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### TTIP: Another Chapter in the United States' Multilateral Trade Agreement?

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#### I. Introduction

1. The balance-of-power theory posits that the power preponderance of a single state or of a coalition of states is highly undesirable because the preponderant actor is likely to engage in aggressive behaviour. Peace is generally preserved when an equilibrium of power exists among great powers. For, in a state of equilibrium, no single state or coalition of states possesses overwhelming power and thereby the incentive to launch war against weaker states.<sup>1</sup> Balance of power is an equilibrating process that maintains peace by counterbalancing any State that seeks superiority, distributing global power evenly through external balancing, namely, alignments with others against the prevailing threat (balancing) or with the source of threat (bandwagoning)<sup>2</sup> as well as through internal balancing, namely, increase of State's military strength.<sup>3</sup> Proponents of this theory appreciate the importance of economics as the mainspring of military power and, even though they have failed to integrate fully the effects of economic cooperation and competition into their theoretical framework,<sup>4</sup> they explain regional integration efforts as a balancing phenomenon in the context of the struggle between alliances and counter alliances.<sup>5</sup>

2. In their analysis of the establishment of alliances, realists stress the role of power and prestige.<sup>6</sup> And even if they do not agree on their exact role,<sup>7</sup> they all see power and

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<sup>1</sup> Paul, T.V. 'Introduction: The Enduring Axioms of Balance of Power Theory and Their Contemporary Relevance', in: Paul, T.V., Wirtz, J.J. & Fortmann, M., *Balance of Power: Theory and Practice in the 21<sup>st</sup> Century* (Stanford University Press 2004), p. 5.

<sup>2</sup> Walt, S.M., 'Alliances: Balancing and Bandwagoning', in: Robert J. Art, R.J. & Jervis, R. (eds), *International Politics* (HarperCollins 1996), p. 110.

<sup>3</sup> For an analysis see, Brawley, M.R., 'The Political Economy of Balance of Power Theory', in: Paul, T.V., Wirtz, J.J. & Fortmann, M., *Balance of Power: Theory and Practice in the 21<sup>st</sup> Century* (Stanford University Press 2004), p. 81.

<sup>4</sup> *Ibid.*, p. 76.

<sup>5</sup> Morgenthau, H.J. *Politics among Nations: The Struggle for Power and Peace* (Mc GrawHill 2005), p. 202.

<sup>6</sup> Power refers to the economic, military and related capabilities of the State whereas prestige refers primary to the perceptions of other States with respect to a State's capacities and its ability and willingness to exercise power [Gilpin, G., *War and Change in World Politics* (Cambridge University Press 1983), p. 31].

<sup>7</sup> Some claim that structural power, namely, the possession or control over material resources, and thereby control over knowledge and ideas influences the course of institutional bargaining, namely the efforts of autonomous actors to reach an agreement on the terms of constitutional contracts or interlocking rights and rules that are expected to govern their subsequent interactions [Young, O.R., 'Political Leadership and Regime Formation: On the Development of Institutions in International

prestige as driving forces in the creation of alliances, including international institutions. International institutions are said to be created by the most powerful States to further those States power in the international system. Some argue that powerful States (hegemon) create international institutions to maintain the global order by providing public goods like free trade and stability.<sup>8</sup> Others claim that the more powerful States (enactors) can create an international institution without the consent of other States and then force other States to join the international institution by making them worst off when they resist participating.<sup>9</sup> Others, finally, observe the exercise of State power in the resolution of distributional conflicts, where power is used to determine who can play the game, with the less powerful actors never invited to the table, or to dictate the rules of the game, for instance who gets to move first thus dictating the outcome,<sup>10</sup> in other words, defining the participants and the agenda.

3. U.S. trade and investment policy of competitive liberalisation relies on the balance-of-power theory and on the role of power and prestige in asymmetrical bargaining. Indeed, while the U.S. trade policy has traditionally relied exclusively on multilateral negotiations, since the mid-1980s, they have turned to regional and bilateral agreements.<sup>11</sup> This trend led originally to the conclusion of numerous bilateral and plurilateral Free Trade Agreements

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Society' 45 *Int'l. Org.* (1991), p. 282, 288]. However, while some see an absolute positive correlation between structural power and institutional bargaining, on the assumption that the most powerful participants shape the outcome of the negotiation terms, others focus instead on the interplay between possession of structural power and the achievement of bargaining leverage to conclude that the possession of structural power does not automatically translate into bargaining leverage [Young, O.R., *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press 1994), pp. 117-141]. Others claim that the bargaining power among states and the outcomes of negotiations are defined principally by the relative prestige of the parties involved [Gilpin (*supra*, note 6), p. 31].

<sup>8</sup> Gilpin (*supra*, note 6), p. 35.

<sup>9</sup> Gruber, L., *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton University Press 2000), p. 10.

<sup>10</sup> Krasner, S.K., 'Global Communications and National Power: Life on the Pareto Frontier', 43 *World Politics* (1991), p. 340,

<sup>11</sup> As Weintraub explains, traditionally, the U.S. trade policy was to rely almost exclusively on the multilateral negotiations in the General Agreement on Tariffs and Trade (GATT) and to avoid bilateral FTAs, 'except with state trading countries whose import tariffs had little consequence on the direction of trade'. In 1987, however, the U.S. concluded the Canada-U.S. FTA (CUSFTA), which in turn led to the adoption of NAFTA, then to the Free Trade Areas of the Americas FTAA initiative, and now to bilateral FTAs whenever they seem appropriate. The new U.S. policy involves negotiation into global, regional, plurilateral and bilateral level [Weintraub, S., 'Some Implications of U.S. Trade Agreements with Chile and Singapore', *LAEBA*, Working Paper No.14, June 2003, p. 8]. Similarly, according to Gantz, although for most part of the post-World War II period, the U.S. have exercised leadership in global efforts to achieve freer trade, prior to 1985, focusing almost exclusively on the General Agreement on Tariffs and Trade, 'the year 1985 marked a pivotal period in U.S. foreign trade policy. The United States began to depart from its long-standing opposition to regional trade agreements' [Gantz, D., 'The 'Bipartisan Trade Deal,' Trade Promotion Authority and the Future of U.S. Free Trade Agreements' 28 *Saint Louis University Law Review* (2008), p. 116].

(FTAs). The collapse of the Doha Round negotiations in 2011<sup>12</sup> marked the beginning of a new era in international trade liberalisation. Most notable amongst the changes brought about because of this collapse, was the rise of the negotiation fever for the conclusion of further bilateral and plurilateral FTAs by the U.S. The numerous explanations for this shift include the increase of trade leverage and the promotion of global liberalisation,<sup>13</sup> the difficulties of conciliation of the heterogeneous interests within the WTO system,<sup>14</sup> the unwillingness of the U.S. to satisfy the demands of developing countries for further concessions<sup>15</sup> along with the internal protectionist pressures triggered by the increase of the American trade deficit<sup>16</sup> as well as by the demands for furtherance of social and environmental protection goals.<sup>17</sup> Bilateralism is supposed to facilitate agreement between like-minded countries as well as bridge the differences in asymmetrical bargaining through the carrot of a privileged access to the market of the strongest state that may persuade smaller countries to give concessions on the bilateral level what they would have never given on a multilateral level.

4. It is therefore not surprising that in international trade, as Kolsky Lewies observes, '*what members cannot accomplish through the WTO, they may try to achieve through free*

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<sup>12</sup> For an analysis of the reasons of collapse, see, Schott, J.J. *Reviving the Doha Round*, Peterson Institute for International Economics, 2004, in: <<http://www.iie.com/publications/papers/paper.cfm?ResearchID=207>> and Gantz, D.A., *Liberalizing International Trade after Doha: Multilateral, Plurilateral, Regional and Unilateral Initiatives* (Cambridge University Press 2013), pp. 36-46.

<sup>13</sup> According to Weintraub, the official explanation was that bilateral agreements '*not only increase U.S. trading leverage, but also encourage global trade liberalization*'. In addition, the U.S. have been criticised for concluding only a limited number of FTAs thus '*promoting a world of trade discrimination*' and the conclusion of FTAs may seem like an answer to the criticism that the U.S. are pursuing a policy of '*discriminatory free trade*', namely a policy of non-discriminatory or MFN treatment on condition of conclusion of a FTA [Weintraub (*supra*, note 11), p. 9].

<sup>14</sup> Indeed, the U.S. may also have adopted a more pragmatic approach to the problem of trade liberalisation. Traditionally, international trade negotiations were dominated by 'Quad' countries namely, the U.S. the E.U., Japan and Canada whereas the role of developing countries was limited. The deadlock of the WTO negotiations has demonstrated the drawbacks of the WTO system, namely, the impossibility of reconciliation heterogeneous interests of its 162 member States let alone the limitation of power of the 'Quad' countries [Schott (*supra*, note 12)].

<sup>15</sup> The complexity of the negotiations and the difficulties of reaching a consensus in the framework of the WTO was further accentuated by the unwillingness of the U.S. and the E.U. to satisfy the demands of developing countries for further concessions in the areas of agriculture and textiles that are of major export interest to developing countries [Schott (*supra*, note 12)].

<sup>16</sup> Protectionist pressures are nurtured by the numerous tensions in U.S.-China trade relationships stemming from China's incomplete transition to a free market economy and the ever-increasing size of the American trade deficit with China [Morrison, W. M., *China-U.S. Trade Issues*, Congressional Research Service Report, December 15, 2015, pp. 2-3].

<sup>17</sup> Noland, M., *Learning to Love the WTO* *Foreign Affairs* (September/October 1999).

*trade agreements ... , particularly with economically or politically weaker trade partners*'.<sup>18</sup> Griffith, Steinberg & Zysman explain that '[b]y negotiating deals one-by-one with individual countries, the US was able to leverage its power, securing deeper liberalization and a more complex trade agenda than could be advanced in the WTO, where US trade bargaining power was more diffused than in one-on-one negotiations. This bilateral strategy was characterized as *Competitive Liberalization: the idea that once a critical mass of bilateral agreements were achieved, states not party to these agreements would be inclined to liberalize along similar lines in order to avoid trade and investment diversion, and to remain competitive in a global economy*'.<sup>19</sup> Indeed, using power and prestige to achieve superior bargaining power in order to establish alliances with smaller like-minded countries, the U.S. aspires to neutralise alliances of unsympathetic countries in order to dictate the rules on international trade that satisfy their taste for freedom of trade and maximise their benefit.

5. Even though the Transatlantic Trade and Investment Partnership (TTIP) has been at the centre of attention for a long period of time, the debate '*has been centred too much on 'horror stories' and too little on the economic, geopolitical and regulatory effects of TTIP*'.<sup>20</sup> Addressing the latter issues, in this paper we argue that the analysis of the likely impacts of the TTIP should take into account that this treaty will be part of the wider network of U.S. FTAs established in the context of their competitive liberalization strategy. The U.S. have established a network of FTAs with selected, smaller like-minded countries in which other countries will have to accede on a take it or leave it basis. And numerous countries, for fear of loss of their parts in international trade, will rush to conclude FTAs with the U.S. Thus, the division between developed and developing countries, a principal cause of the deadlock of the WTO Doha Round, is avoided and the U.S. will be in a position to dictate the content of international trade law rules. Seen as a bilateral agreement, TTIP may present indeed some clear advantages for the E.U., even though its rules in a number of issues, such as the content of the rules of origin or the nature of cooperation in standard setting, may ultimately jeopardise European interests. Seen however as part of a network of treaties supervised by the U.S., TTIP may lead to a clear loss of sovereignty for the E.U., since it may restrict its ability to introduce alternative trade policies in the future.

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<sup>18</sup> Kolsky Lewies, M., 'The Politics and Indirect Effects of Asymmetrical Bargaining Power in Free Trade Agreements', in: Broude, T., Busch, M.L. & Porges, A., *The Politics of International Economic Law* (Cambridge University Press 2011), p. 19.

<sup>19</sup> Griffith, M.K., Steinberg, R. & Zysman, J., 'Great Power Politics in A Global Economy: Origins and Consequences of the TPP and TTIP', in: <<http://www.brie.berkeley.edu/wp-content/uploads/2015/02/Great-Power-Politics-in-a-Global-Economy-Origins-and-Consequences-of-the-TPP-and-TTIP.pdf>>.

<sup>20</sup> De Ville, F., & Siles-Brügge, G., *The T.T.I.P.: The Truth about the Transatlantic Trade and Investment Partnership* (Polity Press 2016), p. 2.

## II. The Establishment of the Network of the U.S. Free Trade Agreements

6. Between 1985 and 2015, the United States entered into 16 FTAs with 28 countries. The U.S. has thus today established a wide network of bilateral FTAs<sup>21</sup> as well as three plurilateral FTAs, the North-America Free Trade Agreement (NAFTA),<sup>22</sup> the Central American Free Trade Agreement (CAFTA-DR),<sup>23</sup> and the Trans-Pacific Partnership (TPP).<sup>24</sup> The TTIP, currently under negotiation, will be added to this network. With the exception of the FTA with Israel and NAFTA, all agreements have been concluded after 2000. The attempts to enlarge the U.S. FTAs network have been intensified since 2011 with the conclusion of the TTP and the negotiation of the TTIP. From the point of view of the participants, this network includes a number of weaker, like-minded countries chosen by the U.S. on political rather than on economic grounds. From the point of view of the content, the choice of weaker partners allowed also the U.S. to dictate the agenda.

### A. The Choice of Partners

7. The U.S. has entered into agreements with 25 different countries. The list includes 8 OECD Countries<sup>25</sup> and 17 Non-OECD Countries.<sup>26</sup> Of those, most are located in the Americas,<sup>27</sup> seven are located in the Asia - Pacific region<sup>28</sup> and five in the MENA Region<sup>29</sup>. Interestingly enough, however, all of the above partner countries are relatively weaker and had much to gain from access to the U.S. market whereas, with the exception of Canada, Mexico, South Korea, Singapore, Australia, Chile, Colombia and Israel, they have little or no significance for U.S. trade. In contrast, there are no FTA with some of the major U.S. trade partners, namely China and the European Union even though the U.K., Germany, the

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<sup>21</sup> Australia (2005), Bahrain (2006), Canada (1987), Chile (2004), Colombia (2011), Israel (1985), Jordan (2001), South Korea (2011), Morocco (2006), Oman (2006), Panama (2011), Peru (2007), Singapore (2004).

<sup>22</sup> Canada, Mexico (1994)

<sup>23</sup> Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Dominican Republic (2006).

<sup>24</sup> Australia, Brunei Darussalam, Chile, Japan Malaysia, New Zealand, Peru, Singapore, Vietnam (2015).

<sup>25</sup> Australia, Canada, Chile, Israel, Japan, Mexico, New Zealand and South Korea.

<sup>26</sup> Bahrain, Brunei Darussalam, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Jordan, Malaysia, Morocco, Nicaragua, Oman, Panama, Peru, Singapore, Vietnam.

<sup>27</sup> Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Peru.

<sup>28</sup> Australia, Brunei Darussalam, Japan, Malaysia, Singapore, South Korea and Vietnam.

<sup>29</sup> Bahrain, Israel, Jordan, Morocco and Oman.

Netherlands, Belgium and France in the aggregate account for more than China in total value for export of goods.<sup>30</sup>

8. Koh explained that '*the U.S. international trade policy is driven, in part by commercial interests, and, in part, by strategic interests*'.<sup>31</sup> Similarly, Gordon claimed that most of the partners were chosen for political rather than for economic reasons.<sup>32</sup> For example, according to Koh, in the case of Canada and Mexico there has been a congruence of U.S. economic and strategic interests whereas in other cases such as Israel and Jordan the interests were more strategic than economic.<sup>33</sup> In contrast, according to Lusztig, proponents of the dependency theory present NAFTA as the outcome of the declining U.S. hegemony and the subsequent imperative of consolidating a U.S.-led and controlled hemispheric trade block.<sup>34</sup> Weintraub claimed in relation to Chile and Singapore that their choice was explained by the limited protectionism problems of the two countries, their limited interest in access to U.S. agricultural products' market and their strategic position to set an example in the countries of their respective regions, Latin America and Southern Asia, to want their own FTAs with the U.S., the so-called bandwagon motive.<sup>35</sup> Koh observed in relation to Singapore that the two countries '*share a common worldview and threat perception*'.<sup>36</sup> Finally, Gordon added in 2003 that Singapore's key attraction to the US is its symbolic value to others in East Asia whereas Chile's low tariff policy makes it the South American poster-boy the US wants others to emulate.<sup>37</sup>

9. A decade later, indeed, NAFTA, CAFTA-DR and a number of FTAs cover a substantial number of Latin American countries and TPP a number of significant countries in the Asia - Pacific Region. There is no doubt that the U.S. have clear political interests in Latin America. Similarly, if the focus of the U.S. on the Asia - Pacific Region may not be explained solely in terms of economic interests, it may be easily explained in terms of

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<sup>30</sup> See, *Top U.S. Trade Partners Ranked by 2014 U.S. Total Export Value for Goods*, in: <[http://www.trade.gov/mas/ian/build/groups/public/@tg\\_ian/documents/webcontent/tg\\_ian\\_003364.pdf](http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003364.pdf)>.

<sup>31</sup> Koh, T.T.B., 'The USSFTA: A Personal Perspective', in: Koh, T. & Lin Chang, L. (eds), *The United States – Singapore Free Trade Agreement: Highlights and Insights* (Singapore: Institute of Policy Studies, 2004), p. 8.

<sup>32</sup> Gordon, B.K., *By Invitation Only: Cozy Free Trade Deals Subvert Global Integration*, YaleGlobal Online Magazine, 13 February 2003.

<sup>33</sup> Koh (*supra*, note 31), p. 8.

<sup>34</sup> Lusztig, M., *Risking Free Trade: The Politics of Trade in Britain, Canada, Mexico, and the United States* (University of Pittsburgh Press 1996), p. 98.

<sup>35</sup> Weintraub (*supra*, note 11), p. 9.

<sup>36</sup> Koh (*supra*, note 31), p. 9.

<sup>37</sup> Gordon (*supra*, note 32).

strategic interests. Indeed, in November 2002, the ten member states of the Association of Southeast Asian Nations (ASEAN)<sup>38</sup> and the six states with which ASEAN has existing FTAs<sup>39</sup> formally launched negotiations for the adoption of the Regional Comprehensive Economic Partnership (RCEP) in order to liberalise trade in goods and services and investment. In response to that initiative, in 2008, the U.S. expressed their interest to participate even though negotiations for the TPP were initiated early in the 1990s. Hamanaka claims that the U.S. involvement in the TPP negotiations was motivated by the aim of restriction of the Chinese power in Asia.<sup>40</sup> Similarly, Gantz explains that '*the TPP is a key element of U.S. economic, political, and security policy in Asia at a time when China's influence in all that areas is rapidly increasing*'.<sup>41</sup>

10. Similar explanations were given in relation to other U.S. FTAs. Galal and Lawrence claim that '*political rather than economic considerations have driven US Free Trade Agreements in the Middle East*'.<sup>42</sup> In the case of Morocco, as the same authors explain, primary U.S. objectives were political, namely to enhance Morocco's reform process, cement the friendly relations between Morocco and the West, reduce conditions of despair that have created a breeding ground for terrorists and catalyse similar changes in neighbouring countries.<sup>43</sup> Similarly, Rosen claims that '*the US-Israel and the US-Jordan Free Trade Agreements are typically treated as footnotes in most discussions on US trade policy, owing to the small amount of trade they cover ... the US-Israel and the US-Jordan FTAs are clear examples of the use of trade policy –specifically bilateral trade agreements- as a means of pursuing foreign policy objectives*'.<sup>44</sup>

## **B. The Choice of the Agenda**

11. This choice of partners allowed also the U.S. to dictate the agenda. This was because in most cases the U.S. had little or no benefits from trade with its partners whereas its weaker partners had much to gain from access to the U.S. market and they were

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<sup>38</sup> Brunei, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, Vietnam.

<sup>39</sup> Australia, China, India, Japan, South Korea and New Zealand.

<sup>40</sup> Hamanaka, Sh., *Trans-Pacific Partnership versus Regional Comprehensive Economic Partnership: Control of Membership and Agenda Setting*, ADB Working Paper Series on Regional Economic Integration, No. 146 (December 2014), p. 16.

<sup>41</sup> Gantz (*supra*, note 12), p. 270.

<sup>42</sup> Galal, A. & Lawrence, R.Z., 'Egypt, Morocco, and the United States', in: Schott, J.J. (ed.), *Free Trade Agreements: US Strategies and Priorities* (Institute for International Economics 2004), p. 299.

<sup>43</sup> *Ibid.*, p. 326.

<sup>44</sup> Rosen, H., 'Free Trade Agreements as Foreign Policy Tools: The US-Israel and the US-Jordan FTAs', in: Schott, J.J. (ed.), *Free Trade Agreements: US Strategies and Priorities* (Institute for International Economics 2004), p 51.

therefore ready to consent to the U.S. FTA model. As Gordon points out, *'from the perspective of potential US FTA partners, especially smaller developing nations, guaranteed access to the enormous American market is highly tempting bait'*.<sup>45</sup> For example, Gantz explains that the FTAs concluded with Peru, Panama and Colombia *'apply to small Latin American Nations with relatively limited capacity to export or to demand major changes in the standard U.S. FTA model'*.<sup>46</sup> Similarly, in the case of Chile and Singapore, Weintraub observes that the two countries wanted to obtain a legal document assuring access to the U.S. market. In contrast, the concessions the two countries received from the U.S. were not central in the negotiation. He therefore describes *'the two FTAs as exchanges in which Chile and Singapore made concessions in the areas most sought by the United States (e.g., services, government procurement, and intellectual property) in exchange for legal assurance of access to the U.S. market. In the exchanges, Chile and Singapore had to change some laws (e.g., on capital controls), whereas the United States did not'*.<sup>47</sup> As a result, all FTAs follow a model dictated by the U.S. The origins of this model are found in NAFTA and the NAFTA-like Chile and Singapore FTAs that *'became the templates for the many U.S. FTAs that followed, with appropriate modifications to deal with an individual country's situation'*.<sup>48</sup> All FTAs contain provisions on trade and investment as well as provisions on a number of other issues of similar but not necessarily identical content.

12. The U.S. Trade Promotion Authority<sup>49</sup> is vested with a wide mandate to negotiate on trade issues, including the elimination of trade barriers and distortions and the trade in services.<sup>50</sup> And all FTAs contain relevant rules on liberalisation of trade on goods and services. As Weintraub explains, the U.S. sought to go beyond what has the WTO and NAFTA, in particular, to obtain liberalization of trade in a variety of services, substantial ability to compete for government contracts in the partner countries, assuring the ability to carry out e-commerce, and pushing for greater transparency in setting trade rules, regulations, and dispute settlement. There was also a desire to lock in low import duties, which will likely be more germane in FTAs with other developing countries that have higher tariffs. Finally, another motive was to reduce discrimination against exports from the United

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<sup>45</sup> Gordon (*supra*, note 32).

<sup>46</sup> Gantz (*supra*, note 12), p. 145.

<sup>47</sup> Weintraub (*supra*, note 11), p. 10.

<sup>48</sup> Gantz (*supra*, note 11), p. 122.

<sup>49</sup> On the powers of the Trade Promotion Authority see, Fergusson, I.F., *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, CRS Report for Congress, June 2015.

<sup>50</sup> The trade negotiating objectives include overall trade negotiating objectives and principal trade negotiating objectives. The latter refer to trade barriers and distortions as well as to trade in services. [19 U.S. Code, Chapter 24, par 3802 (Trade negotiating objectives)].

States when competing against comparable exports from countries that already had FTAs with their partners.<sup>51</sup> In contrast, the U.S. government did not offer liberalisation on sectors traditionally protected like agriculture, steel, textiles and clothing.<sup>52</sup>

13. Similarly, in relation to foreign direct investment (FDI), the U.S. Trade Promotion Authority is mandated '*to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice*'.<sup>53</sup> Indeed, with the exception of the FTA with Australia, all other FTAs contain rules on liberalisation of investment. The U.S. sought to liberalise foreign direct investment (FDI) along the lines of their Bilateral Investment Treaty (BIT) model or to quote Akhtar & Weiss U.S. FTAs contain "*BIT-like*" investment chapters with "*core*" investor protections'.<sup>54</sup>

14. Most FTAs contain provisions on a number of other issues, including intellectual property rules and rules for labor standards and environmental protection. Intellectual property rules contained in FTAs introduce standards that go beyond the requirements of the TRIPS Agreement, the so-called TRIPS plus rules.<sup>55</sup> However, as Roffe and Vivas-Eugui explain '*the US recently relaxed several patent-related IP rules in revised versions of its FTAs with Colombia, Panama and Peru*'.<sup>56</sup> The provisions on introduction of satisfactory rules for labor standards and environmental protection were necessary in order to attract favorable votes from those constituencies when congressional approval is sought<sup>57</sup> and the U.S. Trade Promotion authority was explicitly mandated to introduce such rules.<sup>58</sup> Yet, the

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<sup>51</sup> Weintraub (*supra*, note 11), p. 9.

<sup>52</sup> As Gantz explains, even though the U.S. remains one of the most open markets in the world '*long-standing U.S. policy continues to provide extensive protection to agriculture commodities, steel, textiles and clothing, among others*' [Gantz (*supra*, note 11), p. 118].

<sup>53</sup> 19 U.S. Code, Chapter 24, par 3802 (Trade negotiating objectives).

<sup>54</sup> Akhtar, S.I. & Weiss, M.A., *U.S. International Investment Agreements: Issues for Congress*, CRS Report for Congress, April 2013, p. 13.

<sup>55</sup> Cf. Weintraub (*supra*, note 11), p. 10.

<sup>56</sup> Roffe, P., & Vivas-Eugui, D., 'A Shift in Intellectual Property Policy in US FTAs?', 11 *Bridges* (2007), p. 15.

<sup>57</sup> Weintraub (*supra*, note 11), p. 10.

<sup>58</sup> The U.S. Trade Promotion authority was mandated, in particular, '(5) to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources; (6) to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO ... and an understanding of the relationship between trade and worker rights; (7) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do

requirement of increased labour and environmental protections is likely to increase production costs in developing countries and improve in turn U.S.' competitiveness. NAFTA did not contain such provisions but only two side agreements, the North American Agreement on Labor Cooperation and the North American Agreement on Environmental Cooperation. Almost all subsequent agreements, in contrast, incorporate references to labor and environmental standards.<sup>59</sup>

15. Last but not least FTAs contain MFN treatment clauses. Wonnacott explains that the MFN treatment '*has been a cornerstone of US commercial policy since the 1920s, although there have been a number of exceptions*'.<sup>60</sup> The clause is introduced in relation to both trade and investment provisions of the FTAs. NAFTA contains limited MFN clauses in relation to trade (tariffs) and investment (treatment). In contrast, the U.S. - Singapore FTA contains MFN clauses in relation to trade (cross border trade in services, financial services) and investment (treatment). Similarly, the U.S. - Chile FTA contains MFN clauses in relation to trade (cross border trade in services, financial services) in relation to investment (treatment).

### III. The Effects and Side-Effects of the Network

16. U.S. FTAs establish preferential treatment with U.S. partners that departs from the principle of non-discrimination of the WTO. Articles XXIV of the General Agreement on Tariffs and Trade 1994 and V of the General Agreement on Trade in Services authorise regional trade agreements, namely free trade areas and customs unions as well as preferential trade arrangements, namely unilateral, non-reciprocal trade preferences.<sup>61</sup> Yet, the components of the U.S. FTAs' network are not identical. The network includes, bilateral FTAs establishing reciprocal bilateral relationships as well as plurilateral FTAs that establish plurilateral reciprocal relationships. And, even though the U.S. is the strongest party in all U.S. FTAs, from the legal point of view, the effects of bilateral and plurilateral agreements may not be identical. Furthermore, by virtue of the Most-Favoured-Nation (MFN) Treatment

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*not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade* [19 U.S. Code, Chapter 24, par 3802 (Trade negotiating objectives)]

<sup>59</sup> As Gantz rightly concludes, '*virtually all of the U.S. FTAs, beginning with NAFTA, call for providing citizens of the Parties with opportunities for access to some kind of mechanism for addressing violations of the labor and environmental (and many other) obligations agreed to by the Parties*' [Gantz, D.A. 'Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements', 42 *University of Miami Inter-American Law Review* (2011), p. 304].

<sup>60</sup> Wonnacott, P., *The United States and Canada: The Quest for Free Trade: an Examination of Selected Issues* (Institute for International Economics, 1987), p. 45.

<sup>61</sup> For an interesting discussion on the relationship see Kolsky Lewies, M., 'The Prisoners' Dilemma Posed by Free Trade Agreements: Can Open Access Provisions Provide an Escape?' 11 *Chicago Journal of International Law* (2010), pp. 633-642.

clauses, this network will actually operate as a single multilateral trade agreement under the supervision of the U.S.

#### **A. The Political Effects**

17. In her analysis of the effects of asymmetrical bargaining power, Kolsky Lewies explains that in addition to the direct impact of political pressure on the weaker party to the FTA in the form of ‘take it or leave it’ terms, FTAs may also have indirect impact on non-parties by effectively constraining policy choices outside the context of the original FTA.<sup>62</sup>

18. The U.S. FTAs are mentioned by Kolsky Lewies as an example of asymmetrical bargaining and the outcome of U.S. political pressures. For, through FTAs the U.S. has managed to impose provisions favoured by its domestic constituents like strengthening intellectual property provisions or introducing labor and environment clauses that it has not been able to get WTO members to agree collectively in the multilateral forum.<sup>63</sup> Gruber claims that the U.S., as the strongest country, managed to manipulate and limit the choices of between the relatively weaker countries, Canada and Mexico. For, while Mexico did not wish to have an FTA with the U.S., the U.S. managed to make it so that there would be only two available options for Mexico: left out by a Bilateral FTA with Canada, thus undertaking the risk of lower trade barriers between U.S. and Canada affecting Mexico’s ability to compete in the American market or participate in NAFTA, even though doing so would force Mexico to make faster and more significant political and economic changes than its people or its government supported. Mexico thus entered NAFTA not because it would make it better off but because staying outside the agreement would have left Mexico worse off.<sup>64</sup> Kolsky Lewies explains also in relation to the U.S.-Australia FTA that ‘*Australia succumbed to the United States superior bargaining power ... by agreeing to various exceptions to liberalisation commitments and to terms with which it was not happy. The success of U.S. pressure has resulted in changes in the Australian law*’.<sup>65</sup>

19. Accordingly, when relations between U.S. and non-party countries are asymmetrical, the risk of lower trade barriers affecting the ability to compete in the U.S. FTAs area may be a major incentive for non-party countries to conclude an FTA with the U.S., thus increasing the corresponding bargaining power of the U.S. In addition, the U.S. plurilateral FTAs’ network offers to parties more that access into the U.S. market, an access to a package of

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<sup>62</sup> Kolsky Lewies (*supra*, note 18), p. 21.

<sup>63</sup> *Ibid.*, p. 19

<sup>64</sup> Gruber, L., ‘Power Politics and the Free Trade Bandwagon’ 34 *Comparative Political Studies* (2001), pp. 703-741.

<sup>65</sup> Kolsky Lewies (*supra*, note 18), p. 22.

low tariffs in a number of countries. This incentive of non-party countries to accede to the plurilateral FTAs will lead to a further increase of the U.S. bargaining power. In both cases, non-party countries will wish to make concessions in order to conclude an FTA with the U.S. or to accede to a U.S. plurilateral FTA, and they might even compete on concessions in order to obtain priority access. U.S. bargaining power is bound to increase as the number of U.S. FTAs' parties increases and the number of non-parties decreases. For, according to the competitive liberalisation strategy, once a critical mass of FTAs are concluded, presumably with like-minded countries, unsympathetic countries, unable to form a counter alliance, will inevitably have to liberalise along the lines of the U.S. FTAs. This may explain the interest of the U.S. in the conclusion of the TTIP.

20. Kolsky Lewies, however, adds in relation to the indirect impact of FTAs on non-parties that the U.S.-Australia FTA had repercussions on New Zealand because under the Australia-New Zealand Closer Economic Relations Trade Agreement the two countries had agreed to a harmonised business environment.<sup>66</sup> The bargaining process between Australia and the U.S., she concludes, *'did not take into account the negative externalities of these terms impacting New Zealand. It is problematic that New Zealand finds itself with unexpected, undesired regulatory choices as a result of political power being exercised in an agreement it had no role in negotiating'*.<sup>67</sup>

21. Using the stick of exclusion and the carrot of access to the U.S. market and to a package of low tariffs in a number of countries, the U.S. has thus imposed the conclusion of further FTAs with like-minded countries. These FTAs may have indirect effects on rules on trade and investment of third countries because of their agreements with party countries. The power of inclusion -like that of exclusion- of the U.S. will increase as the number of U.S. FTAs' parties increases, bringing demands for conclusion of FTAs with the U.S. from unsympathetic countries. Through this gradual establishment of the network of FTAs, the U.S. will be able to introduce to both like-minded and unsympathetic countries rules of international trade and investment that serve U.S. interests. This is the ultimate aim of the U.S. competitive liberalization strategy, articulated by President Obama in his defence of the TPP initiative in 2015: *'[w]e have to make sure America writes the rules of the global economy. And we should do it today, while our economy is in the position of global strength. Because if we don't write the rules for trade around the world -- guess what --*

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*, p. 30.

*China will. And they'll write those rules in a way that gives Chinese workers and Chinese businesses the upper hand, and locks American-made goods out.*<sup>68</sup>

## **B. The Legal Side-Effects**

22. Even though every international agreement is a restriction of sovereignty, participation in this network of FTAs may impose particular restrictions stemming from the pre-commitment of the parties to restrict their freedom to set tariffs introduced through the MFN treatment clauses included in the FTAs. MFN treatment *'is accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State'*.<sup>69</sup> Consequently if one of the original treaty parties enters into a subsequent treaty with another State, any more favourable trade terms granted to the third State would apply in the other party of the original treaty as well.<sup>70</sup> Schill rightly explains that the subsequent third-party treaty as a *res inter alios acta*,<sup>71</sup> does not modify the relationship as between the parties to the basic treaty but is incorporated by reference *ipso jure* into the relationship between the State parties to the basic treaty without any additional act of transformation, functioning as an automatic treaty adaptation mechanism.<sup>72</sup>

23. Miroudot claims that MFN treatment clause *'is a pillar of international trade law and has historically been a powerful tool for multilateralizing bilateral commitments'*.<sup>73</sup> According to Mavroidis, MFN treatment clauses were introduced to avoid concession diversion when one of two parties in a bilateral treaty offers further reduced tariffs to a third party leaving the second party in the original treaty with an obligation to apply reduced tariffs even though he has lost the trade benefit of the bilateral treaty as a result of the reduction of tariffs in relation to imports from that third party.<sup>74</sup> Horn and Mavroidis list a number of common perceptions of the effects of the MFN clauses on trade liberalisation: they prevent concession diversion because they increase the cost of concessions, making less attractive for a party to

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<sup>68</sup> US President B. Obama, 8 May 2015, Beaverton, Oregon.

<sup>69</sup> International Law Commission, *Draft Articles on Most-Favoured-Nation Clauses* (1971), Art. 5.

<sup>70</sup> Mavroidis, P., *Trade in Goods* (Oxford University Press, 2012), p. 131.

<sup>71</sup> Anglo-Iranian Oil Company (United Kingdom v. Iran), Judgement of 22 July 1952, *ICJ Reports* 1952, p. 109.

<sup>72</sup> Schill, S.W., *The Multilateralization of International Investment Law*, (Cambridge University Press, 2009), p. 127.

<sup>73</sup> Miroudot, S., 'Investment', in: Chauffour, J.-P. & Maur, J.-Ch. (eds), *Preferential Trade Agreement Policies for Development: A Handbook* (The World Bank 2011), p. 316.

<sup>74</sup> Mavroidis (*supra*, note 70), pp. 131-132; cf. Goldsmith J.L. & Posner, E.A., *The Limits of International Law* (Oxford University Press 2005), pp. 141-144, *passim*

undermine the treaty by subsequently offering better terms of market access to a third party. They also make stronger countries unwilling to make concessions to weaker countries, since in return for peanuts stronger countries must extend their concessions to a large volume of trade. They promote free riding for they allow one of the parties in the original treaty to obtain a benefit without having to make any new concession, they prevent subsets of countries to liberalise more than desired by the rest of the world, they increase credibility of trade agreements by increasing the cost of giving concessions and they make attractive to outsiders to enter into an existing agreement since they get access to a package of low tariffs.<sup>75</sup>

24. Schill focuses instead, albeit in relation to BITs, on the multilateralization effect of MFN clauses. He explains that '*[a]n investor covered by a BIT with a MFN clause can, therefore, invoke the benefits granted to third party nationals by another BIT of the host State and directly import them into its relationship with the host State. Consequently, MFN clauses multilateralize the bilateral inter-State treaty relationships and harmonize the protection of foreign investments in a specific host State*'.<sup>76</sup> He further observes that MFN treatment '*breaks with bilateralism as an ordering paradigm for international relations by extending rights and benefits from a third party relationship containing the MFN clause. Finally, ... it locks States into a multilateral framework and makes the abandonment of standards ... adopted previously more difficult*'.<sup>77</sup>

25. However, the MFN treatment clauses in U.S. FTAs trade provisions can work only to the benefit of the U.S. For, as Schott explains, '*the United States have very little left to give at the negotiating table in terms of market access, except things that are very difficult to give—i.e., the protection in agriculture and textiles that has survived eight previous rounds of multilateral trade negotiations and that is of major export interest of developing countries ... developing countries object to lowering their own generally much higher trade barriers without increased and more secure access to industrial markets*'.<sup>78</sup> In addition, being the stronger country with increased bargain power, the U.S. do not need to make concessions. In contrast, small non-party countries wishing to conclude FTAs will have to make such concessions to the U.S. and they might even compete on concessions in order to get priority access to the network. The U.S. could benefit from further concessions made by party countries to third countries. Yet, if Schill is right, once acceding to the network, small party

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<sup>75</sup> Horn, H. & Mavroidis, P., 'Economic and Legal Aspects of the Most-Favored-Nation Clause', 17 *European Journal of Political Economy* (2001), p. 251

<sup>76</sup> Schill (*supra*, note 72), p.123.

<sup>77</sup> *Ibid.*, pp. 128-129

<sup>78</sup> Schott (*supra*, note 12).

countries will avoid giving further concessions to non-parties for fear that the U.S. will benefit from them without extending its concessions in return. These effects of MFN treatment clauses will apply to a larger extent to plurilateral FTAs. The network can therefore be extended only at the will of the stronger party country, namely the U.S. This conclusion is confirmed by the traditional view of preferential trade agreements as stumbling blocks in the path of freer economic trade.<sup>79</sup>

#### IV. The Effects -and Side-Effects- of the TTIP

26. Unlike other FTAs negotiated between the U.S. and weaker countries, the TTIP involves a negotiation between equals. Accordingly, the U.S. will not be able to benefit from power and prestige in asymmetric negotiation in order to dictate the rules on international trade and investment that satisfy their taste and maximise their benefit. However, the E.U. and the U.S. are like minded countries for they share a number of common traits, amongst others, the E.U. has very little to give in terms of market access, except in the traditionally protected sectors.<sup>80</sup> Nevertheless, since 2006, in an attempt to counteract U.S. competitive liberalisation policy,<sup>81</sup> the E.U. has tried to build a counter alliance. To that end, the E.U. has been concluding preferential trade agreements with a number of smaller countries, including countries that are also parties to the U.S. FTAs.<sup>82</sup> Interestingly enough, as in the case of the U.S., with the exception of South Korea, all other countries have little significance for E.U. trade whereas there are no FTAs with some of the major E.U. trade partners namely, China, Russia, Japan, India and Brazil.<sup>83</sup>

27. What are then the interests of the U.S. in the conclusion of the TTIP ? Apart from the debatable positive economic impact assessments, criticised by some as '*an exercise in managing fictional expectations*' to convince stakeholders of the desirability of a

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<sup>79</sup> Baldwin, R. & Freund, C., 'Preferential Trade Agreements and Multilateral Liberalization', in: Chauffour, J.-P. & Maur, J.-Ch. (eds), *Preferential Trade Agreement Policies for Development: A Handbook* (The World Bank 2011), p. 124.

<sup>80</sup> Schott (*supra*, note 12).

<sup>81</sup> Sbragia, A., 'The EU, the US and Trade Policy: Competitive Interdependence in the Management of Globalization', 17 *Journal of European Public Policy* (2010), pp. 369-370, 378.

<sup>82</sup> The list includes the Association Agreement between the E.U. and Central America (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama), the Economic Partnership Agreements are being implemented in with the Caribbean (fifteen CARIFORUM States), the Pacific (Papua New Guinea) and Eastern and Southern Africa (Zimbabwe, Mauritius, Madagascar, the Seychelles) as well as the bilateral FTAs with Colombia and Peru, South Korea, Mexico, South Africa and Chile [European Commission, The EU's bilateral trade and investment agreements – where are we?, Brussels, 3 December 2013, in: <[http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc\\_150129.pdf](http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf)>

<sup>83</sup> See, <[http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_122530.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122530.pdf)>.

*transatlantic market*,<sup>84</sup> the U.S. will benefit from the expansion of their FTAs network with like-minded countries necessary in order to reach the critical mass of FTAs which, according to the competitive liberalisation strategy, will make unsympathetic countries, unable to form a counter alliance, to liberalise along the lines of the U.S. FTAs.<sup>85</sup> As De Ville and Siles-Brügge justly observe, the TTIP, once concluded, will have the potential to lock down and hollow out E.U. policy choices,<sup>86</sup> including the potential to build a trade counter alliance. Henceforth, the E.U., as a member the U.S. FTAs network, will be unable to threaten the expansion U.S. territorial influence and, therefore, their influence in the international trade system.

28. Indeed, TTIP is bound to restrict future intra- and extra-E.U. trade policy choices, and will therefore lead to a clear loss of the E.U. member - States sovereignty that may ultimately jeopardise European interests. A number of other arguments have been advanced in that respect. Streek claims for example that this sort of locking down of domestic policy choices via treaties is ultimately in contradiction with democracy.<sup>87</sup> But isn't that what international treaties are all about? One may also ask why the E.U., after coming under fire for its democratic deficit and its handling of the sovereign debt crisis and for the ways in which the Financial Compact and the EMU arrangements limit national choices and add to its democratic deficit, may want to conclude a treaty which has the potential to further subvert the national policy choices and add to de-legitimisation of the E.U. But then, TTIP is very likely to be a mixed agreement. This is because, TTIP concerns '*policy areas within the competence of the Member States*', including in particular '*certain elements of policy areas such as services, transport and investment protection*',<sup>88</sup> which are beyond the scope of the exclusive powers of the EU. It is therefore highly likely that EU member States will have to ratify the TTIP, even though the ratification process is still unclear.<sup>89</sup> As a result, the democratic deficit argument, as it is usually formulated, does not stand.

29. Last but not least, the TTIP is also bound to have indirect impact on E.U. FTAs' partners. Those partners are in a similar position to those of the U.S. FTAs partners. The impact may differ depending on whether parties to the E.U. FTAs are also parties to the U.S.

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<sup>84</sup> De Ville, F., & Siles-Brügge, G., 'The Transatlantic Trade and Investment Partnership and the Role of Computable General Equilibrium Modelling: An Exercise in 'Managing Fictional Expectations'', 20 *New Political Economy* (2014), p. 671.

<sup>85</sup> *Supra*, para. 19.

<sup>86</sup> De Ville & Siles-Brügge (*supra*, note 20), p. 138.

<sup>87</sup> Streeck, W., 'The Crises of Democratic Capitalism', 71 *New Left Review* (2011), p. 5; Streek, W., *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verson 2014).

<sup>88</sup> See, <<http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-7557-EN-F1-1.Pdf>>.

<sup>89</sup> See, <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1410949127767&uri=URISERV:l14532>>.

FTAs or not. A number of countries located in the Americas, for example, have concluded FTAs with both the E.U. and the U.S. Those countries have most probably already adapted their legislation to the requirements of both countries. As a result, negative externalities may impact mostly on countries that not parties to both countries' FTAs.

30. The balance-of-power theory indicates some additional side-effects. For, if regional integration efforts are a balancing phenomenon in the context of the struggle between alliances and counter alliances, then an alliance of E.U. to the U.S. may reverse the equilibrium of power between the strongest players of the international trade and investment and create imbalances in the international arena. Thus, along with the temporary increase of the U.S. influence in the international trade system, the TTIP may bring induce unsympathetic countries, namely, China, Russia and the WTO developing countries to establish their own alliances. Balance will then be restored but not necessarily to the benefit of freedom of trade and investment aimed at by the U.S. competitive liberalisation policy. The agreement of BRICS (Brazil, Russia, India, China and South Africa) on the establishment of the New Development Bank<sup>90</sup> in order to bypass the Bretton-Woods institutions is a sign of a new trend that may soon jeopardise the very existence of the WTO.

### **III. Some Tentative Conclusions**

31. The U.S. relied on its power and prestige in order to pursue trade and investment policy of competitive liberalisation. The U.S. thus established a network of FTAs with weaker, like-minded countries and though this network of FTAs they were able to curtail unsympathetic countries and alliances of unsympathetic countries, including China and the WTO developing countries alliances so as to dictate the rules of the rules of international trade and investment in their favour. It is expected indeed that non FTAs parties, for fear of loss of their parts in international trade, will rush to conclude FTAs with the U.S. Thus, the division between developed and developing countries, a principal cause of the deadlock of the WTO Doha Round, is avoided and the U.S. will be in a position to dictate the content of international trade law rules. Seen in this context, the TTIP along with its indirect impact on E.U. FTAs' partners, will restrict future E.U. policy choices, increase U.S. influence in the international trade system. One can wonder whether the carrot of increased trade and investment and of joint cooperation in standard-setting can offset the increased U.S. influence in the international trade system that could neutralise future European trade policies with third countries, including China, especially in view of the fact that E.U. trade deficit with China is not a source of concern for Europe. One can wonder also whether this increase of the U.S. influence in the international trade system will induce the establishment

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<sup>90</sup> See, <<http://ndbbrics.org/agreement.html>>.

of new alliances between the unsympathetic countries, namely, China, Russia and the WTO developing countries alliances.