

Going Forward by Staying Put: The Political Economy of Stabilizing Trade Agreements and Initiatives



Dr Christian Delev

University of Bristol Law School
Wills Memorial Building
Queen's Road
Bristol
BS8 1RJ

bristol.ac.uk/law/research/legal-research-papers

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Christian Delev*

Abstract: Increasingly, States are entering into trade agreements or negotiating initiatives which sustain Parties' existing market access commitments and 'behind-the-border' regulatory barriers to trade. This article examines the political economy of such stabilizing trade agreements or initiatives (STAI). First, it provides a functional account of what STAI are as legal instruments and maps the formal diversity of such arrangements. Second, the article addresses how they may meaningfully support the welfare-enhancement and international security protection objectives typically pursued by international trade agreements. Finally, it shows how, unlike liberalizing trade agreements, STAI rely on three core governance functions: i) stabilize economic actor expectations when liberalization commitments between trade partners are rebalanced, ii) facilitate regulatory and political cooperation between trade partners, and iii) create a first mover's advantage for (coalitions of) trade partners in setting new rules of economic governance.

I. Introduction

In May 2022, thirteen States launched formal negotiations over the Indo-Pacific Economic Framework for Prosperity (IPEF) – a landmark of the Biden administration's trade policy agenda. The arrangement seeks to enhance cooperation between IPEF Parties in four principal areas: trade, supply chains, the transition to a clean economy, and ensuring a fair economy.¹ Given IPEF's focus on economic resiliency, transition to carbon neutrality, and

* Lecturer in International Economic Law, University of Bristol Law School. The author is thankful for comments from Victor Crochet, Jochelle Greaves Siew and Gregory Messenger on earlier versions of the article, as well as helpful discussions with Olabisi Akinkugbe, Meredith Kolsky Lewis, Gabrielle Marceau, Vera Thorstensen, among others, during the 2023 Society of International Economic Law Biennial Conference in Bogotá, Colombia. All potential errors remain those of the author. Email: christian.delev@bristol.ac.uk

¹ USTR, 'Ministerial Text for Trade Pillar of the Indo-Pacific Economic Framework for Prosperity', <[ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20\(Trade%20Pillar\)_FOR%20PUBLIC%20RELEASE%20\(1\).pdf](https://ustr.gov/sites/default/files/2022-09/IPEF%20Pillar%201%20Ministerial%20Text%20(Trade%20Pillar)_FOR%20PUBLIC%20RELEASE%20(1).pdf)> accessed 2 July 2024; USTR, 'Ministerial Statement for Pillar II of the Indo-Pacific Economic Framework for Prosperity' <www.commerce.gov/sites/default/files/2022-09/Pillar-II-Ministerial-Statement.pdf> accessed 2 July 2024 (IPEF Supply Chains Ministerial Statement); USTR, 'Ministerial Statement for Pillar III of the Indo-Pacific Economic Framework for Prosperity', <www.commerce.gov/sites/default/files/2022-09/Pillar-III-Ministerial-Statement.pdf> accessed 2 July 2024;

capacity-building among negotiating States, it has been promoted as a ‘model for the rest of the world that unlocks enormous economic value’ by the United States (US),² and proponents suggest it offers ‘a new approach’ to address ‘the new landscape and the new challenges we face’.³

At the same time, pillar agreements concluded under IPEF are aimed at creating new rules and institutions of economic cooperation without the promises of greater market access commitments, regulatory harmonization, or equivalence recognition. Critics thus argue that IPEF is an ineffective framework for trade governance, citing its failure to incentivize cooperation based on free trade among the negotiating Parties. Schoenbaum notably sees IPEF as largely the product of a political climate where ‘[f]ree trade agreements are out of favo[u]r with the electorate, and free trade agreements do not fit well with Biden’s announced “worker-oriented” trade policy’.⁴ From this standpoint, when compared with liberalizing regional trade agreements (RTAs) in the sense of Article XXIV General Agreement on Tariffs and Trade (GATT), the US is less likely to achieve sufficient support from eventual IPEF Parties to ‘grow its economy’ or ‘win’ its trade war against China.⁵

The approach to economic governance adopted by IPEF, however, is neither altogether novel, nor toothless. Instead, IPEF forms part of a growing phenomenon of trade law-making: the resort to stabilizing trade agreements and initiatives (STAI)s. Such formations are diverse in form and emerge out of distinctive contexts, ranging from the conclusion of a series of ‘rollover agreements’ that ensured immediate economic stability for UK trade relations with third countries after Brexit, to the long-term cooperation that underlies the Trade and Technology Council (TTC) between the US and European Union (EU). STAI)s, by design, do not deepen economic integration between their parties; they shape the conditions of competition between trade partners while *maintaining* or *reducing* existing market access commitments, or the extent to which regulations are harmonized or considered

USTR, ‘Ministerial Statement for Pillar IV of the Indo-Pacific Economic Framework for Prosperity’, <www.commerce.gov/sites/default/files/2022-09/Pillar-IV-Ministerial-Statement.pdf> accessed 2 July 2024.

² USTR, ‘2023 Trade Policy Agenda and 2022 Annual Report of the President of the United States on the Trade Agreements Program’, at 12, <ustr.gov/sites/default/files/2023-05/2023%20Trade%20Policy%20Agenda%20and%202022%20Annual%20Report%20FINAL.pdf> accessed 2 July 2024.

³ The White House, ‘On-the-Record Press Call on the Launch of the Indo-Pacific Economic Framework’ (2022) <www.whitehouse.gov/briefing-room/press-briefings/2022/05/23/on-the-record-press-call-on-the-launch-of-the-indo-pacific-economic-framework/> accessed July 2024.

⁴ Thomas J Schoenbaum, ‘The Biden Administration’s Trade Policy: Promise and Reality’ (2023) 24(1) GLJ 102, 117.

⁵ *ibid* 117. Curiously, similar arguments regarding the ability for the UK to ‘roll over’ trade agreements concluded by the EU with third countries without making additional market access concessions were raised during the early stages of post-Brexit negotiations: Panos Koutrakos, ‘Negotiating International Trade Treaties after Brexit’ (2016) 41(4) ELRev 475.

equivalent. They are controversial tools of economic governance that are designed primarily to achieve cooperative or distributional objectives by shaping or affirming the underlying conditions of competition between trade partners.⁶ At first glance, such formations seemingly undermine the perception that international trade law as a system serves the ‘social purpose’ of deepening economic ties between trade partners.⁷ The debate over the merits of IPEF shows that STAs have been framed as either ineffective or seemingly protectionist formations.⁸ As STAs are increasingly weaved into the fabric of international trade law, however, a deeper look at the political economy behind these formations is needed.

This article explores STAs as a new development in international trade law. It suggests that STAs are chiefly designed and utilized to fulfil three main functions. First, STAs perform a stabilizing function where they embed existing protections for key domestic constituencies without removing earlier market access restrictions, or ratchet up protectionism where domestic industries successfully lobby their governments to renegotiate bilateral or plurilateral commitments. Second, they create opportunities for Parties to resolve disputes, or deepen their political as well as regulatory cooperation through trade agreements without requiring deeper economic integration. Third, Parties to STAs may benefit from a first mover’s advantage where the agreement sets new rules which discipline previously unregulated areas of economic governance including digital trade, sustainable trade, or supply chain governance.

The argument is developed in four parts. Section II provides a functional account of STAs and explores the twin trade policy shifts that they reflect: a shift in the *objectives* typically pursued by international trade agreements, and a shift in *techniques* through which international trade agreements govern economic ties between trade partners. Section III makes the case that, depending on their design, STAs can still meaningfully contribute to the welfare and essential security objectives typically pursued by liberalizing international trade agreements. Adopting an institutionalist perspective, Section IV explores the three core

⁶ The present article departs from the tendency to describe these treaty objectives as ‘flanking issues’, since they are at the centre of how NTAs shape Parties’ relative gains, even if this would set the conditions for future trade liberalization efforts: see Section IV.B below.

⁷ This is based on the assumption that the social purpose of international trade law is effectively welfare enhancement: John Gerard Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order’ (1982) 36(2) *International Organization* 379, 382 (‘Whatever its institutional manifestations, political authority represents a fusion of power with legitimate social purpose.’).

⁸ Frédéric Grare, ‘Ambitions and access: The new economic framework for the Indo-Pacific’ (*European Council on Foreign Relations*, 7 June 2022) <ecfr.eu/article/ambitions-and-access-the-new-economic-framework-for-the-indo-pacific/> accessed 2 July 2024 summarizing the spectrum of trade policy viewpoints on IPEF. For prominent critiques of IPEF, see notably James Bacchus, ‘Biden should nix his Indo-Pacific economic plan and start from scratch’ (*The Hill*, 12 March 2023) <thehill.com/opinion/international/4337785-biden-should-nix-his-indo-pacific-economic-plan-and-start-from-scratch/> accessed 2 July 2024; Schoenbaum (n 4) 117.

functions of STAs by drawing on recent negotiating practices for illustration. Finally, Section V summarizes the argument.

II. Shifting Sands in International Trade Governance

A. From Trade Liberalization to Trade Stabilization

To explore what stabilizing formations are, we must first briefly explain how international trade agreements have conventionally approached economic governance through trade liberalization. Both the GATT/WTO regime and RTA network – at least under the ‘establishment narrative’⁹ commonly adopted by trade negotiators – have been animated by the promises of absolute and reciprocal gains from the removal of trade barriers, and the historical experiences of (tackling) unilateral protectionist policies.¹⁰

Drawing on these motivations, trade liberalization is primarily comprised of two aspects, each limiting or conditioning the regulatory powers of States. Liberalizing trade agreements operate as cooperative forums where barriers to trade are gradually reduced to remove inefficiencies in States’ domestic trade policies while ensuring that conditional policy exceptions may be invoked. Under the GATT, trade liberalization was primarily a negative process and focused on negotiations to reduce market access barriers, and this approach has since been replicated in the services liberalization context.¹¹ Trade liberalization efforts may also take a positive form, primarily through the standardization, harmonization, or equivalence recognition of trade partners’ ‘behind-the-border’ measures as under the TBT and SPS Agreements.¹² Liberalizing RTAs have drawn on both negative and positive approaches to achieve economic integration.

⁹ Anthea Roberts and Nicolas Lamp, *Six Faces of Globalization: Who Wins, Who Loses, and Why It Matters* (HUP 2021) 35 refer to this as the ‘establishment narrative’ given its ‘widespread support’ among ‘the majority of politicians across the developed and developing world.’

¹⁰ John H Jackson, *World Trade and the Law of GATT* (The Bobbs-Merrill Company 1969) 9; Robert E Hudec, *The GATT Legal System and World Trade Diplomacy* (2nd edn, Butterworth Legal Publishers 1990) 5. Douglas A Irwin, Petros C Mavroidis, and Alan O Sykes, *The Genesis of the GATT* (CUP 2011) 177–197 identify three objectives pursued by GATT negotiators: ‘increasing economic income’, committing governments despite the influence of strong domestic interest groups, and pursuing the foreign policy objectives of the US as hegemon.

¹¹ On the positive economic case for cooperative tariff reductions, see Robert W Staiger, *A World Trading System for the Twenty-First Century* (MIT Press 2022) 61, 66–75.

¹² See Gene M Grossman, Phillip McCalman and Robert W Staiger, ‘The “new” economics of trade agreements: from trade liberalization to regulatory convergence?’ (2021) 89 *Econometrica* 215, 233–246 exploring the welfare implications of efforts to achieve regulatory convergence. For a critical perspective, see Dani Rodrik, ‘What Do Trade Agreements Really Do?’ (2018) 32(2) *Journal of Economic Perspectives* 73.

Alongside reducing market access barriers and preventing the adoption of their policy substitutes, trade liberalization is only effective where the conditions of competition between like product groups, or like groups of services and service providers, empower global trade flows.¹³ The creation of the GATT/WTO system was thus underpinned by the adoption of unconditional most-favoured-nation (MFN) treatment obligations, which preserve the ‘equality of competitive opportunities’ for products and services (or service providers), independent of their origin.¹⁴ Unconditional MFN treatment has allowed for economic actors to benefit from expectations of equal treatment when exporting or competing in foreign markets. How these conditions of competition are set, however, may vary depending on the precise objectives pursued by an agreement. To take an example: in keeping with its efforts to achieve both continent-wide economic integration and socio-economic development through trade liberalization, the African Continental Free Trade Area (AfCFTA) adopts conditional MFN treatment obligations which require advantages to be granted to other State Parties ‘on a reciprocal basis’.¹⁵ In keeping with the principle of variable geometry, the AfCFTA modifies the conditions of competition for products traded from different State Parties seemingly to enable mutually beneficial economic cooperation between trade partners ‘whose benefits from integration are likely to be rather lop-sided’.¹⁶

Liberalization and its related expectations of welfare enhancement, remain the dominant means and ends of international trade regulation. But these are not the only means and ends that trade agreements emphasize. The development of disciplines in liberalizing trade agreements to address negative externalities from trade liberalization, even or directly pursue non-economic values including sustainability and gender equality, is well-documented and discussed in the literature.¹⁷ As the emergence of STAs shows, trade agreements and

¹³ Article I:1 General Agreement on Tariffs and Trade 1994 (GATT); Article II:1 General Agreement on Trade in Services (GATS).

¹⁴ International Law Commission, ‘Most-Favoured-Nation Clause – Final Report of the Study Group on the Most-Favoured-Nation clause’, Annex to the Report of the ILC (14 August 2015) UN Doc A/70/10, 98 at paras 41–43. This logic similarly underpins the interpretation of the national treatment obligations under Article III GATT: see, notably, WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* (adopted 1 November 1996) WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R, 16.

¹⁵ Articles 5(c) and (d), 18:1 Agreement Establishing the African Continental Free Trade Area (adopted 21 March 2018, entered into force 30 May 2019) <au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> accessed 2 July 2024 (AfCFTA) and Article 4 AfCFTA Protocol on Trade in Goods. See, for analysis, Rita Mawufemor Tsorme and Joseph Amoah, ‘African Continental Free Trade Agreement’s Conditional Most Favoured Nation: A Necessary Compromise?’ (2024) 23(1) WTR 93.

¹⁶ James Thuo Gathii, *African Regional Trade Agreements as Legal Regimes* (CUP 2011) 62–63.

¹⁷ Illustratively, Gregory Shaffer, ‘Retooling Trade Agreements for Social Inclusion’ (2019) University of Illinois Law Review 12–29; Kathleen Claussen, ‘Next-Generation Agreements and the WTO’ (2022) 21(3) WTR 380, 382; Marie-Claire Cordonier Segger, *Crafting Trade and Investment Accords for Sustainable Development: Athena’s Treaties* (OUP 2021); Amrita Bahri, Dorotea López and Jan Remy (eds), *Trade Policy and Gender Equality* (CUP 2023).

initiatives may also move away from trade liberalization as a steering device for economic governance.

STAI s should be understood in a functional sense, as formations which govern international trade while, or even through, preserving or increasing existing market access and ‘behind-the-border’ barriers to trade. These formations are ‘stabilizing’ in the sense that the aggregate protections which could be imposed by a State under the agreement are increased or maintained.¹⁸ In a normative sense, stabilization effectively denotes that the existing powers of States to regulate are not limited through further build-up of trade liberalization commitments.¹⁹ As such, STAI s are designed on the assumption that economic cooperation between trade partners does not depend on the introduction of greater constraints to how each State governs trade flows. This may be a short-term or long-term trade policy assumption. STAI s, such as the UK-EU Trade and Cooperation Agreement (TCA) and the rollover agreements negotiated under the UK Trade Continuity Programme, were largely designed to ensure stability in UK trade relations following its withdrawal from the EU.²⁰ In these instances, trade stabilization served as a precondition for negotiating future trade liberalization commitments in the long-run. By contrast, the IPEF pillar agreements seem to have been negotiated under the assumption that they provide a long-term cooperation framework between the US and its Indo-Pacific trade partners, particularly when it comes to transboundary challenges (for instance, the climate crisis) and cross-border economic formations (for instance, supply chains). In this sense, trade stability operates as an ingredient of economic resilience – both for individual economic actors and supply chain participants – or cooperation around other non-welfarist objectives between the Parties.²¹

Adopting such a functionalist definition of STAI s further gestures to two shifts in trade governance that STAI s reflect. The first shift concerns the purposes pursued by international trade agreements. For the most part, liberalizing trade agreements are primarily

¹⁸ The term ‘stabilizing’ is used here, as ‘protectionism’ carries economic assumptions that measures impact trade flows by increasing existing costs for foreign producers to enter a market to the benefit of domestic producers, even where the empirical evidence is limited. This could be problematic to apply in all instances where STAI s introduce rules in areas of economic governance: see, illustratively, Desirée LeClercq, Raymond Robertson, and Daniel Samaan, ‘Labor provisions in trade agreements: recasting the protectionist debate’ (forthcoming) *Journal of Law, Economics, & Organization*, challenging the common claims regarding the protectionist effects of labour provisions in international trade agreements.

¹⁹ See, for discussion of this broader tendency in institutional design of economic cooperation, Andrew Lang, ‘Global Disordering’: Practices of Reflexivity in Global Economic Governance’ (2024) 35(1) *EJIL* 93, 134–136.

²⁰ Trade Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation (adopted 11 February 2019, entered into force 31 December 2020) <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780200/CS_Swiss_4.2019_FTA.pdf> accessed 2 July 2024 (UK-EU TCA). See further discussion in Section III.A below.

²¹ See further discussion in Section IV.C below.

designed to enhance welfare through market integration. STAIs, by contrast, concentrate on confirming or adjusting the *relative gains* of commerce between trade partners. As such, they typically set distributive or cooperation objectives, including establishing economic certainty, enabling regulatory or private sector cooperation, and ensuring economic resiliency. This shift can be illustrated by surveying the stated purposes of several stabilizing formations. Post-Brexit rollover agreements concluded by the UK with third country trade partners under the Trade Continuity Programme, for instance the UK-Andes Trade Agreement or the UK-Canada Continuity Agreement, stress as their main objectives the need to preserve rights and obligations that existed under earlier EU free trade agreements.²² Other formations, such as the EU-US TTC or the Australia-Singapore Green Economy Agreement, instead emphasize regulatory innovation alongside cooperation between trade partners in specific areas of economic governance (for instance, digital or sustainable trade).²³ Moreover, the IPEF Supply Chain Agreement (SCA) adopts starkly geoeconomic objectives and uses the terms ‘resilience’, ‘diversification’ and ‘security’, among others, in the first recital to the preamble to frame its approach to supply chain governance.²⁴

In responding to these purposes, STAIs also shift the techniques they rely on to govern global markets. While they may take a wide range of forms, there are four prominent approaches that have been adopted. First, STAIs can maintain existing trade liberalization

²² Article 1 Trade Agreement between the United Kingdom of Great Britain and Northern Ireland, of the one part, and the Republic of Colombia, the Republic of Ecuador and the Republic of Peru, of the other part (adopted 15 May 2019, entered into force 28 June 2022) <assets.publishing.service.gov.uk/media/5d025a8240f0b609aa67427e/MS_22.2019_Andeand_Trade.pdf> accessed 2 July 2024; preamble, Agreement on Trade Continuity between the United Kingdom of Great Britain and Northern Ireland and Canada (adopted 9 December 2020, entered into force 1 April 2021) <assets.publishing.service.gov.uk/media/5fd1fcacd3bf7f30641aa2d3/CS_Canada_1.2020_Agreement_on_Trade_Continuity_UK_Canada.pdf> accessed 2 July 2024 (noting the Parties’ ‘desir[e] that the rights and obligations between them as provided for by CETA should continue following the departure of the United Kingdom from the European Union and following the end of the transition period [...]’).

²³ EU-US Trade and Technology Council Inaugural Joint Statement (29 September 2021) <ec.europa.eu/commission/presscorner/detail/en/statement_21_4951> accessed 2 July 2024 (Pittsburgh Statement) states that the TTC objectives are to ‘coordinate approaches to key global technology, economic, and trade issues; and to deepen transatlantic trade and economic relations, basing policies on shared democratic values’; Singapore-Australia Green Economy Agreement (adopted 18 October 2022, entered into force 18 October 2022) <www.dfat.gov.au/geo/singapore/singapore-australia-green-economy-agreement/singapore-australia-green-economy-agreement-text#vision> accessed 2 July 2024 at para 6.

²⁴ Preamble, Indo-Pacific Economic Framework for Prosperity Agreement Relating to Supply Chain Resilience (adopted 16 November 2023, entered into force 24 February 2024) <www.commerce.gov/sites/default/files/2023-09/2023-09-07-IPEF-Pillar-II-Final-Text-Public-Release.pdf> accessed 2 July 2024 (SCA) acknowledges ‘resilience, efficiency, productivity, sustainability, transparency, diversification, security, fairness, and inclusivity are indispensable considerations in the development of resilient and robust supply chains, in addition to costs.’

commitments in pursuing their specific objectives.²⁵ In these instances, international trade law is not used to impose additional restraints on the right to regulate trade flows, but merely to reaffirm existing commitments and set expectations for economic actors and trade partners.

Second, STAIs can introduce disciplines or cooperative institutions that build on pre-existing commitments relating to trade liberalization and conditions of competition.²⁶ Where formations adopt this approach, it allows trade partners to establish dialogue and coordinate their domestic trade policies, or to achieve future cooperation on specific areas of economic governance.

Third, STAIs can maintain trade partners' existing trade liberalization commitments, whilst at the same time empowering or encouraging them to alter the conditions of competition within their domestic markets, especially where they attempt to shape global supply chains *ex post*.²⁷ STAIs typically do not require States to directly discriminate between or hinder trade flows. Instead, States are sanctioned to influence the market behaviour of their domestic producers and consumers, for instance, by encouraging or discouraging market behaviours based on national security or economic resilience concerns. Crucially, as these formations provide institutional infrastructure that facilitates dialogue, this allows trade partners to coordinate the cues they provide to domestic economic actors.

Finally, STAIs can partially eliminate or adjust existing trade liberalization commitments concluded between trade partners.²⁸ In so doing, States are subject to fewer disciplines governing how they unilaterally pursue trade policy objectives. STAIs allow trade partners to increase the trade-related costs borne by foreign producers and suppliers who are, in turn, likely to pass these costs onto their domestic consumers. This may create competitive advantages for domestic producers given the increased protections that could be imposed on competing goods, but also harm them should the newly introduced barriers affect intermediate goods and thus raise domestic producers' costs when manufacturing finished goods.

B. The Formal Diversity of STAIs

²⁵ An example of this are Brexit rollover agreements, which maintain or minimally alter parties' pre-Brexit market access commitments as well as TBT or SPS obligations to preserve their economic ties. See further discussion in Section III.A below.

²⁶ Consider, for instance, the EU-US TTC and the Singapore-Australia Green Economy Agreement.

²⁷ The quintessential example of a formation adopting this approach is the IPEF SCA. See further discussion in Section IV.C below.

²⁸ See, notably, the UK-EU TCA.

While the increasing adoption of STAs reflects a functional shift in how international trade agreements approach economic governance, such arrangements differ in terms of the forms that they take. This coincides with a broader practice within international trade law-making of adopting heterogeneous forms of agreements as tools for economic governance that extend beyond the RTAs envisaged under Article XXIV GATT, Article V GATS, or the Enabling Clause.²⁹ While STAs may take a broad range of forms, this Section identifies three prominent variations based on existing treaty practice: i) renegotiated RTAs which preserve or rebalance existing trade liberalization commitments, ii) forums for trade cooperation, and iii) self-standing cooperative trade agreements that introduce normative commitments.

Renegotiated RTAs are those formations which replicate or rebalance earlier trade liberalization commitments between trade partners. These formations may ostensibly qualify as RTAs for the purposes of Article XXIV GATT, Article V GATS, or the Enabling Clause as they maintain existing trade preferences between their trade partners that go beyond their WTO commitments. However, such arrangements – which include formations such as the UK rollover agreements, the UK-EU TCA, and arguably the USMCA – do not liberalize overall trade commitments between trade partners beyond those that had been previously agreed. Instead, they maintain or rebalance commitments between trade partners (for instance, by reducing overall trade commitments between the Parties, or reducing commitments in some areas while expanding liberalization commitments in others).

These formations further matter since they create economic stability in trade partners' relations by embedding an institutional framework within which trade cooperation takes place. This could be either by creating or adjusting trade committees to reflect the state of play between trade partners. This could be for a range of reasons that depend on the specific context. The rollover agreements created a new trade committee infrastructure that allows the UK to interact with its trade partners without having to rely on EU free trade agreement committees following its withdrawal from the EU.³⁰ The USMCA, in turn, introduced the

²⁹ See, notably, Andrea K Bjorklund and Gabrielle Marceau, 'New (Paradigms In) International Economic Law' (2023) 26(1) *JIEL* 3, 6–7; Kathleen Claussen, 'Next-Generation Agreements and the WTO' (2022) 21(3) *WTR* 380, 386–388; Kathleen Claussen, 'Trade's Mini-Deals' (2022) 62(2) *Virginia Journal of International Law* 315, 337–352; Lang (n 19) 130–137; Meredith Kolsky Lewis, 'International Trade Agreements: Laboratories of Innovation or Propellers of Fragmentation?' (2023) 26(1) *JIEL* 110.

³⁰ Arguably, this institutional preference is separate from the law of treaties issue of whether the UK could have continued participating in EU Association Agreements following its withdrawal. See, on the debate whether the UK could have maintained trade relations with third countries based on EU-concluded RTAs, Eirini Kikarea, 'Brexit and Preferential Trade Agreements: Issues of Termination and Survival Clauses' (2019) 46(1) *LIEI* 53; Martin Molinuevo, 'Brexit: Trade Governance and Legal Implications for Third Countries' (2018) 52(4) *JWT* 599, 602–607; Ramses A Wessel, 'Consequences of Brexit for International Agreements Concluded by the EU and its Member States' (2018) 55 *CMLRev* 101, 114–130.

facility-specific rapid response labor mechanism to address US concerns around labour conditions in Mexican facilities.³¹

STAs which operate as forums for trade cooperation, by contrast, are largely institutional set-ups designed to facilitate dialogue between trade partners. In these instances, the initiatives serve to empower trade partners to take part in regulatory dialogue without requiring closer economic alignment as a pre-condition. Notable example of such initiatives are the US-EU TTC, as well as various issue-specific US-UK trade dialogues underpinning regulatory cooperation under the auspices of the US-UK Atlantic Declaration.³² The significance of such institutional cooperation mechanisms for achieving long-term economic governance is explored in greater depth in Section IV.B below.

A third form that STAs may take is through cooperative trade agreements, or so-called economic partnership agreements, that are self-standing and introduce normative commitments. Such treaties are distinct from the former two categories, as they neither directly address existing trade liberalization commitments between trade partners akin to renegotiated RTAs, nor are they restricted to facilitating economic dialogue between trade partners. Instead, while these treaties largely maintain the Parties' pre-existing market access and 'behind-the-border' commitments, they serve as devices for introducing new norms that shape the approaches to economic governance followed by each Party.³³ While these formations are notably employed by the US following its trade policy shift, such as the IPEF SCA and the US-Taiwan Trade Initiative,³⁴ they are also reflected in other trade agreements that do not pursue welfarist objectives, including self-standing Green Economy Agreements.³⁵ As explored in greater detail below, while these formations rely on a

³¹ Annex A, Chapter 31, Agreement between the United States of America, the United Mexican States, and Canada (adopted 10 December 2019, entered into force 1 July 2020) <ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> accessed 2 July 2024 (USMCA). For discussion of the origins and use of the rapid response labor mechanism, see Desiree LeClercq, 'A Worker-Centered Trade Policy' (2023) 61(3) *Columbia Journal of Transnational Law* 733, 751–756.

³² The White House, 'The Atlantic Declaration: A Framework for a Twenty-First Century U.S.-UK Economic Partnership' (2023) <whitehouse.gov/briefing-room/statements-releases/2023/06/08/the-atlantic-declaration-a-framework-for-a-twenty-first-century-u-s-uk-economic-partnership/> accessed 2 July 2024.

³³ See, notably, discussion on the IPEF SCA in Section IV.C below.

³⁴ SCA; Agreement Between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States Regarding Trade between the United States of America and Taiwan, (adopted 1 June 2023) <ustr.gov/sites/default/files/2023-05/AIT-TECRO%20Trade%20Agreement%20May%202023.pdf> accessed 2 July 2024 (US-Taiwan Trade Initiative).

³⁵ See, illustratively, Australia-Singapore Green Economy Agreement. Notably, formations including the Memorandum of Understanding on the Green Economy Framework between the Government of the United Kingdom and the Government of the Republic of Singapore (adopted 1 March 2023) <www.gov.uk/government/publications/green-economy-framework-memorandum-of-understanding/memorandum-of-understanding-on-the-green-economy-framework-between-the-government-of-the-united-kingdom-and-the-government-of-the-republic-of-singapor> accessed 2 July 2024 share features with

cooperative infrastructure to promote compliance, trade partners' behaviour is shaped *ex ante* through specific soft law and obligations of conduct.

The form that STAs take carries important implications for how such formations affect the economic relations between trade partners, and what specific governance functions they rely on, as identified in Section IV below. For instance, while renegotiated RTAs may perform a host of functions, they specifically set the degree of trade liberalization between their Parties. By contrast, forums for trade cooperation create an institutional framework and primarily affect trade partners' relations through *ex post* decision-making through self-standing instruments or unilateral declarations. Self-standing cooperative trade agreements, in turn, allow for both regulatory cooperation as well as normative and institutional innovation. In short, how STAs are designed matters for their effectiveness in pursuing the Parties' policy objectives.

III. Do STAs Undermine the International Trade Law System?

The resort to STAs is gradually remoulding the normative and institutional terrain of international trade law. This has, as previously noted, sparked concerns among observers regarding their likely impact on the economic and non-economic objectives that trade agreements have typically pursued by means of liberalization.³⁶ For this reason, it is important to examine whether STAs may contribute to, or at the very least whether they are compatible with, these traditional objectives. The present analysis approaches this issue by focusing on two such objectives: welfarism and essential security preservation.

A. Welfare Preservation or Protectionist Backlash?

STAs are heterodox formations that cover a broad spectrum. As addressed in Section II, this spectrum ranges from cooperative agreements that promote trade flows without further constraining trade partners' regulatory powers, to arrangements which expressly authorize the re-introduction of protections. At both ends of the spectrum, these formations may be instrumental in preserving welfare achieved by earlier trade liberalization efforts by maintaining constraints on domestic protectionism.

both forums for trade cooperation – such as the informal nature of the arrangement – while also maintaining soft law commitments that affect their Parties' governance approaches.

³⁶ See footnote 8 above.

This can be illustrated using the specific example of Brexit rollover agreements. Prior to its formal withdrawal from the EU, the UK concluded a series of rollover agreements with third countries that had previously negotiated RTAs with the European Union to stabilize its trade relationships.³⁷ As such, these arrangements emerged as a *sui generis* response to the economic disintegration between the UK and EU. With the notable exception of the UK-Japan Comprehensive Economic Partnership Agreement,³⁸ most UK rollover agreements incorporate *mutatis mutandis* existing trade liberalization commitments under existing European Union-concluded RTAs, subject to adjustments in tariffs and tariff-rate quotas (TRQs) for historical usage and currency exchange rates. At the same time, several rollover agreements altogether remove unused preferential TRQs,³⁹ or – for technical reasons relating to the demonstration of regulatory equivalence – do not recognize UK conformity assessments for key sectors of products, including live animals and agricultural products.⁴⁰

While rollover agreement negotiations allowed trade negotiators to request new or reduced concessions from the UK due to its limited negotiating capacity and timetable for dialogue, this largely did not occur.⁴¹ There are several likely explanations for this. One plausible explanation would be that influential domestic groups across trade partners, particularly manufacturers, are often dependent on existing levels of economic integration and could face harm from marked readjustments in barriers to trade. From their perspective, existing protections may even be considered optimal and unnecessary to adjust for either side. Alternatively, due to the limited length of time between the Brexit referendum and the UK withdrawal from the European Union, trade partners could have been risk-averse to renegotiating schedules of commitments and concessions from the baseline achieved already

³⁷ See, notably, Kikarea (n 30); Koutrakos (n 5).

³⁸ Agreement between the United Kingdom of Great Britain and Northern Ireland and Japan for a Comprehensive Economic Partnership (adopted 23 October 2020, entered into force 1 January 2021) <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/929181/CS_Japan_1.2020_UK_Japan_Agreement_Comprehensive_Economic_Partnership_v1.pdf> accessed 2 July 2024.

³⁹ Free Trade Agreement between Iceland, the Principality of Liechtenstein and the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland (adopted 8 July 2021, entered into force 1 February 2023)

<assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003335/Free_trade_agreement_between_UK-Northern_Ireland_and_Liechtenstein_Iceland_and_Norway_volume_1.pdf> accessed 2 July 2024. See, for parliamentary review, UK Parliament, ‘Scrutiny of international agreements; treaties considered on 14 May 2019’ (House of Lords European Union Committee, 2019) <publications.parliament.uk/pa/ld201719/ldselect/ldcom/362/36204.htm#_idTextAnchor005> accessed 2 July 2024.

⁴⁰ Article 1(2)(b) UK-EU TCA. See Panos Koutrakos, ‘Three narratives on the United Kingdom’s trade agreements post-Brexit’, in Adam Łazowski and Adam Cygan (eds), *Research Handbook on Legal Aspects of Brexit* (Edward Elgar 2022) 416–417.

⁴¹ Joris Larik, ‘Imitation as Flattery: The UK’s Trade Continuity Agreements and the EU’s Normative Foreign Policy’ (2023) 34(4) EJIL 801, 813–819.

while the UK was still a Member State. Regardless of the precise explanation for why the trade partners largely retained existing trade liberalization commitments, the rollover agreements demonstrate how STAs can preserve existing welfare commitments in the face of economic shocks. Moreover, the rollover agreements have created a starting-point for the UK to begin negotiations on future trade liberalization commitments with Canada, Mexico, Israel, and Switzerland, among others. In these instances, the rollover agreements did not create path-dependent protectionism; instead, they ensured short-term stability and set the conditions for trade liberalization negotiations to resume at a later date.

The impact of STAs on welfare is more complicated where formations eliminate substantial liberalization commitments that previously existed between trade partners. The negative welfare effects of agreements such as the UK-EU TCA on consumers and producers have been well-modelled and discussed within the economic literature.⁴² While such arrangements have starkly detrimental and protectionist effects, the rebalance of obligations allows for certain commitments to be preserved once the STA is concluded. As Section IV.A further illustrates, these formations may be even regarded as ‘second-worst’ options to unilateral State withdrawals from existing RTAs and a return to trade on MFN treatment terms.

B. An Essential Security Bulwark

In the post-World War context, trade liberalization became depicted by its proponents as a powerful weapon to prevent the recurrence of global or regional conflict.⁴³ This follows a deceptively simple logic: by integrating the economies of various States, be it through the regional pooling of resources or lowering of market access barriers globally, free trade would raise the costs of engaging in armed conflict.⁴⁴ Trade formations, as institutions, provide important political and legal restraints on security threats.

The significance of political dialogue was recognised international trade forums was recognised as early as the Havana Charter negotiations. This sentiment was echoed by the

⁴² Ilaria Fusacchia, Luca Salvatici and L Alan Winters, ‘The consequences of the Trade and Cooperation Agreement for the UK’s international trade’ (2022) 38(1) *Oxford Review of Economic Policy* 27, 48 modelling ‘in gross terms UK exports will fall by 7.9 per cent and imports by 14.2 per cent, and in value added terms by 6.3 per cent and 13.7 per cent, respectively’ following UK-EU TCA entry into force; Jun Du, Emine Beyza Satoglu and Oleksandr Shepotylo, ‘How did Brexit affect UK trade?’ (2023) 18(2) *Contemporary Social Science* 266, 272–280 examining short-term effects of the UK-EU TCA.

⁴³ See Cordell Hull, *The Memoirs of Cordell Hull, Volume I* (The MacMillan Company, 1948) 82.

⁴⁴ This approach reflects the ‘logic of markets’ discussed in Harlan Grant Cohen, ‘Nations and Markets’ (2020) 23(4) *JIEL* 793, 800.

Norwegian delegate and chair during the Article XXI GATT negotiations, who suggested ‘the atmosphere inside the [International Trade Organization] will be the only efficient guarantee against abuses’ of the exception.⁴⁵ In this sense, the transparency and political pressure emerging from deliberations between trade partners at the multilateral or regional level was seen as a constraint on the extent to which States would resort to warfare where global economic interests are at stake.⁴⁶

Legal restrictions, by contrast, emerge from the power of dispute settlement to *legitimize* or *delegitimize* trade partners’ resort to economic warfare. Following the *Russia—Traffic in Transit* report, WTO panels have consistently maintained that the subject-matter and temporal dimensions of essential security exceptions are reviewable.⁴⁷ The introduction of legal standards is significant, as this ensures accountability for abuses of essential security exceptions which are not hindered by collective political pressure.⁴⁸

Beyond replicating these mechanisms, STAs may operate as signals to economically powerful third countries and deter coercion based on ‘weaponised trade’.⁴⁹ This can be illustrated through the US-Taiwan Trade Initiative. A principle effect of the agreement – which was concluded between the American Institute in Taiwan and the Taipei Economic and Cultural Representative Office in the United States – is to create norms and institutions that could underpin closer regulatory cooperation and potentially future trade liberalization commitments between the US and Taiwan in the long-run.⁵⁰ While the Trade Initiative relies on obligations of conduct and does not adopt trade liberalization commitments, the newly introduced institutions and regulatory dialogue venues create expectations of stability for

⁴⁵ United Nations, ‘Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment’ (1947) UN Doc E/PC/T/A/PV/33, 21.

⁴⁶ On how existing WTO institutions can address security concerns, see Mona Pinchis-Paulsen, ‘Let’s Agree to Disagree: A Strategy for Trade-Security’ (2022) 25(4) JIEL 527, 541–547.

⁴⁷ WTO Panel Report, *Russia – Measures Concerning Traffic in Transit* (adopted 26 April 2019) WT/DS512/R (Panel, *Russia – Traffic in Transit*); WTO Panel Report, *Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights* (unadopted) WT/DS567/R (Panel, *Saudi Arabia – IPRs*); WTO Panel Report, *United States – Origin Marking Requirement* (not yet adopted) WT/DS597/R; WTO Panel Report, *United States – Certain Measures on Steel and Aluminium Products* (not yet adopted) WT/DS544/R (Panel, *US – Steel and Aluminium Products (China)*).

⁴⁸ Geraldo Vidigal and Stephan W Schill, ‘International Economic Law and the Securitization of Policy Objectives: Risks of a Schmittean Exception’, 48(2) LIEI 109, *passim*.

⁴⁹ Markus Wagner, ‘Weaponised Trade: A New Concept for an Increasingly Complex World’ (*Periscope*, December 2022) <periscopekasaustralia.com.au/briefs/weaponised-trade-a-new-concept-for-an-increasingly-complex-world/> accessed 2 July 2024. Erik Gartzke and Oliver Westwinter, ‘The complex structure of commercial peace contrasting trade interdependence, asymmetry, and multipolarity’, (2016) 53(3) *Journal of Peace Research* 325, 330–333 infer ‘[s]tates with multiple dependencies can more effectively counter the coercive effect of any given dependency, limiting usable leverage for less dependent partners and discouraging coercion by less dependent trade partners.’

⁵⁰ Articles 2.6(9), 2.11(2), 2.25(1) and (2), 3.16, 6.2, and 6.4 US-Taiwan Trade Initiative.

economic actors and thus promote US-Taiwan trade flows.⁵¹ By increasing economic and regulatory cooperation between the US and Taiwan, however, the Trade Initiative raises the political cost of economic coercion against Taiwan. In this sense, STAs are useful instruments for achieving geoeconomic trade policy objectives, such as deterring economic coercion from third countries based on strategic economic alliances.

IV. Economic Governance Functions of STAs

The question remains why trade partners are increasingly resorting to such formations. This section develops an institutionalist account of the core functions that STAs perform in governing international trade. While STAs are diverse in terms of the express purposes they seek to achieve and their method of disciplining trade (see discussion in Section II), understanding how these new formations shape international trade is a first step in exploring their strategic use as economic governance tools. As such, this Section explores the economic functions of STAs through which they achieve their stated objectives.

Independent of the precise form they take – whether as a renegotiated RTA, an economic cooperation agreement, or a negotiating initiative – STAs are ultimately institutions which shape the economic ties between trade partners. They are both legal instruments that define what trade barriers could be introduced and the underlying conditions of competition between economic actors in pursuit of stability alongside distributive objectives, and fora that (re)structure the economic dialogue between trade partners. Given the transnational implications of STAs – simultaneously configuring the global market and international political arena, and reshaping the interests of trade partners and economic actors alike – their functions must be understood through their impact on both domestic interest groups and inter-State relations.

An important caveat that must be taken into account is that liberalizing trade agreements may similarly perform versions of these governance functions. For instance, liberalizing trade agreements may provide for sector-specific trade liberalization commitments without addressing more difficult economic disagreements. This Section instead makes a narrower contribution to the literature: that is, to frame how STAs approach

⁵¹ While Article 3.16(1) US-Taiwan Trade Initiative encourages ‘compatibility and cooperation’ and various mechanisms for dialogue are created under Articles 2.29, 3.17, 6.4, and 7.7(2), there are no express trade liberalization commitments.

economic governance without relying on trade liberalization as a pre-condition for cooperation or coordination.

A. Shaping Economic Expectations of Interest Groups

Trade agreements and negotiations impact domestic actors' interests by maintaining or reducing economic barriers between trade partners. While trade liberalization is rightly seen by economists as an instrument for growing the 'social pie,' the dual threats of wage stagnation for workers and price competition for (certain groups of) domestic industries create powerful disincentives for political leaders involved in trade negotiations to agree to further concessions.⁵² Recent experiences suggest these challenges cannot be easily overcome by executives where there is a need for legislative approval to ratify trade agreements, such as the failure to ratify the Trans-Pacific Partnership in the US Congress and the challenges of ratifying the EU-Canada Comprehensive Economic and Trade Agreement within Member State parliaments. Similarly, likely owing to the expiry of the 'fast-track' procedure for Congressional approval of trade agreements under the Trade Promotion Authority in July 2021,⁵³ none of the four agreements being negotiated under the 2023 US Trade Policy Agenda are intended to reduce market access barriers or directly alter domestic 'behind-the-border' regulations of products and services.⁵⁴ This shift in US trade policy – toward a preference for stabilizing trade agreements – appears to be motivated by the low domestic political costs of STAs, as they do not undercut existing protections (namely, tariffs and 'behind-the-border' regulatory measures) for domestic constituencies,⁵⁵ and the lack of trade liberalization potentially provides grounds for avoiding the need for Congressional approval.⁵⁶ Pursuing such an approach, however, is both a blessing and a curse. As STAs reduce the costs of overcoming pressure from powerful industries or interest groups benefitting from protections, domestic political leaders risk receiving relatively minor

⁵² Giovanni Maggi and Ralph Ossa, 'The Political Economy of Deep Integration' (2021) 13(1) Annual Review of Economics 19, 28–35.

⁵³ Section 103(a)(1)(A)(ii) Bipartisan Congressional Trade Priorities and Accountability Act of 2015, 17 U.S.C. §4201.

⁵⁴ USTR (n 2) 15–19.

⁵⁵ Interest groups mobilize and use their collective 'voice' to pressure political parties within legislatures to represent their interests, or threaten to 'exit' by withdrawing support, executives face difficulties when passing legislation or committing to treaties where legislative approval is necessary: Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (HUP 1970) ch 2 and 3.

⁵⁶ Kathleen Claussen and Tim Meyer, 'The President's (and USTR's) Trade Agreement Authority: From Fisheries to IPEF' (*Lawfare*, 2022) <www.lawfareblog.com/presidents-and-ustrs-trade-agreement-authority-fisheries-ipef> accessed 2 July 2024 discussing legal arguments raised by the United States Trade Representative to avoid requiring Congressional approval for IPEF.

reciprocal concessions, or even losing previously negotiated concessions, from their trade partners in return.

For foreign importers, STAI may have an *expectation-stabilizing effect* where they are used to resolve the consequences of specific trade disputes, or broader processes of economic disintegration and decoupling. The prospect of increased future costs following a state's unilateral withdrawal from a trade agreement creates a 'reference point' for importers and negotiating governments, against which even a protectionist STAI may appear as a second-worst option to trading on an MFN treatment basis.⁵⁷

An example of this effect is the TCA between the UK and EU. Following the 2016 referendum decision, the UK began a series of long-running negotiations with the Commission, as well as third countries over the nature of their future trade relations. As Belke and Ptok show, while there was 'little effect on British exports to the [EU]' during the early stages of negotiations, uncertainty over the future trading relationship had 'a substantial impact on exports from Belgium, Germany, France, Italy, and the Netherlands to the [UK]' across a range of product groups.⁵⁸ Negotiations over the TCA were concluded on 24 December 2020, with the agreement subsequently being ratified by the UK Parliament and entering into force in March 2021.

With respect to trade in goods, the TCA largely does not introduce tariff or quantitative restrictions on goods traded directly between the UK and EU.⁵⁹ However, trade barriers are raised by i) the introduction of stricter preferential rules of origin, which prevent tariff-free re-export where products have not undergone a 'substantial transformation,' and ii) the shift away from the principle of mutual recognition.⁶⁰ In practice, this means that exporters must now satisfy the importing state's product regulations and health measures, unless the technical regulations or SPS measures are harmonized or deemed equivalent.⁶¹ Even though the TCA reduced overall trade flows in goods and services between the trade

⁵⁷ For the significance of reference points from a behavioural economics perspective, Anne van Aaken and Jürgen Kurtz, 'Beyond Rational Choice: International Trade Law and The Behavioral Political Economy of Protectionism' (2019) 22(4) JIEL 601, 610: 'Gains and losses are defined in relation to some reference point, usually (but not invariably) the status quo or an entitlement. A loss counts more than a gain (loss aversion). [...] What counts as a loss or as a gain depends on the reference point.'

⁵⁸ Ansgar Belke and Sebastian Ptok, 'British-European Trade Relations and Brexit: An Empirical Analysis of the Impact of Economic and Financial Uncertainty on Exports' (2018) 6 International Journal of Financial Studies 73, 82–83.

⁵⁹ Articles 21 and 22 UK-EU TCA.

⁶⁰ This may be justified by the likely WTO-incompatibility of mutual recognition agreements which are closed to other Members: Lorand Bartels, 'The Legality of the EC Mutual Recognition Clause Under WTO Law' (2005) 8(3) JIEL 691.

⁶¹ Catherine Barnard and Emilija Leinarte, 'Movement of Goods under the TCA' (2022) 13 Global Politics 106, 111.

partners in the short-term and is expected to have negative income and welfare effects when compared with UK membership of the EU, the agreement itself created concrete expectations of regulatory stability for affected producers and consumers. In this sense, it operates as a ‘second-worst’ alternative to trading on Most-Favoured-Nation treatment terms.

At the same time, depending on their design, STAIs may have an *expectation-destabilizing effect* where they introduce high-probability, high-impact costs for the trade partners’ producers, service providers, and (directly or indirectly) consumers. As the abovementioned example of the post-Brexit referendum negotiations illustrates, the uncertainty over whether the TCA would be successfully concluded affected the trading behaviour of risk-averse exporters and other economic actors.⁶² Hence, interest group expectations were only stabilized once the TCA was adopted.

B. Freezing Economic Struggles in Amber

The second function that STAIs perform concerns their power to foster long-term regulatory cooperation between trade partners without deepening their economic interdependence. As already noted, where trade partners choose to liberalize their trade relations, this requires either the reduction of market access barriers, or harmonizing and recognizing the equivalence of product regulations and standards. Achieving economic integration, however, poses difficulties where trade negotiations must settle disagreements over what Pielke calls ‘abortion politics’ issues: regulatory questions where trade partners do not share a common regulatory objective owing to differences in value judgments, regulatory cultures, and public concerns, such as over the approach to address the potential welfare and biodiversity risks of genetically modified organism (GMO) crops.⁶³ Since the global economy is increasingly integrated, negotiators are regularly faced with addressing ‘abortion politics’ issues when concluding or renegotiating liberalizing trade agreements. At the same time, trade agreements provide vital platforms for political deliberation and technical regulatory cooperation between trade partners. Under liberalizing trade agreements, such cooperation is typically premised on

⁶² Belke and Ptok (n 58).

⁶³ Roger A Pielke Jr, ‘Forests, Tornadoes, and Abortion: Thinking about Science, Politics, and Policy’, in Karen Arabas and Joe Bowersox (eds), *Forest Futures: Science, Politics, and Policy for the Next Century* (Powman & Littlefield Publishers 2004) 145–146. To illustrate the significance of abortion politics within international trade law, consider the divergent regulatory views over GMO crops in trade negotiations: Mark A Pollack and Gregory C Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (OUP 2009).

shared economic interests which become more difficult to identify or reconcile once ‘abortion politics’ issues are concerned.

A STAI may serve as pretext for improving trade relations between trade partners where they create the necessary conditions for effective regulatory cooperation. This is because such arrangements do not require ‘abortion politics’ questions to be immediately resolved before the trade partners may cooperate under the formation. Instead, they create forums for technical dialogue between trade partners to take place, initially on the premise that the arrangement maintains or rolls back existing levels of economic integration to accommodate for differences in values or interests.

A recent example is the TTC established in June 2021. The TTC was originally envisaged to create a ‘forum’ for technical and political dialogue between the EU and US through which the trade parties could avoid raising trade restrictions and develop regulatory cooperation on ‘compatible and international standards’, as well as ‘technology, digital issues and supply chains’ more broadly as policy areas.⁶⁴ As such, it created conditions for digital trade concerns between the trade partners to be addressed in an informal setting and at a technical level without requiring a consensus to emerge over online privacy as an ‘abortion politics’ question.⁶⁵ This emphasis on ensuring regulatory cooperation and coordination was well-reflected in the 2021 Pittsburgh Statement issued after the inaugural TTC meeting. The Pittsburgh Statement recognized that ‘cooperation and exchanges of the TTC are without prejudice to the regulatory autonomy of the [EU] and the [US]’ and set up ten thematic working groups carrying out technical dialogue on topics, including technology standards, climate-neutral technology, supply chain resilience, and export controls for dual-use goods.⁶⁶ The second TTC meeting deepened regulatory cooperation achieved by the working groups and established a Strategic Standardisation Information mechanism to facilitate information-sharing and a ‘Trade and Labour Dialogue’ between unions, businesses, and government officials.⁶⁷ Building on the technical dialogue and institutional infrastructure, the TTC has

⁶⁴ European Commission, ‘EU-US launch Trade and Technology Council to lead values-based global digital transformation’ (Press Release, 15 June 2021) <ec.europa.eu/commission/presscorner/detail/en/IP_21_2990> accessed 2 July 2024. The TTC operates as an informal formation and may thus provide a replicable model for future NTAs: see Felicity Vabulas and Duncan Snidal, ‘Cooperation under autonomy: Building and analyzing the Informal Intergovernmental Organizations 2.0 dataset’ (2020) 58(4) JPR 859 demonstrating the increasing reliance on informal inter-governmental organizations by States independent of power dynamics.

⁶⁵ On divergent regulatory approaches to privacy and their consequences for international trade law, Anupam Chander and Paul Schwartz, ‘Privacy and/or Trade’ (2023) 90(1) The University of Chicago Law Review 49.

⁶⁶ Pittsburgh Statement (n 23).

⁶⁷ EU-US Joint Statement of the Trade and Technology Council (16 May 2022) <circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/14bf0332-62ee-411b-8c74-bea38cd79efb/details> accessed 2 July 2024.

since been relied on to negotiate ‘behind-the-border’ trade liberalization. During their third and fourth meetings, the TTC parties extended their mutual recognition agreements on marine equipment and pharmaceuticals and initiated discussions over the easing of conformity assessments for machinery.⁶⁸ While the TTC was originally designed as a STAI to develop regulatory cooperation over technology standards, inter alia, it created the mutual trust and institutional framework necessary for negotiating deeper economic integration after the parties’ underlying regulatory disagreements were addressed.

The normalization of relations that STAIs enable may also result from powerful States’ attempts to legitimize their economic priorities by embedding them within international trade law in return for ending or pausing disagreements.⁶⁹ The Trump Administration, for instance, threatened to withdraw the US from the North American Free Trade Agreement (NAFTA) unless their policy concerns with the agreement were addressed. This, in turn, led the US to adopt a ‘divide and conquer’ negotiating strategy by using its economic power as leverage during initial bilateral negotiations with Mexico, before formally involving Canada in the NAFTA renegotiation process.⁷⁰ While the agreement did involve some level of tariff liberalization and harmonization of intellectual property rules, it mainly resolved the underlying economic disputes by disintegrating economic relations between the trade partners through more stringent preferential rules of origin for automotives, textiles, and apparel goods whilst liberalizing trade in agricultural goods.⁷¹ The USMCA – as a ‘rebalancing’ economic governance model – provides a stark illustration of how cooperation based on STAIs may emerge on the back of ‘the use of raw economic power.’⁷²

C. A First Mover’s Advantage in Rule-Setting

⁶⁸ Commission, ‘EU-US Joint Statement of the Trade and Technology Council’ (5 December 2022) <ec.europa.eu/commission/presscorner/detail/en/statement_22_7516> accessed 2 July 2024; Commission, ‘EU-US Trade and Technology Council enhances cooperation in emerging technologies, sustainable trade and economic security’ (31 May 2023) <ec.europa.eu/commission/presscorner/detail/en/ip_23_2922> accessed 2 July 2024.

⁶⁹ See on the instrumentalization of, and withdrawal from, international law obligations by hegemony, Nico Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’ (2005) 16(3) EJIL 369, 382–385. For the techniques used to further hegemonic interests through international law instruments, Eyal Benvenisti and George W Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’ (2007) 60(2) Stanford Law Review 595, 610–619.

⁷⁰ ‘TIMELINE – The long bumpy road from NAFTA to USMCA’ (*Reuters*, 2020) <www.reuters.com/article/usa-trade-usmca-timeline-idUSL1N2E803Q> 4 March 2024.

⁷¹ Christian Delev, ‘Straining the Spaghetti Bowl: Re-Evaluating the Regulation of Preferential Rules of Origin’, 25(1) JIEL 25, 35–43 examining USMCA.

⁷² Sergio Puig, ‘The United States-Mexico-Canada Agreement: A Glimpse into The Geoeconomic World Order’ (2019) 113 AJIL Unbound 56, 57.

The final, and perhaps most contentious, function of STAs concerns their potential to create a first mover's advantage for trade partners in forming new rules covering areas of economic governance that have largely not been disciplined by WTO law (i.e., WTO-extra obligations). The premise of this claim is that STAs are a distinct type of legal instrument which may address issues outside of wealth-enhancement, such as supply chain resiliency, the protection of labour and the environment, and cooperation over economic security. Hence, establishing an early consensus on negotiated rules within a smaller group of trade partners based on shared economic interests increases pressure for other States to adopt these same rules or develop alternative proposals (i.e., performing an agenda-setting function).

Crucially, economically weaker States may have an incentive to participate in drafting such WTO-extra trade agreements with stronger States. For stronger States to demonstrate that the developed rules are viable and deserve wider recognition, they must gather sufficient support from other States willing to support the agreement or initiative. For this reason, economically weaker States may participate in STA negotiations and ensure their interests are reflected within the WTO-extra disciplines in exchange for concluding the STA. Beyond confirming that their interests are reflected within the STA itself, economically weaker States may rely on economically powerful States' efficiency-seeking practice of using previous trade agreements as 'boilerplate' when negotiating future arrangements, to ensure their interests are embedded and reflected in future international trade agreements.⁷³

These factors inform the account of the first mover's advantage argument developed by US Secretary of Commerce Gina Raimondo to justify the IPEF negotiations:⁷⁴

[IPEF] is intentionally designed not to be a "same old, same old" traditional trade agreement. But it's designed as a more innovative and flexible approach, designed to reflect the fact that our economies have changed. The most pressing issues that we need to tackle with our allies have changed, and we need a new approach going forward if we're going to meet the needs of our citizens.

So, by focusing on economic priorities that affect all of our economies, this framework is designed to reflect the shared realities we face, which is climate change; the opportunity and challenges presented by moving, meeting the need of climate change

⁷³ On the use of boilerplates within international trade agreements, see Todd Allee and Manfred Elsig, 'Are the Contents of International Treaties Copied and Pasted? Evidence from Preferential Trade Agreements' (2019) 63(3) *International Studies Quarterly* 603; Claire Peacock, Karolina Milewicz, and Duncan Snidal, 'Boilerplate in International Trade Agreements' (2019) 63(4) *International Studies Quarterly* 923.

⁷⁴ White House (n 3).

and the opportunity of clean tech jobs; supply chain disruptions; and the need for a better-coordinated, high-tech manufacturing economy.

While Secretary Raimondo presents an admittedly caricatured description of what a ‘traditional trade agreement’ is, as the issue-areas she refers to have already been addressed within liberalizing trade agreements, a more limited case could be made for negotiating new areas of economic governance based on STAIs.⁷⁵ Liberalizing RTAs which satisfy the conditions of Article XXIV:8 GATT require extensive trade liberalization negotiations stretching to ‘substantially all the trade’ in goods, while economic integration agreements under Article V:1 GATS must have ‘substantial sectoral coverage’ and remove ‘substantially all discrimination’ between parties to liberalize trade in services.⁷⁶ Given the wide scale of issues, even RTAs which only liberalize trade partners’ market access commitments would need to undergo lengthy negotiations. As Moser and Rose show, RTA negotiations concluded between 1988 and 2009 on average took 28 months and the length increased depending on the number of negotiating parties involved and their geographic proximity.⁷⁷

One possible advantage of STAIs is that negotiations focus on a relatively limited range of issue-areas that exclude broader trade liberalization commitments, thus allowing for a faster conclusion of talks as fewer policy-sensitive issues are addressed. STAI rule-making could more rapidly set the stage for what obligations are considered within future plurilateral or multilateral negotiations, or quickly establish economic collaboration between trade partners during future geoeconomic confrontations based on so-called ‘spheres of independence.’⁷⁸

Crucially, however, this does not mean that STAIs are ‘perfect substitutes’ for liberalizing trade agreements. Effective long-term cooperation through STAIs is conditioned on addressing narrow issue-areas and cooperation is likely limited to a narrow group of interest-sharing Parties.⁷⁹ As welfare gain through trade liberalization remains the primary

⁷⁵ Some of these concerns are the focus of the new European Union trade policy toward sustainable development within free trade agreements: European Commission, ‘The Power of Trade Partnerships: Together for Green and Just Economic Growth’, COM(2022) 409 final (2022).

⁷⁶ Article XXIV GATT; Article V GATS.

⁷⁷ Christoph Moser and Andrew K Rose, ‘Why Do Trade Negotiations Take So Long?’ (2012) 27(2) *Journal of Economic Integration* 280, 284–287 also showing ‘slightly weaker’ results suggesting ‘openness and richness’ among trade partners reduce the length of negotiations.

⁷⁸ Thomas Wright, ‘Sifting through Interdependence’ (2013) 36 *The Washington Quarterly* 7, 8; Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, ‘Toward a Geoeconomic Order in International Trade and Investment’ (2019) 22(4) *JIEL* 655, 663–665.

⁷⁹ Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 2015) 23–28 demonstrated the possibility of cooperation surrounding collective action problems around public goods in

economic objective for many States, the adoption of STAs is likely to operate as a tool for addressing ‘coordination problems’ where the Parties’ interests directly overlap on a specific legal issue and must agree on a course of action,⁸⁰ or to address a narrow range of collective action problems where the Parties have information symmetry and are sufficiently economically integrated to expect long-term cooperative outcomes.⁸¹ Particularly in the latter case, the power dynamics between Parties and the institutional design could play a role in whether the STA is an effective cooperation mechanism.⁸²

A case in point of the first mover’s advantage is the conclusion of negotiations over the IPEF SCA in May 2023 – a year following the launch of negotiations, which was subsequently signed in November 2023. Despite the speed of negotiations, the agreement presents a significant framework for supply chain governance through an economic agreement. As framed, the SCA effectively adopts a ‘managed trade’ approach to shaping global and regional supply chains, where States actively coordinate with, guide, and intervene in the strategic choices of economic actors. As such, the arrangement is ‘stabilizing’ in the sense of maintaining the conditions of competition and creating collaboration for IPEF Parties’ economic actors that participate in supply chains.⁸³ IPEF Parties have agreed, *inter alia*, to monitor ‘import dependencies, prices [...], and trade volumes of [their] critical sectors and key goods’, ensure transparency and cooperation between market participants in IPEF supply chains, and cooperate to resolve supply chain bottlenecks.⁸⁴ While the SCA mainly introduces obligations of conduct and soft law commitments, this allows for the adoption of *ad hoc* responses to address specific supply chain bottlenecks and disruptions instead of

limited situations involving narrow issue-areas, with small-sized groups of actors participating, and where the risks of harm were largely symmetrical but limited. It is likely that STAs may perform such a first mover’s advantage where they operate in similar circumstances.

⁸⁰ On the differences between coordination and cooperation problems, see specifically Duncan Snidal, ‘Coordination versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes’ (1985) 79(4) *The American Political Science Review* 923, 931–936.

⁸¹ See Eyal Benvenisti, ‘The WHO—Destined To Fail?: Political Cooperation and the Covid-19 Pandemic’ (2020) 114(4) *AJIL* 588, 590–592 summarizing the international relations literature on cooperation and identifying six factors which are ‘influential’ or ‘help predict successful cooperation’: i) ‘the number of participants’, ii) ‘their expectation that they will repeat their engagement indefinitely’, iii) ‘the quality of the information they have about the performance of their partners’, iv) the ‘scope’ of the issue-area (that is, whether this is a ‘single-issue’ or ‘multi-issue’ cooperation problem), v) the ‘frequency of iterations’, and vi) the ‘relative vulnerability of the parties’.

⁸² Ostrom (n 79) 88–102 identifying institutional design aspects that contribute to successful collective action.

⁸³ The SCA may be seen as a direct response to greater State interventionism in the activities of economic actors, principally by China: Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57(2) 57 *Harvard International Law Journal* 261, 264–294. A notable risk flows directly from this response: that only economic actors which directly participate in IPEF treaty bodies may benefit from the State-firm cooperation achieved. In practice, this can lead to the dual risks of only ‘national champions’ selected by IPEF Parties benefitting from economic resilience, or even that transnational cartels form around those supply chain participants that are included in IPEF decision-making.

⁸⁴ Articles 2, 3, 9, 11, and 12 SCA.

relying on a one-size-fits-all framework.⁸⁵ In this sense, compliance with the SCA depends on the level and effectiveness of regulatory cooperation induced by three institutions. These are principally i) the IPEF Supply Chain Council which ensures senior-level regulatory dialogue on supply chains and adopts Action Plans for achieving SCA objectives, ii) the Supply Chain Crisis Response Network which establishes ‘an emergency communications channel’ for responding to supply chain disruptions, and iii) the Labor Rights Advisory Board which promotes labour rights protection within supply chains.⁸⁶

In short, the SCA illustrates the potential for STAIs to rapidly create new norms and institutions to cooperatively govern trade policy. For IPEF Parties, this offered an opportunity to rapidly introduce mechanisms for supply chains to gain resilience in the Indo-Pacific region. As such, the formation created a strategic alignment that empowers collective action between States *vis-à-vis* economic resilience on an *ad hoc* basis. In addition, there is an external-facing side to the first mover’s advantage generated by the SCA. Setting rules through the SCA establishes powerful incentives for non-IPEF Parties to learn from the arrangement and adopt the same rules, adapt the rules to their respective setting, or respond to the new legal framework. Whether the broader international community sees the SCA as a viable and replicable model for cooperative supply chain governance will shape the agreement’s future agenda-setting role.

V. Conclusion

This article has sought to interrogate the political economy behind the growing resort to STAIs as tools of economic governance. While such formations emerge in distinct political economy contexts. These range from *sui generis* attempts to create stability in the aftermath of economic disintegration caused by the Brexit process to the strategic ambiguity underpinning US-Taiwan relations. STAIs are thus legally significant devices as they operate to ensure stability and cooperation between trade partners, without relying on greater or deeper trade liberalization as a driving force.

In practice, STAIs are increasingly significant as instruments for ensuring economic stability – be it in the long-term or short-term – and for pursuing economic cooperation on non-welfarist objectives between trade partners. These arrangements have characterized the

⁸⁵ Notably, soft law obligations have been effective disciplines within other areas of international economic governance, such as international financial law: see Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (CUP 2012) 115–176.

⁸⁶ Articles 6, 7(2), and 8 SCA.

US trade policy turn away from trade liberalization, and are also shaping the trade relations of States more broadly. This phenomenon not only reflects the increased focus by States toward distributive questions, such as the impact of trade liberalization on labour standards and environmental protection. It further highlights how stability and cooperation in trade relations matters for economic actors. As narrow, issue-specific agreements such as the IPEF SCA illustrate, participants in global and regional value chains benefit from STAs given the role that such agreements serve in defining the conditions of competition that economic actors face.

It remains to be seen how impactful STAs will be in texturing the nature of international trade law in the long-run, especially when set against States' increased receptiveness to geoeconomic objectives and the broader securitization of trade policy.