of a much broader understanding of the hierarchy between political communities in the eyes of international law. Even though the specific terms of categorization have evolved around newer criteria for

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<sup>1</sup> Upendra Baxi, *What may the 'Third World' expect from International Law?*, in INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 9 (Richard Falk et al. eds., 2008); See also WTO's *Discussion of Developing Countries*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/dev1\\_e.htm\\_and](http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm_and) EU's *Discussion on Relations with Developing Countries*, EUROPEAN COMMISSION, [http://ec.europa.eu/agriculture/developing-countries/index\\_en.htm](http://ec.europa.eu/agriculture/developing-countries/index_en.htm).

classification, they still largely focus on the same group of non-Western states.<sup>2</sup> As Pahuja has argued, the concept of 'development' decisively entered the vocabulary of international law in the aftermath of the World War Two, when overt imperialism and biological racism were no longer acceptable bases for establishing hierarchy in the international realm.<sup>3</sup> Instead, 'development' was anchored to the supposedly neutral, scientific language of economic measurements, and more specifically to the Gross National Product (GNP).<sup>4</sup> As a result of this discursive shift, the Global North, this time led by the US, maintained its hegemonic position in the international sphere.<sup>5</sup> Further, 'development' provided ideological support for international law and institutions, since it became a new, allegedly universally shared aspiration and a bridge to reconcile the tension between formal sovereignty and persistent hierarchy.

Nonetheless, 'development' turned out to be a complicated and contradictory concept. The fact that the leaders of the developing states eventually embraced it and attempted to use it, in order to challenge this very hierarchy, adds additional complexity to the employment of the term. As Lamp has argued:

'While the lineage of the concept of 'development' may be Western, the 'less-developed' countries appropriated the concept in the context of establishment of the multilateral trading system. These countries deployed it as a counterweight to the US narrative about the purpose of the trading system, namely to lift international economic relations out of the state of nature, release world trade from public and private restrictions and provide a forum for reciprocal liberalisation.'<sup>6</sup>

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<sup>2</sup> WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* 205-220 (Howard University Press 1974) [hereinafter RODNEY].

<sup>3</sup> SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 63 (Cambridge University Press 2013) [hereinafter PAHUJA] ("[T]he promise of the developmentalism nascent in Truman's point four overcame the post-Holocaust unease at maintaining divisions based overtly on race or civilisational status.").

<sup>4</sup> *Id.* at 93 ("Through its securing via the quantifiable, and therefore putatively scientific, measure of GNP, development offered a way to maintain both the putative objectivity of the key concepts of international law and a hierarchy of states but, crucially, it did so without resorting to the now uncomfortable ideas of race or civilisational superiority.").

<sup>5</sup> *Id.* at 48-9 ("Thus 'Europe' was replaced by the 'developed' world, which could both maintain a putative universality for its knowledge and mediate the antinomy between the new formal sovereign equality and the maintenance of hierarchy.").

<sup>6</sup> Nicolas Lamp, *The 'Development' Discourse in International Trade Law Making* 8 (Queen's University Research Paper Series, Paper No. 057, May 2015), available at <http://ssrn.com/abstract=2608198>. [hereinafter LAMP].

The most characteristic instance of this attempted appropriation was the effort of the then Third World to establish a New International Economic Order (NIEO) in the course of the 1970s.<sup>7</sup> The aim of the NIEO was to restructure the international economic order using the post decolonization numeric strength of the Global South.<sup>8</sup> Whilst the NIEO arguably failed to appropriate or radically alter international economic law, its contemporary resonance ought not to be underestimated. Both the global diffusion of economic power as well as the current state of global trade negotiations suggest that at least some of the NIEO's historic tactics, for instance, the reliance on using the Global South's numerical majority in the UN General Assembly or consistent contestation of the assumptions made within economic policies, may be glimpsed again in the World Trade Organization (WTO), the World Bank, and the International Monetary Fund (IMF).<sup>9</sup>

The potentially positive nature of an unsettled legal definition of the Global South or development ought to be taken seriously. It might be positive in the sense that law has not, as it often does, occupied and calcified a particular definition. Potentially, the multiplicity of classifications enables a contested miasma to function around the conception of what is 'developing.' Milan Bulajić argues that 'as in every other system of law, it would be necessary from the point of view of classical law, to determine the subjects of international development law; yet the variation has not caused law to cease functioning.'<sup>10</sup> In the context of trade negotiations, the institution of strict legal definitions may militate against the flexibility that it grants to some in the Global South; for both self-designation and

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<sup>7</sup> See generally MOHAMMED BEDJAOU, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER (UNESCO/Holmes & Meier 1979). The three most significant moments for the construction of NIEO were three UNGA Resolutions largely voted for by the Third World and the Socialist Block, while Western states either abstained or voted against: The three more significant being: Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), U.N. Doc. A/Res/S-6/3201 (May 1, 1974); Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202 (S-VI), U.N. Doc. A/Res/S-6/3202 (May 1, 1974) and the Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. Doc. A/Res/29/3281 (Dec. 12, 1974).

<sup>8</sup> S Chatterjee, *The Charter of Economic Rights and Duties of States and the New International Economic Order*, 40 INT'L & COMP. L.Q. 669 (1991).

<sup>9</sup> Philip S Golub, *From the New International Economic Order to the G20: how the 'global South' is restructuring world capitalism from within*, 34 THIRD WORLD Q. 1000-1015 (2013).

<sup>10</sup> MILAN BULAJIĆ, PRINCIPLES OF INTERNATIONAL DEVELOPMENT LAW 66 (Nijhoff1993).

insistence on a negotiating presence.<sup>11</sup> The value of such flexibility is recognized in the Global North. For example, the EU defines certain regions as areas requiring structural and investment fund assistance, claiming its own internal system of special treatment for lesser developed areas.<sup>12</sup>

B. *The Fluid Content of 'Development' and its Implications for International Economic Law*

To appreciate both the impact of the TTIP and the context which has moved trade negotiations away from within the multilateral fora, it is important to consider how international trade law differentiates itself amongst the Global South. International trade law in the form of special and differential treatment, trade capacity building and the Generalized System of Preferences (GSP) tracks both- what it considers to be development and also, who is allowed to claim the moniker and its apparent benefits.<sup>13</sup> Other definitions such as High-Income Countries, High-Income Developing Countries or Low Income Countries are also significant, particularly in understanding the impact of the TTIP negotiations, albeit for trade law, it is development which accords preference.<sup>14</sup>

One of the most interesting examples of both the limitations and utility of multiple categorizations of development within the Global South is China. China joined the WTO in 2001 self-defining itself as a developing country.<sup>15</sup> Upon membership, China increasingly amplified its profile within the organization, by altering its

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<sup>11</sup> Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986); Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/5/Rev.1 (June 14, 1992).

<sup>12</sup> *European Regional Development Fund*, EUROPEAN COMMISSION, [http://ec.europa.eu/regional\\_policy/en/funding/erdf/](http://ec.europa.eu/regional_policy/en/funding/erdf/).

<sup>13</sup> James Harrison, *Incentives for Development: The EC's Generalized System of Preferences, India's WTO Challenge and Reform*, 42 COMMON MKT L. REV. 1663 (2005); Joseph E Stiglitz & Andrew Charlton, *Aid for Trade*, 5 INT'L J. DEV. ISSUES 1 (2006); Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations*, 10 EUR. J. INT'L. L. 549 (1999) [hereinafter STIGLITZ & CHARLTON]; Bernard Hoekman, *Strengthening the Global Trade Architecture for Development: The Post Doha Agenda*, 1 WORLD TRADE REV. 23 (2002).

<sup>14</sup> *Heavily Indebted Poorer Countries Programme*, INTERNATIONAL MONETARY FUND, <https://www.imf.org/external/np/exr/facts/hipc.htm>; UN *Definition*, UN DEVELOPMENT POLICY AND ANALYSIS DIVISION (last updated Oct. 2014), [https://www.un.org/en/development/desa/policy/cdp/ldc/ldc\\_criteria.shtml](https://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml).

<sup>15</sup> Kym Anderson, *On the Complexities of China's WTO Accession*, 20 WORLD ECON. 749, 764 (1997).

negotiating stance and role in dispute settlement.<sup>16</sup> As part of its global trade negotiations, it has joined a number of WTO groups including, amongst others, the Asia-Pacific Economic Co-operation (APEC), the Recent New Members (RAMs), the G-33, and the ‘W52’ sponsors. This mix of WTO memberships typifies China’s complicated position: as a member of the RAMs, it is amongst new members, most of whom are DCs but not LDCs while as a member of the W52 sponsors, it supports specific forms of trade protection. As such, China takes both a protectionist stance with regard to certain products as well as supporting some LDC positions within the Organization, for example in relation to the TRIPs, while contemporaneously pushing for ‘freer’ trade with regard to its own access to the Global Markets. Outside the WTO, China holds membership of the G20 which represents 85% of global GDP and over 75% of the global trade and at present, it is pushing for reforms on governance within the IMF.<sup>17</sup> Yet, China is excluded in other global trade negotiations such as the TPP. Whilst the World Bank describes China as an Upper Middle Income Country and it was the first country to reach the Millennium Development Goal (MDG) of halving the number of its people living in extreme poverty and hunger, there is still a large swath of the population that remains in poverty.<sup>18</sup> Even though China is outside both the TTIP and the TPP negotiations, its economic and political position means that it cannot be ignored entirely; although, as discussed later, some EU officials appear convinced that China will accommodate any decisions that the TTIP negotiators settle upon. As such, it is caught in what Ming Du describes as a ‘catch-22’ situation where it must wait and see the impact of the TPP and the TTIP on its foreign trade and investment, while being a developing country that continues to lift its entire population out of poverty.<sup>19</sup>

LDCs sit in a rather static cornucopia which allows for graduation into the next rung of defined economic development, but does not leave any room for states to ‘regress’ into the category. This may suggest a positive outlook for states following

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<sup>16</sup> For details of disputes involving China see *China and the WTO*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/china_e.htm); Chi Manjiao, *China’s Participation in WTO Dispute Settlement over the Past Decade: Experiences and Impacts*, 15 J. INT’L. ECON. L. 29 (2012). For an account of the Global South’s experience at the DSB of the WTO see DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE (Gregory C Shaffer & Ricardo Meléndez-Ortiz eds., Cambridge University Press 2010).

<sup>17</sup> See G20 Members, G20 (last visited Nov. 26, 2015), <http://g20.org/about-g20/g20-members/>.

<sup>18</sup> See *China*, THE WORLD BANK (last visited Nov. 26, 2015), <http://data.worldbank.org/country/china>.

<sup>19</sup> Ming Du, *Explaining China’s Tripartite Strategy Toward the Trans-Pacific Partnership Agreement*, 18 J. INT’L. ECON. L. 1, 8 (2015), 1, 8.

a linear trajectory towards an ever positive economic development. However, it has been repeatedly shown that such progressive optimism rarely reflects the fate of countries or the character of their development beyond purely economic factors.<sup>20</sup> The most consistently applied definition employed across international economic institutions operates as a fulcrum of debt relief alongside MDGs with a distinct presence within trade law.<sup>21</sup> The LDC definition incorporates the gross national income per capita, the human asset index (HAI), and the economic vulnerability index.<sup>22</sup> Whilst the Heavily Indebted Poorer Country (HIPC) Programme identifies 39 LDCs eligible for debt relief, the EU recognizes 49 countries and the UN recognizes 48.<sup>23</sup> States that narrowly miss the definition are largely ineligible for debt relief or for the WTO's limited exception for non-reciprocal forms of trade arrangements, a factor of some import in the EU's relations with the Global South in its negotiations with the ACP countries.

Six international organizations, the IMF, the International Trade Centre, the UN Conference on Trade and Development (UNCTAD), the UN Development Programme (UNDP), the World Bank Group, and the WTO operate the Enhanced Integrated Framework which grants technical assistance, aid in economic growth and poverty eradication programs to LDCs with the intent of integrating the Global South into global trade. Of the 48 states recognized as

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<sup>20</sup> F.J.Garcia, *Global Justice and the Bretton Woods Institutions*, 10 J. INT'L ECON. L.461 (2007); P. Alston, *Shortcomings of a Garfield the Cat Approach to the Right to Development*, 15 CAL. W. INT'L L.J. 510 (1985).

<sup>21</sup> Economic development means qualitative change and restructuring in a country's economy in connection with technological and social progress. The main indicator of economic development is increasing GNP per capita or (GDP per capital). Economic growth Refers to the quantitative change or expansion in a country's economy. Economic growth is conventionally measured as the percentage increase in gross domestic product (GDP) or gross national product (GNP) during one year. See, World Bank Definition, UN DEVELOPMENT POLICY AND ANALYSIS DIVISION (last visited Nov. 27, 2015), [http://www.un.org/en/development/desa/policy/cdp/ldc/ldc\\_data.shtml](http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_data.shtml).

<sup>22</sup> *UN LDC Definition*, UN DEVELOPMENT POLICY AND ANALYSIS DIVISION (last updated Oct. 2014), [http://www.un.org/en/development/desa/policy/cdp/ldc/ldc\\_criteria.shtml](http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml).

<sup>23</sup> *EU's Programme of Debt Relief*, EUR-LEX, [http://eurlex.europa.eu/summary/chapter/development.html?root\\_default=SUM\\_1\\_CODED%3D11, SUM\\_2\\_CODED%3D1106&locale=en; LDC Criteria](http://eurlex.europa.eu/summary/chapter/development.html?root_default=SUM_1_CODED%3D11, SUM_2_CODED%3D1106&locale=en; LDC Criteria), UN DEVELOPMENT POLICY AND ANALYSIS DIVISION (last updated Oct. 2014), [http://www.un.org/en/development/desa/policy/cdp/ldc/ldc\\_criteria.shtml](http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml); *The Multilateral Debt Relief Initiative*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/exr/facts/hipc.htm>.

LDCs by the UN,<sup>24</sup> the vast majority, 36 (with several LDC states currently in negotiations to join) are members of the WTO and thus part of the policy of full global integration into the world trading system.<sup>25</sup> From a trade perspective one of most important outcomes of a designation as a LDC is the ability to benefit from the Generalised System of Preferences (GSP), which provides for a system of exemptions from the rules contained in the WTO agreements for countries trading with the LDCs.

Beyond LDCs, global institutions utilize a range of economic, legal and statistical definitions to categories the rest of the Global South. Nevertheless, the UN definitions differ from those utilized by both the IMF and the World Bank Group.<sup>26</sup> Whilst all three have slightly differing aims, purposes and policy outlooks regarding development, building trade capacity is a central feature of each organization's agenda. The WTO, whilst following the UN's definition of LDCs enables states, upon membership to self-designate itself as 'developing'.<sup>27</sup> In part, this recognizes that states may wish to vary their stance depending on their own estimation of what status best suits their economies; yet, it also allows existing members to object to such self-designation.<sup>28</sup> Further, this designation is upon entry to the WTO and cannot be downgraded thereafter, though a country may choose to re-designate itself as developed. In turn, this is a further indication of the close links between 'development' and the ideology of linear an uninterrupted progress that still lies at the heart of international law.<sup>29</sup> Moreover, this linear trajectory is unresponsive to the fact that developing states might choose to self-identify themselves as 'developed' for a series of complicated political reasons. The

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<sup>24</sup> For the current list please see List of Least Developed Countries, UN DEVELOPMENT POLICY ANALYSIS DIVISION (last updated May 2016), [http://www.un.org/en/development/desa/policy/cdp/ldc/ldc\\_list.pdf](http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf).

<sup>25</sup> For the list of countries see [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm)

<sup>26</sup> For the World Bank Group definitions please see *World Bank Group Definitions*, THE WORLD BANK, <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>; For the IMF definitions please see <http://www.imf.org/external/np/exr/key/pdf/PRGTEligibleCountries.pdf>

<sup>27</sup> See *supra* note 21; *List of Least Developed Countries*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm).

<sup>28</sup> *WTO Policy on Development*, WORLD TRADE ORGANIZATION, [https://www.wto.org/english/tratop\\_e/devel\\_e/d1who\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/d1who_e.htm).

<sup>29</sup> Malcolm Shaw provides one of the most concise summaries of this approach in the opening phrase of his classical textbook on international law. See MALCOLM SHAW, *INTERNATIONAL LAW 1* (6<sup>th</sup> ed. Cambridge University Press 2003). ("In the long march of mankind from the cave to the computer a central role has always been played by the idea of law—the idea that order is necessary and chaos inimical to a just and stable existence.").

Apartheid in South Africa is a very telling example: after the end of the racist regime, South Africa requested to be reclassified as a developing country under the General Agreement on Tariffs and Trade (GATT), since the white-supremacist regime had opted for 'joining' the club of developed states for political reasons linked to their self-image. However, South Africa's request was rejected.<sup>30</sup> This precedent indicates how the trade system remains unresponsive to the realities of the Global South and the political ramifications of certain relevant choices.

Thus, the bulk of the global trade understanding of the South-North and the South-South economic relations focus on definitions, designations and building trade capacity. This includes latitude for self-categorization and at least from the WTO's perspective, the view that the Global South possesses some strength in numbers, which enables a purposeful approach reminiscent of the NIEO rather than an aid-based designation of assistance. The underlying purpose of integration into the global market through capacity building, GSPs, and special and differential is rarely critically evaluated. From the perspective of the TTIP negotiations the ongoing negative reactions of the Global North to the strength in numbers of the Global South within the WTO is an important feature of the context of negotiation. The Global South's assertion of its dissent to the terms of negotiation at the WTO, which it perceives as running contrary to the aims of integration on equal terms, puts the flood of mega or super markets in a different context than the mere inconvenience of fragmentation within international law.<sup>31</sup> It is also evident that when it comes to the TTIP type negotiations, the Global South once again becomes subsumed into a whole. Risse describes the decision to join the WTO as a 'choice between the Scylla of subjection to unwanted and perhaps unreasonable norms and the Charybdis of isolation',<sup>32</sup> what is evident from the TTIP negotiations is that Charybdis may be the imposed outcome which may lead to the same or perhaps a worse result even when Scylla was the chosen option.

### III. EU AND THE GLOBAL SOUTH

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<sup>30</sup> LAMP, *supra* note 6, at 21 ("It appears that, for South Africa under white rule, being seen as a developed country was partly a point of pride; the African National Congress, by contrast, saw no shame in South Africa being classified as a developing country. Given these ideational connotations of "developing country" status, it should perhaps not be surprising that, for a country to decide to change its status, it will often take more than the mere fact that it has ascended in the economic league tables.").

<sup>31</sup> Thomas Cottier, *The Common Law of International Trade and the Future of the World Trade Organization*, 18 J. INT'L ECON. L. 3 (2015)

<sup>32</sup> MATHIAS RISSE, ON GLOBAL JUSTICE 351 (Princeton University Press 2012).

As it has already been stressed, these negotiations do not take place in a legal, political or historical vacuum. Indeed, the EU has very specific trade arrangements with the Global South. The Global South states, which were once EU member states' colonies or with which certain members have historical links, are at the fore of EU's policy. In turn, differing attitudes of Member States toward their former colonies inform EU's policy in the field.<sup>33</sup> Hence, disputes amongst EU members as to how relationships with the Global South ought to proceed, cannot be decoupled from their historical contexts. Relationships in the postcolonial frame are often presented in the context of the Commonwealth or *La Francophonie*. Whilst it is difficult to generalize, the wider historical context under which these organizations operate ought not to be underestimated. One relevant example is the persistence of hybrid economies in post-colonial states such as Congo or Chad. These typically include a modern sector based on a capitalist model, which involves exploitation of primary resources and a general economy based on pre-capitalist structures geared towards subsistence agriculture, that benefited Europe massively, but left post-colonial states at a unique economic disadvantage.<sup>34</sup>

It is critical to note that the 1957 Treaty of Rome and specifically, Articles 131 and 136 that were established in a context of imperialism buttress the elements of the EU policy, although the empires have been disbanded. Carbone argues that the EU's most recent policy and legal iterations leave little space for meaningful engagement of the Global South in the process of settling trade arrangements, which nevertheless they must follow to access the EU market.<sup>35</sup>

Yet, the EU's treaty obligations interweave co-operation, trade, poverty reduction, and most critically, the need to take note of the impact of its own policies on the Global South. Under Title III, Article 208.1 of the Lisbon Treaty, 'the Union's development cooperation policy shall have as its primary objective the reduction and, in the long term, the eradication of poverty. The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries' and under Article 208.2., 'the Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organizations.' This two pronged approach appears progressive in that it first focuses on poverty eradication but it also takes a fairly

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<sup>33</sup> RODNEY *supra* note 2. Such states include former colonies of the UK, France, Germany, and the Netherlands.

<sup>34</sup> *Id.*

<sup>35</sup> Maurizio Carbone, *The EU and the Developing World: Partnership, Poverty, Politization*, in INTERNATIONAL RELATIONS AND THE EUROPEAN UNION 325 (Christopher Hill & Michael Smith eds. 2<sup>nd</sup> ed., Oxford University Press 2011).

typical Global North perspective on what the objectives ought to be. Second, whilst the Article recognizes development co-operation, particularly the UN's approach and the effect of policies on DCs, there is no requirement to actually integrate the Global South's view of development into its practices.

The Cotonou Agreement forms the backbone of the EU's arrangements with the ACP states (African, Caribbean, and Pacific Countries) and is currently in the process of renegotiation.<sup>36</sup> Arguably, the preceding Yaoundé and Lomé Agreements incorporated a more partnership-oriented approach combining trade with aid, than what their successor does.<sup>37</sup> It is clear from the Cotonou Agreement that the EU is largely on board with the so-called 'Washington Consensus', which is the neoliberal approach to development that focuses on privatization and expansion of market forces within an economy, as the only means to achieve development.<sup>38</sup> For example, one of the Cotonou Agreement's core objectives is the integration of the ACP countries into the global economy and as such, states receiving aid must agree to macroeconomic changes monitored by the EU. An alternate option for Global South states wishing to trade with the EU, is to enter into the Generalized System of Preferences of the Special Incentive Arrangement for Sustainable Development and Good Governance, which requires full incorporation into the global market.<sup>39</sup> In his report to the UNDP, Dani Rodrik questions whether trade liberalization improves a country's development and suggests that this conclusion depends on the perspective the evaluator begins with.<sup>40</sup> The relationships between these DCs and LDCs and the EU are currently

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<sup>36</sup> *EU Policy Regarding Cotonou*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:r12101> (last visited Nov.26, 2015).

<sup>37</sup> Albeit the Yaoundé Agreement was originally conceived during the final pangs of European colonialism and as with the Treaty of Rome must be considered in that context. See Richard Gibb, *Post-Lomé: The European Union and the South*, 21 *THIRD WORLD Q.* 457 (2000) [hereinafter GIBB]; Maria Perrson & Fredrik Wilhelmsson, *Assessing the Effects of EU Trade Preference for Developing Countries*, in *THE EUROPEAN UNION AND DEVELOPING COUNTRIES: TRADE, AID AND GROWTH IN AN INTEGRATING WORLD* 30-3 (Yves Bourdet et al. eds., Edward Elgar Publishing 2007).

<sup>38</sup> For the developmental policies of neoliberalism and the emergence of the 'Washington Consensus', see Jennifer Bair, *Taking Aim at the New International Economic Order*, in *THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* 147 (Philip Mirowski & Dieter Plehwe eds., Harvard University Press 2009).

<sup>39</sup> *EU Policy on Trade with the Global South*, EUROPEAN COMMISSION, [http://ec.europa.eu/taxation\\_customs/customs/customs\\_duties/rules\\_origin/preferential/article\\_781\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/article_781_en.htm).

<sup>40</sup> DANI RODRIK, UNDP, *THE GLOBAL GOVERNANCE OF TRADE AS IF DEVELOPMENT REALLY MATTERED* (July 2001),

covered by the 2008-2013 Revised Cotonou Agreement. With each re-negotiation, there has been an increasing focus on the reduction of trade barriers, such as rules of origin and other restrictions which impact the EU's Common Agricultural Policy intermixed with migration restrictions and security.

One of the most significant changes instigated under the Cotonou Agreement was the institution of full reciprocal trade. Under the Lomé, whilst the ACP states had duty-free access to the EU, they were permitted to retain some trade barriers to protect their fragile hybrid economies. The replacement of these trade preferences with the Economic Partnership Agreements established reciprocal trade agreements with duty free access for both sets of countries, albeit states covered by an LDC designation were afforded special and differential treatment. At present, the Agreement requires the ACP countries to provide duty-free access to their own markets for EU exports. The partial rationale for this was the need to comply with the WTO law which does not permit non-reciprocal trade arrangements beyond the LDCs. Whilst the WTO members agreed to a waiver and the Cotonou Agreement was re-negotiated, there is little suggestion that the EU fought to retain these key provisions in favor of the ACP states.<sup>41</sup> This insistence of reciprocity demonstrates the interactions between trade negotiations at the regional and global level and how it is impossible to understand these negotiations in isolation, for the reason being that together they form the context in which the Global South must compete.<sup>42</sup>

As is required under the EU's own treaties, the EU and its Member States' commitments to the MDGs, amongst other legal obligations, need to be paramount in considering the impact of the TTIP and the Cotonou Agreement upon the Global South. It is critical that the EU, in negotiating the TTIP, will not further undermine the remaining favorable elements of the Cotonou Agreement or its own constitutional obligations toward the Global South. The EU appears to be following the WTO in 'forcing' a change in the key benefits that accrue to the Global South or, at least, to the ACP members since the EU's policy excludes other DCs from group negotiations.<sup>43</sup> The ACP states are at the table, even if the

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<http://www.sss.ias.edu/files/pdfs/Rodrik/Research/global-governance-of-trade.pdf>> [hereinafter RODRIK].

<sup>41</sup> GIBB, *supra* note 30, at 457.

<sup>42</sup> For details of EU's trade position *see* EU's trade position, EUROPEAN COMMISSION (last updated 6<sup>th</sup> May, 2010), <http://ec.europa.eu/trade/policy/countries-and-regions/regions/africa-caribbean-pacific>.

<sup>43</sup> Albeit the broader nature of the benefits are contestable; for example, the Bananas Cases which alongside the EU and US, pitted the ACP members against other Global South states.

current re-negotiation of the Cotonou Agreement leads to an Agreement which no longer grants any specific preferential treatment or introduces regulatory frameworks that nullify trade concessions or create non-tariff barriers to trade. Within the WTO system, changes to the global trading system can be ameliorated by the Global South's strength in numbers and increased South-South co-operation. The apparent lack of interest from the EU in seeing the impact of the TTIP upon the Global South suggests that the creation of the mega-market is taking priority and that it is largely ignoring its own self-imposed obligations to the DCs.

#### IV. GLOBAL TRADE NEGOTIATIONS

##### A. *The Geography of 'Mega-Regionals'*

To fully appreciate the impact of the TTIP upon the Global South, we need to take into consideration other trade agreements, in particular, the TPP (Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam)<sup>44</sup> and the CETA (Canada and the EU)<sup>45</sup>. It is important to emphasize that most of the participants have pre-existing Free Trade Agreements and are members of the WTO. For instance, the TTIP is not the first trans-Atlantic trade deal: the Transatlantic Declaration (1990), the New Transatlantic Agenda (1995), the Transatlantic Economic Partnership (1998), and the Transatlantic Economic Council (2007) all serve as precursor agreements. However, it is the depth and breadth of the TTIP that makes it of critical importance to the Global South. Further, the size of the markets created by these agreements, either as Free Trade Areas or Customs Unions, will dominate the global regulatory framework for states other than the BRICS (Brazil, Russia, India, and China, South Africa) whose own markets and relative market power enable them to negotiate with these larger groupings on a somewhat equal footing. This is a point to which we will return shortly.

In turn, the TPP contains a mix of the Global South and North states and in its original incarnation, was intended to be amongst a much smaller group of states.<sup>46</sup>

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<sup>44</sup> For the full text of the agreement, see <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.

<sup>45</sup> For the updated text of the agreement that includes EU's proposal for the establishment of a permanent court of arbitration and the explicit protection of the 'right to regulate', see [http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc\\_154329.pdf](http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf).

<sup>46</sup> Brunei, Chile, New Zealand, and Singapore. For an early evaluation of TPP (before its conclusion), see Raj Bhala, *Trans-Pacific Partnership or Trampling Poor Partners? A Tentative Critical Review*, 11 MANCHESTER J. INT'L ECON. L. 2 (2014).

The TPP, as it includes states of the Global South, is the only negotiation of the three, to directly tackle the patent differences in size and economic power of the signatories. Nonetheless, like the CETA and the TTIP, there is minimal concern for Global South states outside of the negotiation. On the other hand, the CETA resembles the TTIP in its immediate make-up (EU-Canada), even though the volume of trade involved is more limited. Reoccurring features, such as the intellectual property protection which is similar to the TRIPs-plus, extends the remit of IP protection beyond the global negotiated process envisaged by the WTO, environmental concerns, food safety, access to medicines (perhaps re-opening the access to medicines debate that was so fraught early in the WTO's operation and which had to be vigorously fought by the Global South),<sup>47</sup> and specifically regarding the CETA, public banking in Canada and Investment Protection and Investor-State-Dispute Settlement, are ever present critiques of all three treaties, which is discussed below.<sup>48</sup> The recent changes to CETA's Investor-State-Dispute Settlement (ISDS), including the introduction of an appeals process and ethical standards to avoid conflict of interest amongst panel members along with the changes to the appointment of panel members to bring it in line with the TTIP's ISDS provisions, suggests that some of the disquiet about their operation has had an effect.<sup>49</sup> However, the core critiques on the ISDS more generally and the specific provisions of the TTIP and the CETA regarding the prioritizing of investors over public policy, the lack of oversight from domestic courts, and the absence of democratic oversight remain.<sup>50</sup>

B. *The Collapse of the Doha Development Round and its Implications for the Developing World*

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<sup>47</sup> World Trade Organization, Ministerial Declaration on the TRIPs Agreement and Public Health of 14 November 2001,, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002); Duncan Matthews, *WTO Decision of Paragraph 6 of the Doha Declaration, On the TRIPs Agreement and Public Health: A solution to the Access to Essential Medicines Problem?*, 7 J. INT'L ECON. L. 73 (2004).

<sup>48</sup> Susy Frankel, *Challenging Trips-Plus Agreements: The Potential Utility of Non-Violation Disputes*, 12 J. INT'L ECON. L. 1023 (2009); Jean-Frédéric Morin, *Multilateralizing TRIPs-Plus Agreements: Is the US Strategy a Failure?*, 12 J. World Intell. Prop. 175 (2009); Frederick M Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 AM. J. INT'L. L. 317 (2005).

<sup>49</sup> *CETA: EU and Canada Agree on New Approach on Investment in Trade Agreement*, EUROPEAN COMMISSION, (Feb. 29, 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1468>.

<sup>50</sup> Himaloya Saha, *A Critical Analysis of the Commonly Recommended Reforms of Investor-State Dispute Settlement (ISDS)*, 4 LEGAL ISSUES J. 39 (2016); Ingo Venzke, *Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication*, 17 J. WORLD. INV. & TRADE (forthcoming 2016).

The failure of the Doha Development Round (DDR) of negotiations at the WTO, whose core aim was to improve the status of developing member states, is a major driver of current trade negotiations.<sup>51</sup> The failure of the DDR, following the brief interlude of global negotiations preceding and following the creation of the WTO, is both a symptom and a trend of the fragmented nature of global trade negotiations and the North's disregard of the Global South.<sup>52</sup> Matsushita argues that the WTO will find a role amongst these mega FTAs, but as in themselves, they will not resolve the issues of world trade law necessary to create a comprehensive system.<sup>53</sup> But this approach disregards the place of the Global South within these negotiations. Matsushita's argument that the WTO Agreement and its Annexes may become one of many 'Magna Cartas' within trade law misses the limitations, purpose of that historical document, and importantly, its fictional role in creating a human rights basis within English medieval law.<sup>54</sup> The DDR required a minimum buy-in by the Global South to the trade liberalization agenda and was always going to benefit the stronger economic powers within the Global South more than others. That said the movement of the Global North away from direct negotiations with the Global South and the linguistic turn to refer to it as the Doha Round rather than as the Doha *Development* Round, suggests that the WTO may have become an uncomfortable forum for the Global North.

One reason for the discomfiture with the DDR is that unlike other international institutions linked to global trade, such as the IMF, the World Bank Group, or the UN, the WTO's decision-making processes operate on a one-country-one-vote system combined with qualified majorities for certain decisions.<sup>55</sup> This entrenched process of consensus decision-making at the WTO may have a negative impact upon the ability of some states to stand alone against the tide of opinion; yet, the WTO remains one of the few international organizations which actually abides by the concept of state equality no matter the economic or other might of its

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<sup>51</sup> Gillian Moon, *Trade and Equality: A Relationship to Discover*, 12 J. INT'L ECON. L. 617 (2009); Antoine Bouet & David Laborde, *Assessing the Potential Cost of a Failed Doha Round*, 9 WORLD TRADE REV. 319 (2010); Gillian Moon, *Fair in Form, But Discriminatory in Operation—WTO Law's Discriminatory Effects on Human Rights in Developing Countries*, 14 J. INT'L ECON. L. 553 (2011).

<sup>52</sup> RODRIK, *supra* note 33; STIGLITZ & CHARLTON, *supra* note 11.

<sup>53</sup> Mitsuo Matsushita, *A View on Future Roles of the WTO: Should There Be More Soft Law in the WTO*, 17 J. INT'L ECON. L. 701 (2014).

<sup>54</sup> *Id.* at 701-715.

<sup>55</sup> The exception being the EU which as a WTO has a vote equivalent to that of its Member States, *see* Surya P Subedi, *The Notion of Free Trade and the First Ten Years of the World Trade Organization: How Level Is the Level Playing Field?*, 53 NETH. INT'L L. REV. 273 (2006).

members.<sup>56</sup> This reality has led to the development of several different alliances amongst the Global South that enable states to combine their economic weight. These include the Cairns Group (19 Agricultural Exporting Countries which includes Australia, Canada, and South Africa), the Cotton-4 (Benin, Burkina Faso, Chad, and Mali), and the aforementioned ACP, amongst others.<sup>57</sup> These alliances are mirrored by groupings of developed or large economic powers, the most obvious being the EU, as well as the Quad (Canada, EU, Japan, and the US and the G-20). Alliances amongst the Global South have largely been attempts to move away from the Green Room form of negotiations, where a small group of select states came together to resolve difficult issues excluding other members. Whilst Green Room type negotiations remain at the WTO, the South-South alliances have gone some way to construct barriers to such exclusionary practices.<sup>58</sup>

The rise of the TTIP, the TPP, and the CETA means that while economically strong groups set the terms for market access, it will become far more difficult for the Global South, with the possible exception of the BRICS, to negotiate on (even formally) equal terms or indeed block changes which may have a significant negative impact upon their economies. Beyond the character of the decision-making, perhaps more critically, the WTO system ensured that all states, irrespective of capacity or trade delegation size, could theoretically be aware of all ongoing trade negotiations. Admittedly, the ability to do so remains dependent on the capacity of often small delegations in Geneva to attend multiple meetings and become an expert on a myriad of topics. However, the move away from the WTO, represented by the TTIP, the TPP, and the CETA, makes it far more difficult for those states with limited delegation capacities to maintain full knowledge of the changes which could potentially impact their economies or even voice their concerns. The rise of this type of agreements is also part of the 'noodle/spaghetti bowl'. This is a metaphor for the growing trend of fragmentation of international trade and investment law, as the ever-increasing number of regional trade

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<sup>56</sup> Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations art.ix, art.x, Apr. 15, 1994, 1867 U.N.T.S 14; Claus-Dieter Ehlermann & Lothar Ehring, *Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?*, 8 J. INT'L INT'L. ECON. L. 51 (2005); Richard H Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339,340 (2002).

<sup>57</sup> AMRITA NARLIKAR, *INTERNATIONAL TRADE AND DEVELOPING COUNTRIES: BARGAINING COALITIONS IN THE GATT & WTO* (Taylor & Francis 2005).

<sup>58</sup> Sonia E Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT'L. L. J. 483 (2007); Kent Jones, *Green Room Politics and the WTO's Crisis of Representation*, 9 PROGRESS DEV. STUD. 349 (2009); Mateo Diego-Fernandez, *Trade Negotiations Make Strange Bedfellows*, 7 WORLD TRADE REV. 423 (2008).

agreements make a singular global snapshot of trade regulation near impossible.<sup>59</sup> As Benvenisti and Downs already observed in 2007, fragmentation of international economic law ought not to be seen as an accident, but as a conscious strategy on the behalf of powerful states, and especially the US, in order to weaken the negotiating position of their weaker counterparts.<sup>60</sup>

What is also of direct relevance here is that the TTIP, the TPP, and the CETA demonstrate a move against the trend toward increased transparency amongst international financial institutions, which admittedly was starting from an extremely low point (and is perhaps mirrored by concerns regarding the ISDS).<sup>61</sup> The non-publication of the full terms of negotiation makes it difficult for the Global South to voice their objections to changes to the global economic trading system or undertake domestic or regional reforms in anticipation of a new trading regime. Further, whilst the Cotonou Agreement is currently being reworked on one side, the EU is fully cognizant of the wider political context of what is being negotiated. Further, the ACP countries must negotiate with one arm tied behind their backs as there is no knowledge of what the interaction between the Cotonou and the TTIP will be once both are operative. Although, political exigencies may make publication difficult, the democratic nature of the US and the EU Member States as well as the EU's attempts to gain assurance as to its democratic legitimacy ought to make transparency, where security or commercial secrets are not at issue, an imperative of accountable governance and the rule of law.<sup>62</sup> Such a commitment would also enable the welcome move towards transparency amongst international financial institutions to continue, rather than putting a halt to this positive trend.

### C. Institutional Shifts and the Exclusion of the 'Won't-Do' States

At this point, it is worth recalling how the process of institutional 'shopping' is not unprecedented in the history of international trade law. For example, one of the major tactical manoeuvres of the Global North in the wake of the NIEO was the

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<sup>59</sup> Won-Mog Choi, *Regional Economic Integration in East Asia: Prospect and Jurisprudence*, 6 J. INT'L ECON. L. 49 (2003); Francis Snyder, *China, Regional Trade Agreements and WTO Law*, 43 J. WORLD TRADE 1 (2009).

<sup>60</sup> Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 597-599 (2007).

<sup>61</sup> Luis Hinojosa Martinez, *Transparency in International Financial Institutions*, in TRANSPARENCY IN INTERNATIONAL LAW 77 (Andrea Bianchi & Anne Peters eds., Cambridge University Press 2013); Panagiotis Delimatsis, *Institutional Transparency in the WTO*, in TRANSPARENCY IN INTERNATIONAL LAW, *ibid.*, at 112.

<sup>62</sup> ROBERT SCHÜTZE, EUROPEAN CONSTITUTIONAL LAW 31-44, 74-77 (Cambridge University Press 2012).

prioritization of the World Bank and the IMF in matters of global economic governance over the relevant UN institutions, such as the UNCTAD, which were understood as having been ‘high jacked’ by the then Third World.<sup>63</sup> Admittedly, there are limits to this analogy. First, the Bretton Woods institutions already existed when the Global North upgraded their role. Here, the EU and the US opt for creating a new institutional structure to bypass the WTO. Second, it is not possible to equate the radical demands of the NIEO with the positions of the Global South during the DDR. The latter to a significant extent incorporates the dominant orthodoxy about the unquestionable benefits of trade liberalization and seeks to ameliorate the position of the said states within the current architecture.<sup>64</sup> The aspirations of the NIEO were more far-reaching.<sup>65</sup> Keeping these differences in mind, the eventual defeat of the NIEO points to the far-reaching impact of institutional shifts; it is worth reflecting on the historical parallel.<sup>66</sup> Koskenniemi once wrote that ‘once one knows which institution will deal with an issue, one already knows how it will be disposed of.’<sup>67</sup> In this case, if mega-regionals become the main institutional *loci* for organizing global trade, the disregard of the interests and the opinions of the Global South is to be expected.

It is indicative that the former US Trade Representative Robert Zoellick describes current mega-market deals from the US perspective as moving global trade negotiation forward without the ‘won’t-do countries’ and pressing towards free

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<sup>63</sup> See *The United States in the Opposition in* MARK MAZOWER, GOVERNING THE WORLD: THE HISTORY OF AN IDEA (PENGUIN 2012) [hereinafter MAZOWER].

<sup>64</sup> Ha-Joon Chang, *Hamlet without the Prince of Denmark: How Development Has Disappeared from Today’s ‘Development’ Discourse*, in TOWARDS NEW DEVELOPMENTALISM: MARKET AS MEANS RATHER THAN MASTER 51 (Shahrukh Rafi Khan & Jen Christiansen eds., Routledge 2010) (“Even as they disagree on who should cut their tariffs and subsidies in which areas by how much, most people seem to accept the principle behind the agenda itself – that the developed countries should specialize in industry and the developing countries should specialize in agriculture and therefore that whatever is making that specialization difficult should be criticized.”).

<sup>65</sup> “As Kellogg himself points out (though again in a slightly puzzled tone) ‘many [underdeveloped countries] appear to be very afraid of big American private companies, and [many also] believe in varying degrees of socialism’ PAHUJA, *supra* note 3, at 121.

<sup>66</sup> MAZOWER, *supra* note 62, at 317. (“UNCTAD was defanged with the appointment of a Washington-friendly secretary-general in 1984, and turned into a harmless accessory to the extraordinary transformation of capitalism that now took place under President Reagan and his successors. With not only UNCTAD but the UN itself side-lined, and international economic coordination run through the World Bank and the IMF- two institutions firmly in the control of the West- the United States emerged out of opposition.”).

<sup>67</sup> Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 23 (2007).

trade with the 'can-do countries'.<sup>68</sup> This ignores the rationale behind the DDR, which at least nominally was about securing a fairer deal for the Global South. In moving forward, from the perspective of the TTIP, the TPP, and the CETA, with the countries which in combination control two thirds of global output is, as the Financial Times describes, 'part of a grand strategy to conclude an only slightly less ambitious version of the Doha round by other means.'<sup>69</sup> But arguably, this will be a Doha Round without the Development Agenda (which had already been much watered down anyway). Moving the 'won't-do' countries to positions which they have explicitly rejected, is not moving with the 'can-do' countries. Rather, it is a process of coercing other states outside a forum in which they were able to reject negative policies, to make accommodations which they had previously rejected.<sup>70</sup> After all, as Benvenisti and Downs have noted 'creating or shifting to an alternative venue when the original one becomes too responsive to the interests of weaker states and their agents' is a core fragmentation strategy deployed by powerful states.<sup>71</sup>

Even the rhetorical tactic of describing such countries as intransigents is dismissive and infantilizing, since it suggests that if only they were mature enough to see what needs to be done, they would be reasonable and agree. But, of course, those 'won't-do' countries that eventually blocked the DDR were those in the Global South that either had the economic power such as Brazil or India, to stand on their own or were able to prevent changes being pushed through by sheer numbers in one of the many alliances within the WTO. It is worth recalling here that there is significant precedent to this tactic. Between 1995 and 1998, states of the Global North negotiated the (failed) Multilateral Agreement on Investments (MAI) under the auspices of the Organization of Economic Co-operation and Development.<sup>72</sup> The Agreement was never concluded mainly due to NGOs of the Global North campaigning against it. As Sornarajah points out, MAI rested upon the presumption that foreign investment was exclusively beneficial for host states,<sup>73</sup> while states of the Global South were systematically excluded from the negotiation

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<sup>68</sup> David Pilling & Shawn Donnan, *Trans-Pacific Partnership: Ocean's Twelve*, FINANCIAL TIMES (Sept. 22, 2013), <https://www.ft.com/content/8c253c5c-2056-11e3-b8c6-00144feab7de>.

<sup>69</sup> *Id.*

<sup>70</sup> Rorden Wilkinson, *Of Butchery and Bicycles: The WTO and the 'Death' of the Doha Development Agenda*, 83 POL. Q. 395 (2012); Susan C Schwab, *After Doha: Why the Negotiations are Doomed and What We Should Do about It*, 90 FOREIGN AFF. 104, 105 (2011).

<sup>71</sup> For more detail, see <http://www.oecd.org/daf/mai/>, (last visited Nov. 26, 2015).

<sup>72</sup> For more detail, see <http://www.oecd.org/daf/mai/>, (last visited Nov. 26, 2015).

<sup>73</sup> MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 259 (Cambridge University Press 2010).

process, since they could, at best, acquire observer status.<sup>74</sup> The failure of this strategy can also be said to be at the heart of this overt shift to bilateralism.

## V. FROM MULTILATERALISM TO BILATERALISM AND BACK?

As has been stressed, the failure of the DDR was instrumental in the gradual emergence of mega-markets and new FTAs. Two aspects of this process warrant attention: first, the potential that the sheer size of the markets arising from the TTIP/CETA/TPP will force other states to follow and second, the confidence of the Global North (especially the US) that the TTIP/TPP can serve as tools in a geopolitical competition with China, is potentially destabilizing and reflects hubristic over-confidence.

### A. Potential Trade Diversion and Bilateralism as a Tactical Manoeuvre

As they make trade between contracting states easier and more cost-effective in comparison to that with outsiders, trade agreements, by their very nature, give rise to *trade diversion* that reconstructs the map of trade relations. This occurs through lowering of tariffs and harmonizing non-tariff barriers to trade (NTB).<sup>75</sup> Arguably, in the case of the TTIP, the impact of the former will be secondary, since tariffs are already relatively low between the US and the EU. Xiaotong, Ping and Xiaoyan calculate that the effects of trade diversion, following the TTIP, for China, it will be approximately USD 39 billion, and EUR 145 billion *vis-à-vis* the US and the EU markets respectively.<sup>76</sup> Thus, given that tariff levels between the EU and the US are relatively low, the NTB-related aspects of the agreements are expected to have greater impact both domestically and on third parties.

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<sup>74</sup> *Id.* (“Some developing states did participate in the discussion as observers. Others offered comments from the sidelines, but, on the whole, developing states were absent from the proceedings.”).

<sup>75</sup> This evolution follows the trend identified by Andrew Lang regarding international trade law after the rise of neoliberalism, when an increasing number of regulations were reconceptualised as discriminatory, *see* ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER* 264 (Oxford University Press 2011). (“As a result of these trends in the jurisprudence, the non-discrimination norm became a much more powerful tool to wield against domestic regulation, even that which was apparently ‘non-discriminatory’ in the sense that the term had been traditionally understood. Discrimination began to look very much like ‘trade-distorting market intervention.’”).

<sup>76</sup> Zhang Xiaotong et al., *The EU’s New FTA Adventures and Their Implications for China*, 48 J. WORLD TRADE 525, 536-7 (2014) [hereinafter XIAOTONG ET AL.].

Moreover, Low estimates that NTBs-related cost reductions in primary agricultural products could be around 23 per cent.<sup>77</sup> Further, it is estimated that there will be a 3.3 per cent to 2.3 per cent reduction following lower tariff costs. Even if these calculations are overestimated, it is still arguably the case that trading in primary agricultural products between the two markets will become significantly cheaper. In turn, this will cause trade diversion, which will affect the LDCs more than it will affect, for example, China. This means that aspects of the TTIP will hit the most vulnerable states hardest, thereby potentially hindering their development. Critically, it was also in agriculture where the most significant disputes between the Global North and South occurred at the WTO. As it is now known, developed states undermined the core objectives of the Doha Declaration since it was perceived that trade liberalization in agriculture would mainly benefit developing states: "The Doha Declaration mandates comprehensive negotiations to improve market access, reduce or phase out export subsidies, and reduce trade-distorting domestic support. Further, it explicitly provides that special and differential treatment for developing countries will be integral to the final agreement on agricultural trade rules."<sup>78</sup> Even though we are not convinced that the interests of the Global South should be juxtaposed to those of small and medium-scale agriculture in developed states,<sup>79</sup> this circumvention of the Global South, especially in an area of high interest, is particularly problematic.

The very nature of agricultural products complicates the situation for the DCs and the LDCs. Even if these states are able and willing to undertake the technical and financial costs of meeting the new standards, these changes coupled with the sensitive nature of their products will almost inevitably lead to disruptions in trade, loss of crops, and at least some years of decreased income. Given the fragile economic and political conditions in many of these states, even short-term disruptions in trade could significantly hinder their development in the long run.

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<sup>77</sup> Patrick Low, *TTIP and the World Trading System*, in CATALYST? TTIP'S IMPACT ON THE REST 21 (Simon J Evenett et al. eds.,EPR Press 2015).

<sup>78</sup> Jordana Hunter, *Broken Promise: Trade, Agriculture and Development in the WTO*, 4 MELB. J. INT'L L. 299, 315 (2003).

<sup>79</sup> Anne Orford, *Food Security, Free Trade, and the Battle for the State*, 11 J. INT'L L & INT'L REL. 1, 67 (2015) ("In my view, this is not the time to demand that the European countryside begin to be managed in the same way that the countryside of Asia, Africa, and Latin America has been, but rather this is a moment to revisit the alternatives to the management of agriculture and rural life that might yet be available.").

On the other hand, a 2013 report on the impact of the TTIP on low-income countries suggested that it would be negligible.<sup>80</sup> This assertion was based on the assumption that their economies would not be competing in areas covered by the TTIP; this is partially true, but based on an assumption that these countries will remain primary resource exporters or maintain their hybrid economies. Further, it also assumes that states of the Global South will change their regulations to compensate. A recent report on the potential impact of the TPP on non-members reached strikingly similar conclusions, once again assuming that non-members would follow the regulatory trends set by the treaty.<sup>81</sup> These positions assume first, that non-member states can anticipate what the mega-regionals will contain, second, that they have the capacity to comply and third, that the regulatory changes to accommodate the TTIP, the TPP, or the CETA ought to be a priority.<sup>82</sup> But the Global South's absence from negotiations makes it impossible for these countries to adjudge for themselves or make plans to ameliorate its impact particularly as fluctuations in global trade tend to outrun its regulation.

Consequently, the move away from multilateralism remains significant. As already stressed, the turn to bilateralism is directly linked to the failure of the DDR. Nonetheless, as Alessandrini argues, it was the way this failure was interpreted that signals the move away from multilateralism, rather than the objective fact of its failure.<sup>83</sup> Alessandrini problematizes the response of the WTO to this failure, which was basically a reaffirmation of 'trade liberalization as the universally desirable means for stimulating growth.'<sup>84</sup> Crucially, the decline of international trade after the 2008 financial crisis was seen as a sign of insufficient liberalization, and not as, for example, symptomatic of 'insufficient demand at the global level'<sup>85</sup> attributable to the steadily declining share of national income going to workers not only in the West, but also in Sub-Saharan Africa, the Middle East, the Caribbean,

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<sup>80</sup> JIM ROLLO ET AL., DEP'T. INT'L DEV., POTENTIAL EFFECTS OF THE PROPOSED TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP ON SELECTED DEVELOPING COUNTRIES (2013) available at <http://r4d.dfid.gov.uk/Output/193679/Default.aspx>.

<sup>81</sup> Csilla Lakatos et al., *Topical Issues: Potential Macroeconomic Implications of the Trans-Pacific Partnership*, 219 GLOBAL ECON. PROSPECTS, Jan. 2016, available at <https://www.worldbank.org/content/dam/Worldbank/GEP/GEP2016a/Global-Economic-Prospects-January-2016-Spillovers-amid-weak-growth.pdf>.

<sup>82</sup> ROLLO ET AL., *supra* note 69.

<sup>83</sup> Donatella Alessandrini, *WTO at a Crossroads: The Crisis of Multilateral Trade and the Political Economy of the Flexibility Debate*, 5 TRADE L. & DEV. 256 (2013) [hereinafter ALESSANDRINI].

<sup>84</sup> *Id.* at 258; World Trade Organization [WTO], *DDG Rugwabiža warns protectionism will hurt global growth* (Nov. 4, 2011), [http://www.wto.org/english/news\\_e/news11\\_e/ddg\\_04nov11\\_e.htm](http://www.wto.org/english/news_e/news11_e/ddg_04nov11_e.htm).

<sup>85</sup> ALESSANDRINI, *supra* note 72, at 261.

and Latin America.<sup>86</sup> It is important to note here that Susan Schwab and Karan Bhatia explicitly conceive the TTIP as an alternative to traditional, Keynesian models of economic stimulus in times of crisis.<sup>87</sup>

Hence, the turn to bilateralism is not only linked to which actors will be included and which excluded, but also has a specific content, for instance, further trade liberalization, at least in certain sectors. In turn, along with numerous statements from the US/EU officials, the fact that the turn to bilateralism is linked to a specific solution to the DDR deadlock indicates that bilateralism is on part of the Global North, more of a tactical manoeuvre rather than a long-term strategic choice. Former EU Trade Commissioner Karel De Gucht provided an insight to this when he argued publicly that: 'the EU-US combined weight in the global economy means that many who will to sell to our markets will have an interest in moving towards whatever rules we can achieve'.<sup>88</sup> Presumably, the EU and the US hope that by temporarily by-passing the WTO, they will be able to create an objective market reality that will force the DCs and the LDCs into dropping their objections and start adhering to the new rules, in order to maintain their trade flows with the US and the EU. Hence, this is a way of by-passing equal sovereignty as (imperfectly) reflected in the voting processes of the WTO, by creating a *de facto* situation where the Global South will exercise its formal(istic) sovereign right to consent to certain regulations without having influenced their formation.<sup>89</sup>

B. *The Limits of Manoeuvring: the Colonial Past of International Law and China's Contemporary Role in Global Trade*

As has already been stressed, it is not feasible to treat all developing states as a homogenous group. Their diversity will also determine the degree of success of the trend towards tactical bilateralism. Thus, it is likely that the pressure exerted upon

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<sup>86</sup> Stephanie Sequino, *The Global Economic Crisis, Its Gender and Ethnic Implications, and Policy Responses*, 18 GENDER & DEV. 186 (2015).

<sup>87</sup> Susan Schwab & Karan Bhatia, *Why Mega-Regionals? in Mega-Regional Trade Agreements: Game-Changers or Costly Distractions for the Trading System?* 18 (Global Agenda Council on Trade & Foreign Direct Investment, World Economic Forum edn., 2014) [hereinafter MEGA-REGIONAL TRADE AGREEMENTS: GAME-CHANGERS OR COSTLY DISTRACTIONS FOR THE TRADING SYSTEM?].

<sup>88</sup> Karel De Gucht, A European perspective on Transatlantic Conference, European Conference at Harvard Kennedy School: Europe 2.0: Taking the Next Step, Cambridge, USA (2 March 2013).

<sup>89</sup> See, however, Howse, who argues that WTO law would pose limits to the regulatory convergence between mega-regionals' members, Robert Howse, *Regulatory Cooperation, Regional Trade Agreements, and World Trade Law: Conflict or Complementarity?*, 78 LAW & CONTEMP. PROBS. 137 (2016).

the LDCs to concede to whatever standards the TTIP/CETA/TPP will set will be much more effective than the pressure exerted upon, say, China. This further raises an issue regarding the geopolitical objectives of the TTIP and (especially) the TPP and the potentially uncontrollable consequences of this tactical bilateralism. Despite the intention of the Global North to return to multilateralism in the mid-term, the potential unwillingness of China to accept its exclusion from international norm-making might lead to the fragmentation of the world trade rules into competing trading blocks. After all, it is a common point raised by commentators that apart from the general tactical gesture described above, the TPP and the TTIP are part of the strategy especially of the US, to contain the rise of China and shift its priorities from the Middle East to the Pacific.<sup>90</sup> Crucially, and despite the reserved stance of its political leadership, this is what the Chinese scholars seem to believe: ‘In many ways’ China’s views about the TTIP and the EU-Japan FTA are largely influenced by the overall context of the US pivoting towards Asia and its rediscovery of the TPP as a geo-strategic vehicle for re-asserting its influence in Asia-Pacific.<sup>91</sup>

The confidence of the EU and the US that China, along with the rest of the world, will sooner or later concede to their mutually agreed standards is unjustifiable and capable of destabilizing the international system. The Global North appears to systematically underestimate the determination of China to make itself a major player in international law and importantly, to overcome the ‘trauma’ of 19<sup>th</sup> and 20<sup>th</sup> century legal imperialism against it. This situation is commonly described as China’s determination to stop being a ‘rule taker’ and become a ‘rule maker’.<sup>92</sup> It needs to be stressed here that this determination is not simply reflective of the will of a rising power that seeks to modify the international (legal) realm. Rather, it is also symptomatic of China’s determination to decisively overcome its ‘century of humiliation’ (1840s-1940s), when it was subjected to the economic and political power of the West through a semi-colonial regime that led to the opium trade wars

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<sup>90</sup> Maia Pal, *Old Alliances, New Struggles: The Transatlantic Trade and Investment Partnership*, RADICAL PHILOSOPHY, <https://www.radicalphilosophy.com/commentary/old-alliances-new-struggles/>. (“One of Obama’s crucial foreign policy aims is the ‘Pacific pivot’, a move away from the Middle East and towards the Pacific region. TPP (whose origins go back to 2005) is a major part of this move, and it responds to Chinese efforts at securing free-trade zones with ASEAN. Competition between China and the USA over the region remains crucial. Thus, moving away from the WTO is a way of responding more aggressively to changing geopolitical patterns, and to threats from China and Russia.”).

<sup>91</sup> XIAOTONG ET AL., *supra* note 67, at 545.

<sup>92</sup> Dan Ciuriak, *Mega Regionals and the Developing Countries*, Comments at the Trade Workshop Held under the Auspices of the Centre for Global Development and the International Institute for Sustainable Development, Washington, D.C. (June 24, 2014), at 7 [hereinafter CIURIAK].

and to the imposition of free trade zones such as in Hong Kong or Shanghai.<sup>93</sup> Crucially, international law, in the form of unequal treaties, was central in the construction of this regime.<sup>94</sup> In a recent statement,<sup>95</sup> China's foreign minister stressed the imperialist origins of China's interaction with international law and its determination not to allow repetition of such a relationship.<sup>96</sup> Arguably, although the TTIP/TPP/CETA are not as intrusive as 19<sup>th</sup> century 'gunboat diplomacy', the determination of the US and the EU (and Canada) to unilaterally set the standards for international trade is certainly reminiscent of 19<sup>th</sup> century Western exceptionalism. Once more, the West appears unwilling to confront its imperialist past (and present), which can turn out to be disastrous even on a tactical level.

Thus, China has not remained inactive in light of these events. Even though it is rhetorically committed to multilateralism,<sup>97</sup> its actual practice is more complicated. It has already concluded an FTA with Switzerland, a major European economy,<sup>98</sup> and is actively pursuing FTAs with Japan and Korea, Australia, and crucially,

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<sup>93</sup> As a 'semi-civilized' country, China stood in a peculiar position of selective inclusion/exclusion vis-à-vis international law: *See* MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* 129 (Cambridge University Press 2001). ("In this respect, international lawyers routinely distinguished between non-European communities of different degrees of civilization. For example, in a 1891 study of the concept of the protectorate, the German public law expert Paul Heilborn used Lorimer's scheme to distinguish between the relation Europeans had with civilized non-European states (such as Japan, China, Persia and with non-civilized communities (Stammen). While international law was inapplicable to both, a number of its rules could be applied in the relations Europeans maintained with the former group.").

<sup>94</sup> *See generally* Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 *NORDIC J. INT'L. L.* 335 (2005).

<sup>95</sup> Wang Yi, Minister of Foreign Affairs, People's Republic of China, China, a Staunch Defender and Builder of International Rule of Law (Oct. 24, 2014), [http://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/wjbz\\_663308/2461\\_663310/t1204247.shtml](http://www.fmprc.gov.cn/mfa_eng/wjb_663304/wjbz_663308/2461_663310/t1204247.shtml)

<sup>96</sup> *Id.* ("In the more than 100 years after the Opium War, colonialism and imperialism inflicted untold sufferings on China. For many years, China was unjustly deprived of the right by imperialist powers to equal application of international law. The Chinese people fought indomitably and tenaciously to uphold China's sovereignty, independence and territorial integrity and founded New China.", 'China ardently hopes for the rule of law in international relations against hegemony and power politics, and rules-based equity and justice, and hopes that the humiliation and sufferings it was subjected to will not happen to others.').

<sup>97</sup> XIAOTONG ET AL., *supra* note 67, at 547.

<sup>98</sup> Circular, Entry into force of the bilateral Switzerland-China free trade agreement on 1 July, 2014, available at [http://www.ezv.admin.ch/pdf\\_linker.php?doc=zirkular\\_china\\_06\\_14\\_englisch](http://www.ezv.admin.ch/pdf_linker.php?doc=zirkular_china_06_14_englisch).

Western Asia.<sup>99</sup> On a broader scale, the decision to establish the Asian Infrastructure Investment Bank (AIIB) alongside the BRICS' anticipated development indicates that the Bretton Woods institutions' monopoly over developmental issues is set to be challenged.<sup>100</sup> Presumably, China will not easily give up on the WTO, as Chinese elites consider their state to be one of the primary beneficiaries of the Organization.<sup>101</sup> Nonetheless, it is questionable whether the tactical manoeuvres of the US and the EU will eventually be proven successful. It is also conceivable that it will lead to a fragmentation of international trade law in competing regimes. As Ciuriak has observed, this 'Balkanization' of the global market can only be to the detriment of the weaker developing states.<sup>102</sup> Further, one need not necessarily agree with Andrew Gamble that 'economic blocks also tend to become military blocks'<sup>103</sup> to conclude that this potential fragmentation of international trade in competing blocks could be destabilising for the system of international relations.<sup>104</sup> Even in the most modest scenarios of two competing trading blocks, it is highly likely that certain LDCs which rely on the EU/US and China for their international trade will be squeezed trying to strike a potentially impossible balance between their trading partners. For example, although the EU remains Sub-Saharan Africa's largest trading partner with 25 per cent, China at present accounts for 15% of their international trade.<sup>105</sup> Hence, [a] question that arises is how Sub-Saharan African nations and regions will react, should mega-regional agreements fail to reach coherence and lead to fragmented governance

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<sup>99</sup> India, China, ASEAN, Australia, Japan, South Korea, and New Zealand are currently negotiating the Regional Comprehensive Economic Partnership (RCEP).

<sup>100</sup> Diane Desierto, *Breaking the Washington Consensus? The Rise of 'Alternative' Development Banks*, EJIL: TALK! (Mar. 18, 2015), <http://www.ejiltalk.org/breaking-the-washington-consensus-the-rise-of-alternative-development-banks/>.

<sup>101</sup> "For many Chinese trade veterans, it is impossible to give up the WTO as China is one of the biggest beneficiaries of WTO. They have fought hard to make China join the WTO, and it is unthinkable to turn away from it." XIAOTONGET AL., *supra* note 67, at 547.

<sup>102</sup> CIURIAK, *supra* note 81.

<sup>103</sup> Andrew Gamble, *Multipolarity and the Transatlantic Trade and Investment Partnership*, in *THE POLITICS OF TRANSATLANTIC TRADE NEGOTIATIONS: TTIP IN A GLOBALIZED WORLD 9* (Jean-Frédéric Morin et al. eds., Ashgate 2015) [hereinafter *THE POLITICS OF TRANSATLANTIC TRADE NEGOTIATIONS: TTIP IN A GLOBALIZED WORLD*].

<sup>104</sup> "If Brazil, India, and China play their assigned roles in this storyline, it may all work out peacefully. But that is not the only outcome observed when such tactics were applied historically. This is a world that starts to resemble the 19<sup>th</sup> century Great Powers situation. That episode of globalization did not end well." Richard Baldwin, *The Systemic Impact, in MEGA-REGIONAL TRADE AGREEMENTS: GAME-CHANGERS OR COSTLY DISTRACTIONS FOR THE TRADING SYSTEM?*, *supra* note 76, at 26.

<sup>105</sup> *Id.*, at 30.

structures within the international trading system.<sup>106</sup> Draper and Ismail argue that the most likely scenario is a pro-EU decision.<sup>107</sup> In any case, any choice will involve significant economic and political costs for the LDCs, which could be fatal for their development. In a recent paper, Benvenisti convincingly mapped the 'silencing' effects of the fragmentation of international economic law as represented by the TTIP for developing states.<sup>108</sup> While acknowledging this prospect, we also want to stress that it is a threat of 'cacophony' for international trade law, a cacophony that again will be to the detriment of the LDCs.

## VI. BEYOND THE (DEVELOPING) STATE: THE TTIP/TPP/CETA AND THE SUBALTERNS

Finally, this article aims to escape 'state-centric' conceptions of international (trade) law and broaden the scope of inquiry for the TTIP's/CETA's/TPP's affected 'outsiders'.<sup>109</sup> More specifically, the potential impact of these trade/investment treaties on the subalterns, that is the most oppressed and marginalised groups of DCs/LDCs such as poor peasants, unskilled labourers, women and minorities, further demonstrates the potentially damaging character of these negotiations.<sup>110</sup> Looking below the 'veil' of sovereign statehood and national economy that dominates international law and mainstream economics reveals the potential breadth of the impact of such mega-markets. Two examples illustrate this point: first, how increased competition in agricultural products will not only negatively influence national economies in the Global South, but will also specifically hit the small farmers harder and enhance the position of (mostly-but not exclusively-

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<sup>106</sup> Peter Draper, Salim Ismail, *The Potential Impact of Mega-regionals on Sub-Saharan Africa and LDCs in the Region*, in MEGA-REGIONAL TRADE AGREEMENTS: GAME-CHANGERS OR COSTLY DISTRACTIONS FOR THE TRADING SYSTEM?, *supra* note 76, at 31.

<sup>107</sup> *Id.*

<sup>108</sup> Eyel Benvenisti, *Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law* (Global Trust Working Paper Series, Paper No. 08, 2015).

<sup>109</sup> For the different usages of the term, see Susan Marks, *State-Centrism, International Law and the Anxieties of Influence*, 19 LEIDEN J. INT'L L. 339 (2006).

<sup>110</sup> Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, 5 SOC. & LEGAL STUD. 337, 361 (1996) ("Edward Said (1988) traces the origins of the term subaltern to Antonio Gramsci. In Gramsci's usage, subalternity is the opposite to a dominant, elite or hegemonic position of power, and it is the interaction between dominant and subaltern groupings that is the essence of history. Subaltern Studies scholars use the notion broadly, as inclusive of all those subordinated in South Asian society, whether according to class, gender, caste, religion, age, office or any other system of hierarchizing difference into relations of domination and subordination.").

Western) corporations in agriculture.<sup>111</sup>Second, the impact of the patent provisions of these agreements on access to medicine in the Global South and who will bear the brunt of these changes when access to essential medicine becomes even more difficult.

*A. The TTIP and Small Farmers: Lessons from the Bananas Saga*

As previously discussed, the possibility of trade diversion due to harmonised/mutually recognised standards and even lower tariffs between contracting states in agricultural products is substantial. In turn, this shift will annul in practice the preferential treatment accorded to the products of certain Global South states and will expose their products to increased competition. The experience of the WTO and the well-known *Bananas* cases which involved a claim by Ecuador, Guatemala, Honduras, and the US that the EU's trade preferences for the ACP countries was contrary to the WTO's rules of non-discrimination, Most-Favoured Nation, and licensing arrangements, demonstrate that small agricultural units will suffer most.<sup>112</sup> It is also relevant to the EU's stance in its negotiations around the Cotonou Agreement, as its relationship with the ACP countries under that Agreement was central to the cases. Even though Caribbean states were directly affected by the outcome of the process, they were recognised as 'third states' within the WTO process. It is notable that depending upon the specific architecture of the Investor State Dispute Settlement (ISDS) systems, they will probably lose even this (limited) status.

In the context of the *Banana* saga the crucial difference between these states and those in Latin America that brought the case was how bananas production was organised. In the first case, bananas were grown in small household plots through labour-intensive methods that were relatively environment-friendly and in many cases, run by female heads of households.<sup>113</sup> Hence, the production of the fruit accorded a relatively high and sustainable income to numerous local actors, empowered women and was environmentally sustainable. In the second instance, banana production in the Latin American states was dominated by the US-based

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<sup>111</sup> For the significance of corporate lobbying in the process of TTIP negotiations, see Tereza Novotná, *Business Interests and the Transatlantic Trade and Investment Partnership*, in *THE POLITICS OF TRANSATLANTIC TRADE NEGOTIATIONS: TTIP IN A GLOBALIZED WORLD*, *supra* note 92, at 27.

<sup>112</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, DSR 1997:II, 591 (adopted Sept. 25, 1997) [hereinafter *BANANA CASES*].

<sup>113</sup> Gavin Fridell, *The Case against Cheap Bananas: Lessons from the EU-Caribbean Banana Agreement*, 37 *CRITICAL SOC.* 285, 288 (2011).

company Chiquita, in large plantations, where even unionised workers earned three times less and worked longer hours than their counterparts in the Caribbean.<sup>114</sup>

Therefore, the perceived advantages of trade liberalisation in agriculture must be seen in context. One of the principal arguments against preferential treatment of imports from the Windward Islands was that it resulted in higher prices for bananas in the EU market.<sup>115</sup> Nonetheless, these marginally higher prices arguably had a minimal impact upon the relatively affluent consumers in the EU, while they were crucial for the sustainability of entire communities in the Caribbean. In these terms it is incorrect to 'read' the *Bananas* dispute as a competition between different states of the Global South for access in the EU market. Rather, the active involvement of the US indicates the complicated nature of global value chains in trade. These cases also warrant a look beyond sovereign statehood, by rather focusing on which domestic actors benefit and lose from further trade liberalisation in primary agricultural products. The *Bananas* cases precedent necessitates closer examination of how trade liberalisation and trade diversion under the TTIP/TPP/CETA will impact upon the livelihood of the most vulnerable social groups of the Global South. In turn, this requires focus on an understanding of 'human development' that questions the centrality of economic growth that still dominates international legal discourse regarding development,<sup>116</sup> a fact also reflected in the justification strategies for the TTIP.<sup>117</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> "Under the unified EU [banana] policy, quotas, high prices, and preferential access provide aid to preferred suppliers, but cost EU consumers dearly and the quota restrictions hurt nonpreferred suppliers (mainly Latin American countries)" Brent Borrell, *EU Bananarama III*, (International Economics Department, The World Bank, Policy Research Working Paper, 1994); See BANANA CASES, *supra* note 100.

<sup>116</sup> "Within international law, modern development discourse both tapped into the logic of nationalism being mobilised in the struggles for independence and provided a way to meet the challenge that successful struggles posed to European 'universalism'. It did this through the replacement of the old order based on race or civilizational status with a new scale secured by the ostensibly 'scientific' measure of Gross National Product (GNP), also invented around this time." PAHUJA, *supra* note 3, at 37-38.

<sup>117</sup> European Commission, *Transatlantic Trade and Investment Partnership: The Economic Analysis Explained* (September 2013), [http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc\\_151787.pdf](http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151787.pdf) ("According to CEPR's researchers, TTIP will be beneficial not only for the US and the EU but also for their trading partners around the world, to the tune of €99 billion. This is because economic growth in the US and EU means more purchases by consumers and business of other countries' products. It is also because any common regulatory approaches between the EU and the US will reduce costs for exporters from and to those markets – so-called positive spillover effects.").

*B. Access to Medicines in the Developing World: Eroding 'TRIPS Flexibilities'?*

A second example that demonstrates the impact of mega-markets (and the CETA) on the subalterns is the Intellectual Property Rights (IPR) provisions and its effect on access to affordable medicine.<sup>118</sup> Again, the lack of transparency in negotiations means that some of the comments are based on leaks and remain speculative until the TTIP's publication. Nonetheless, Chapter 22 of the CETA provides a glimpse into some general trends.<sup>119</sup> In Article 3 of the CETA, the importance of the Doha Declaration on the TRIPS Agreement and Public Health is recognised and states are encouraged to ensure consistency in the interpretation and application of the Chapter with the Declaration.<sup>120</sup> Notwithstanding this commitment under Article 9, Canada agrees to bring its patent protection system in line with the EU's (Patent Term Restoration), which in practice, results in a two-year extension of drug patents.<sup>121</sup> Moreover, Article 3 remains aspirational, whereas Chapter 22 patent rights are accompanied by strong enforcement mechanisms. For example, Canada dropped its initial demand to exclude IPR matters from the ISDS mechanism and instead the *possibility* of jointly agreed binding interpretations was incorporated under Chapter 10.<sup>122</sup> It appears that the TPP provides for similar mechanisms. In

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<sup>118</sup> The issue has also attracted the attention of Nobel Laureate Joseph Stiglitz, see Joseph E Stiglitz, *Don't Trade Away Our Health*, THE NEW YORK TIMES (Jan. 30, 2015), [http://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html?\\_r=1](http://www.nytimes.com/2015/01/31/opinion/dont-trade-away-our-health.html?_r=1).

<sup>119</sup> See *supra* note 37 above.

<sup>120</sup> *Id.* (“1. The Parties recognise the importance of the Doha Declaration on the TRIPS Agreement and Public Health adopted on 14 November 2001 by the Ministerial Conference of the World Trade Organization. In interpreting and implementing the rights and obligations under this Chapter, the Parties shall ensure consistency with this Declaration.”).

<sup>121</sup> Scott Sinclair et al. *Intellectual Property Rights*, in MAKING SENSE OF CETA: AN ANALYSIS OF THE FINAL TEXT OF THE CANADA-EUROPEAN UNION COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT 58 (Stuart Trew et al. eds., Canadian Centre for Policy Alternatives, 2014) <https://www.policyalternatives.ca/publications/reports/making-sense-ceta>.

<sup>122</sup> Full text of CETA, see Canadian Department of Foreign Affairs, Trade and Development, CETA, (last visited Nov. 26, 2015), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-accg/text-texte/22.aspx?lang=eng> (“Mindful that investor state dispute settlement tribunals are meant to enforce the obligations referred to in Article X.17(1): Scope of a Claim to Arbitration of Chapter x (yyy), and are not an appeal mechanism for the decisions of domestic courts, the Parties recall that the domestic courts of each Party are responsible for the determination of the existence and validity of intellectual property rights. The Parties further recognize that each Party shall be free to determine the appropriate method of implementing the provisions of this Agreement regarding intellectual property within their own legal system and practice.

addition to that, there is agreement between the supporters and opponents of the TPP that the Agreement will also enable patenting 'diagnostic, therapeutic and surgical methods for the treatment of humans, and animals'.<sup>123</sup> *Médecins Sans Frontières* argue that, '[s]uch measures could increase (the) medical liability and costs of medical practice, and reduce access to basic medical procedures. Several medical associations have declared patenting of medical procedures unethical, and (the) U.S. law prohibits enforcement of these patents on medical practitioners.'<sup>124</sup> Similarly, Oxfam has also been vocal against the EU's approach to patents as reflected in the FTAs it is currently negotiating.<sup>125</sup> The principal concern here is that under the pressure of large pharmaceutical corporations,<sup>126</sup> the EU and the US may attempt to gradually erode 'TRIPS flexibilities' that allows for considerable exceptions (for example, compulsory licencing) on the grounds of public health for which the Global South fought long and hard.<sup>127</sup>

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The Parties agree to review the relation between intellectual property rights and investment disciplines within 3 years after entry into force of the agreement or at the request of a Party. Further to this review and to the extent required, the Parties may issue binding interpretations to ensure the proper interpretation of the scope of investment protection under this Agreement in accordance with the provisions of Article X.27: Applicable Law and Rules of Interpretation of Chapter x (Investment).")

<sup>123</sup> Peter Draper & Ricardo Melendez-Ortiz, *The Trans-Pacific (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP)-Key Issues and Potential Impact on Members*, in MEGA-REGIONAL TRADE AGREEMENTS: GAME-CHANGERS OR COSTLY DISTRACTIONS FOR THE TRADING SYSTEM? , *supra* note 76, at 14.

<sup>124</sup> Médecins Sans Frontières Briefing Note, *Trading away Health: The Trans-Pacific Partnership Agreement (TPP)* (2013), <http://www.msfaaccess.org/spotlight-on/trans-pacific-partnership-agreement>.

<sup>125</sup> OXFAM, HAI EUROPE, *TRADING AWAY ACCESS TO MEDICINES – REVISITED: HOW THE EUROPEAN TRADE AGENDA CONTINUES TO UNDERMINE ACCESS TO MEDICINES* (2014) [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/bp-trading-away-access-medicines-290914-en.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp-trading-away-access-medicines-290914-en.pdf). [hereinafter OXFAM, TRADING AWAY]

<sup>126</sup> Perhaps the most well-known reaction to compulsory licensing under TRIPS was that of the CEO of Bayer, who argued that compulsory licencing of a cancer drug by India was 'theft', see Vikas Bajaj & Andrew Pollackmarch, *India Orders Bayer to License a Patented Drug*, THE NEW YORK TIMES (Mar. 12, 2012), <https://www.nytimes.com/2012/03/13/business/global/india-overrules-bayer-allowing-generic-drug.html>.

<sup>127</sup> 'TRIPS flexibilities' are provisions that permit deviation from the intended harmonizing minimum standards of IP rights. See World Trade Organization, Ministerial Declaration of 14 November 2001 on the TRIPS Agreement and Public Health, at 114, ¶5(b), WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002) ("We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health... [W]e reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS

The legitimising narrative for increased IP protection is that these structures provide incentives for corporations to invest in research and therefore, it promotes innovation,<sup>128</sup> albeit evidence which supports this assertion remains limited and questionable.<sup>129</sup> Second, low average income in developing countries means that individuals are unable to pay enough to ‘compensate’ for private investment. In turn, this means that pharmaceutical corporations tend to underinvest in research linked to endemic diseases outside the Global North.<sup>130</sup> Even when research occurs, the resultant prices render them inaccessible to most individuals in the Global South. So far, the most effective way of lowering the costs has been the production of generic drugs, which are sold in a fraction of the price of the original one. This is one of the cases where competition has been proven to drag down prices in general, thereby facilitating access to much-needed medication. Nonetheless, the production of generics will be impaired if the CETA/TTIP/TPP provisions accord higher protection to IPR than those guaranteed in the TRIPS. Further, these treaties appear to be a confirmation that the only realistic and desirable drive behind pharmaceutical research is/should be profit. Within this framework, those areas of research that are not (immediately) profitable are neglected. The Ebola outbreak and lack of suitable medicines demonstrate the potentially destructive consequences of this approach.<sup>131</sup> Further, the WHO

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Agreement, which provide flexibility for this purpose.... [W]e recognize that these flexibilities include [compulsory licensing, etc.]”).

<sup>128</sup> See generally Tim Warstall, *Where Joe Stiglitz Goes Wrong on Big Pharma and the TPP*, FORBES (Jan. 31, 2015), <http://www.forbes.com/sites/timworstall/2015/01/31/where-joe-stiglitz-goes-wrong-on-big-pharma-and-the-tpp/>.

<sup>129</sup> HA-JOO CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* 144 (Bloomsbury Press 2008). (“Like all other institutions, intellectual property rights (patents, copyrights and trademarks) may or may not be beneficial, depending on how they are designed and where they are used. The challenge is not to decide whether to scrap them altogether or strengthen them to the hilt, but to get the balance right between the interests of the IPR- holders and the rest of the society (or the rest of the world, if you like).”).

<sup>130</sup> See United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Neglected Diseases: A Human Rights Analysis* World Health Organization (2007), [http://www.who.int/tdr/publications/documents/seb\\_topic6.pdf](http://www.who.int/tdr/publications/documents/seb_topic6.pdf).

<sup>131</sup> OXFAM, *Trading Away*, *supra* note 113, at 8-9. (“The current Ebola crisis in West Africa poses fundamental questions about the way in which R&D is financed. While Ebola is a highly infectious and lethal virus, its outbreaks happen in Africa. However, pharmaceutical companies are not interested in the R&D of medicines or vaccines for markets that will not produce high profits. It is only now with the threat of widening spread that companies have started or resumed research – mostly funded by public money from the US.”).

estimates that 80% of deaths due to non-communicable diseases occur in the Lower Middle Income Countries, making access to cheap and safe drugs an essential precondition for the livelihood and well-being of billions of individuals.<sup>132</sup> These two examples far from exhaust the potential detrimental impact mega-markets have upon the subalterns. The CETA/TTIP/TPP incorporate and elaborate a particular understanding of economic efficiency that prioritises economic growth and profit over other potential measures of development, such as access to elementary health care, environmental sustainability, high wages, and empowerment of women. Far from romanticising the WTO's laws (for example, the TRIPS), it is argued that certain aspects of the same took account of 'human development' allowing for deviations from a strict 'economic' rationality. Therefore, we suggest that in order to fully comprehend the impact of these agreements, it is essential to adopt a wider approach that questions the assumption of a unified 'national economy', which is contingent on 'equal sovereignty'.

## VII. CONCLUSION

It is a distinctive characteristic of modern law that it operates based on broad categorisations (usually on binary schemes) that obscure rich, complicated and often contradictory realities on the ground. This contribution aspired to show how the 'Global South' is no exception to this rule. There is no unanimity as for the criteria and modalities of categorisation across international law, but the inclination of constructing hierarchies and incorporating a progress-based conception of history is very real. In any case, the Global South, in all its permutations and combinations, has finally gained a position in terms of economic, legal, and policy development, such that the Global North cannot remain impervious to its wishes. The TTIP/TPP/CETA, whilst apparently demonstrating a way forward for the Global North which avoids having to directly engage with the Global South, also by their nature, lays bare weaknesses within its strategy and suggests that the Global North has yet to accept the new reality of a Global South that cannot be disregarded. First, by moving away from the WTO, the Global North has ceded its ability to control world trade law's agenda through that institution and has sought to denude the negotiating power attained by some from the Global South. Second, the lack of transparency suggests that, whilst domestic opposition impacts what the negotiators think they can push through, the wider global audience of states must be kept in the dark as their reactions cannot be foreseen, albeit some commentators appear to think that they will accept whatever will come. Third, and probably most significantly, in a sense, this trend makes the Global North appear

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<sup>132</sup> *New WHO Report: Deaths from Non-Communicable Diseases on the Rise, with Developing World Hit Hardest*, WORLD HEALTH ORGANIZATION, (Apr. 27, 2011), [https://www.who.int/mediacentre/news/releases/2011/ncds\\_20110427/en/](https://www.who.int/mediacentre/news/releases/2011/ncds_20110427/en/).

foolhardy in its attempts to retain its dominance in the global market by creating these mega markets now that their own individual (or collective in the EU's position) markets cannot withstand the brunt of the Global South's economic forces.

Of course, this is not to underestimate the potential negative consequences for those in the Global South, particularly the LDCs or the DCs which retain their hybrid economies. For LDCs, this turn to bilateralism means increased adaptation costs and possible disruptions in trade, whilst for the global order, the potential resistance of the BRICS to this trend could mean increasing tensions with the emergence of competing trading blocks. Second, it is imperative to look beyond equal sovereignty and national economy and factor in the impact of these agreements on the domestic pattern of production, welfare, and power relations. The cases of trade in fruit and access to medicine tried to illustrate how class, gender, and race will be crucial factors in deciding who will benefit and who will be hurt from certain provisions of these emerging agreements. This projected varying impact of the TTIP on the Global South also aptly depicts the multiplicity of interests that frame the debate on international trade.

To conclude, there are two broader comments to be made, one on policy and one on theoretical levels. First, the focus of our analysis on the Global South aspires to initiate a debate on how international lawyers should approach our object. Our concern is that in a profoundly interconnected world state consent and formal legal obligation are not adequate conceptual tools for capturing the breadth and depth of the TTIP's potential consequences for other actors. In turn, this suggests that both international lawyers and other global legal actors can no longer legitimately 'hide' behind formalism, but should reflect on how international economic law can contribute to the construction of a fairer international society.

Second, the EU possesses a clear mandate within its treaties to take account of development in its policies and negotiations. The EU should use this mandate to make a clear statement not only as to the general content of the TTIP, but also, to the Global South that the impact of its terms on them will be accounted for. Further, with regard to the continued negotiations of the Cotonou Agreement, the EU should consider the broader context of its other negotiations and bring these to the table; particularly, as the EU has pushed for trade liberalisation to become a full part of its negotiations with the ACP countries. To do otherwise, is to negotiate in bad faith with partners who are unaware of the full nature of the market terms they are legally engaging and attempting to trade within. Whilst it remains unlikely that the EU will do this, it ought to be cognisant that there are significant consequences in not doing so and although these will vary according to the Global South player in question, they are nonetheless considerable.