

Challenges from Evolving International Trading Arrangements

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Topics to be covered

- 1. International trading arrangements facing challenges on all three fronts;
 - (a) Trade law making and evolution;
 - (b) Trade law Implementation; and
 - (c) Trade law adjudication.
- 2. US-China Trade War; and
- 3. WTO reform.

Trade Law Evolution Challenges

- On the multilateral front- WTO;
- On the bilateral and regional fronts; and
- On the plurilateral and sectoral fronts.

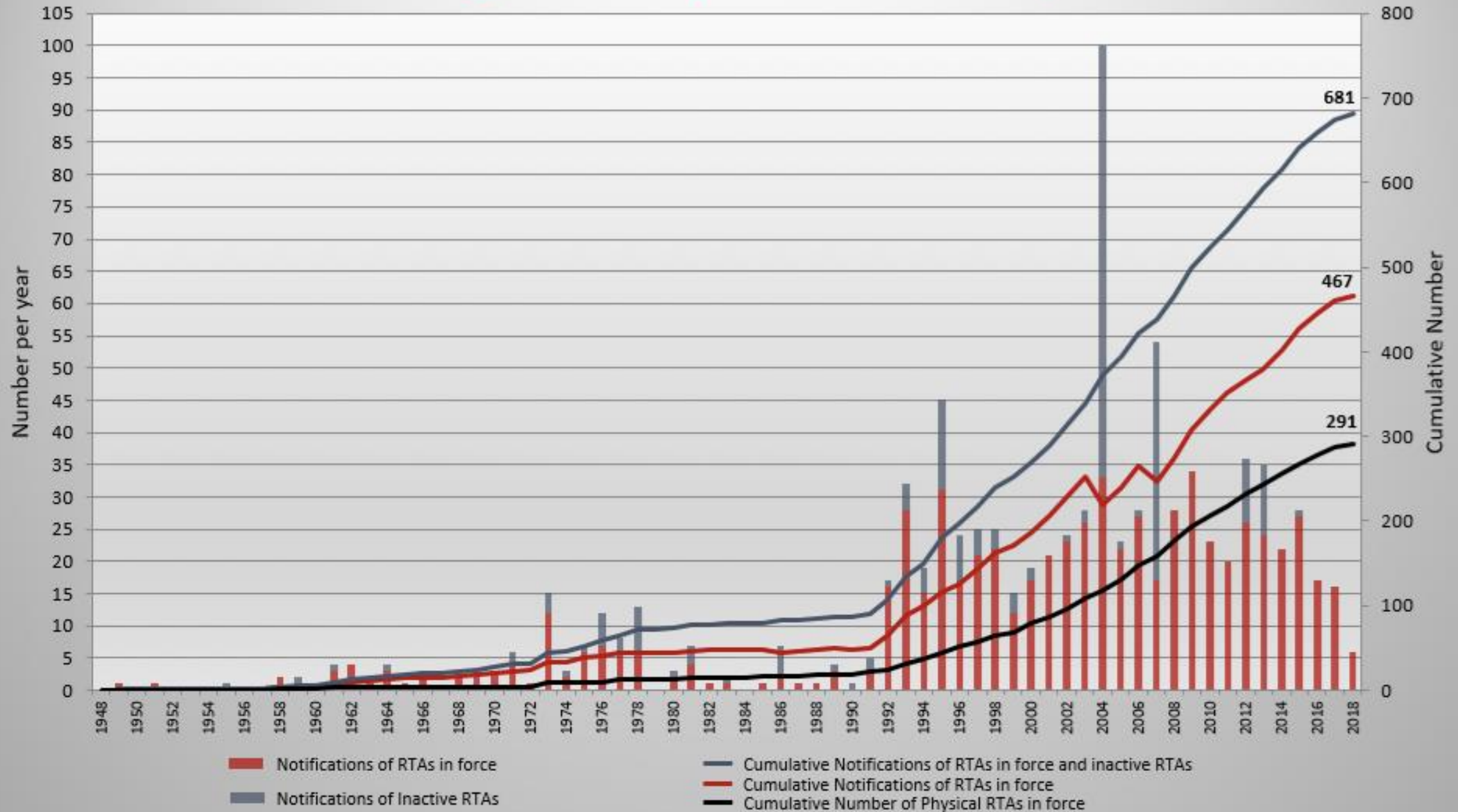
Making of multilateral trade law- the negotiation pillar of WTO

- Doha Round launched with great expectations in 2001;
- A comprehensive mandate towards further trade liberalisation and updating of WTO rules / regulations;
- Was widely acclaimed as a development round and got named as the Doha Development Agenda;
- Made significant progress in the initial years with modalities and approaches;
- Round was to conclude in 2005, got extended to 2006 but suspended thereafter

Doha Round- Why grounded?

- Reluctance of developed countries to let go of their domestic subsidies in agriculture;
- High expectations on market access and other issues from developing countries despite the Doha mandate calling for more favourable treatment towards them;
- Could not even agree on seeking to complete Doha Round in Nairobi in 2015; no declaration in Buenos Aires in 2017.
- A couple of cherry picked subjects however moved forward-trade facilitation (TFA) and fisheries subsidies;
- Success of TFA due to its approach of each country according to its ability; fishery subsidies under negotiation;

Evolution of Regional Trade Agreements in the world, 1948-2019



Note: Notifications of RTAs: goods, services & accessions to an RTA are counted separately. Physical RTAs: goods, services & accessions to an RTA are counted together.
 The cumulative lines show the number of notifications/physical RTAs that were in force for a given year.
 Source: RTA Section, WTO Secretariat, January 2019.

Evolution of bilateral/regional FTAs- from WTO website

Trade Law Evolution-Bilateral /Regional

- Phenomenal rise in such FTAs in the nineties and noughties- continuing also after 2010;
- Trend towards mega regional / cross regional 'high standard' FTAs since 2009- TPP, TTIP, RCEP, FTAAP etc.,
- A challenge for countries like India- increasingly access to many markets like China, EU etc., necessitate an FTA;
- The Trump effect-focussing more on the bilateral, dumping TPP, renegotiating NAFTA etc.,- temporary?
- FTAs vs Multilateralism, much debated - ironically FTAs need WTO for sustainability but also undermine latter.

Trade law evolution

Plurilateral / Sectoral

- Information Technology Agreement (ITA-1) concluded in 1996-operational- 81 members including India;
- ITA-2 agreed in 2015, 201 additional products, 54 member countries, under implementation- India not a member;
- Environmental goods agreement (EGA)-under negotiation-launched in 2014 by 46 countries-54 products;
- Trade in Services Agreement (TiSA) - under negotiation- launched in March 2013 by 50 countries;
- Large developing countries- Brazil, India, Indonesia, Mexico, South Africa- not members of several plurilaterals- ASEAN not in TiSA; and
- Will plurilaterals and FTAs be key future plank for market access?

Implementation pillar of WTO

- On the one hand appeal of WTO reflected in its steady expansion of membership from 128 in 1995 to 164 now;
- Success of Dispute Settlement Body (DSB) of WTO- heard more than 500 cases, given rulings on 350 of them;
- However expectations that membership of WTO will lead to greater openness in governance and move towards market economy not fully realised;
- Non-tariff barriers remain a challenge. Protectionism has also climbed with global slowdown in recent years.

Trade law Adjudication-challenges

- WTO DSB has earned wide approval and credibility but depends on fair process at Panel and Appellate stages;
- US has continued to block AB nominations since May 2016 when it blocked a Korean member for 2nd term;
- US said he made several 'wrong' decisions and went beyond what was needed to settle an individual dispute;
- But US has continued to block all further nominations and reasons for blocking have lengthened under Trump; and
- Currently AB has only 3 out of 7 members- 2 more will leave by year end, DSB will then be fully dysfunctional.

Main objections of US

- AB disregarding 90 days for disposing appeals;
- Continued service of AB members beyond their term;
- AB giving advisory opinions on issues not necessary to resolve a dispute (*obiter dicta*);
- AB review of facts and review of a member's law *de-novo* (AB's review limited to "issues of law covered in the panel report and legal interpretations developed by the panel") ;
- AB's claim its reports constitute precedents absent cogent reasons;
- AB adding/diminishing rights of members of WTO .

US objections to AB reform proposals

- EU, China, India and several other countries presented a joint proposal in November 2018 addressing most of the issues raised by US with a view to restoring AB to normal functioning;
- EU, China and India also submitted another proposal on working of AB - suggesting a longer period for AB members but restricted to one term, serving full time to cope with rise in dispute cases, and also enhancing AB strength from present 7 members to 9 or so; but
- US rejected these proposals as not effectively addressing its concerns - and has made no counter proposals from its side. The crisis therefore continues.

Inter-related issues at play in the trade war

- The growing bilateral US-China trade imbalance;
- The divide between world trade rules and China's trade and industrial policies and practices under its 'state capitalism' or 'socialism with Chinese characteristics';
- China's looming economic dominance and its efforts to step up technology and innovation status, through fair or other means ;
- Trump's 'America First' agenda with a focus on reviving American manufacturing and readiness to act unilaterally.

US-China Trade Arithmetic (in US\$ bn)

	Merchandise Trade (2017)	Trade in services (2017)	Local Sales of US/China invested enterprises
US exports to China	129.9	57.63	455.8
US imports from China	505.5	24.94	25.6
Deficit / Surplus for US	-375.6	+32.69	+430.2

- 59% of trade surplus of China with US , as per China customs, was on account of foreign invested enterprises in China in 2017 and 61% to processing trade;
- By end 2017, US investment in China totalled US\$ 83 bn. Chinese investments in US were US\$ 67 bn. China also held US \$ 1.18 tn. of treasury bills by May 2018.

The broad spectrum of US allegations against China

- Unfair trade - Goods trade deficit almost 50 per cent of US's overall trade deficit;
- State subsidies that have *inter alia* resulted in over-capacities in several sectors distorting world trade;
- State enterprises operating on non-market principles;
- Forcing US companies to part with their IPRs;
- Lack of transparency in regulatory processes;
- Whole of government approach, has talked of 'economic aggression' by China.

The Trade War specifics-Main Theatre of Conflict

US Charge against China under Section 301 of US Trade Act

- China's technology transfer regime for inbound investments is unfair; several companies forced to make technology transfer;(eg.,changan model-'Introduce, Digest, Absorb, Re-innovate")
- China's licensing restrictions are discriminatory, opaque and vaguely worded and favour domestic competitors without leaving paper trail ;
- State support to China's outbound investments in key Industries with strategic intent & not market driven;
- Unauthorised cyber intrusions and IPR theft;
- Investigations by USTR under Section 301 is affirmative and results in positive finding on all counts;
- President Trump imposes 25% duty on US\$ 50 bn. Chinese imports

Penal Tariffs, Retaliation and Counter Retaliations

- US penal tariff of 25 per cent in two stages- US\$ 34 bn. in July 2018 followed by US\$ 16 bn. in August last year;
- US penal tariffs mainly targeted- 95 %- intermediate and capital goods affecting US supply chains;
- Chinese retaliation prompt and in equal measure- particularly soybeans and other agri products;
- US counter retaliation in September- 10% tariff on US\$ 200 bn.-indication of tariff on them going upto 25 % in Jan 1
- China counter retaliation of tariffs on US\$ 60 bn. of US imports

The two side shows

- **Sec. 232 investigations on dubious security grounds** : Globally applicable addl. duties of 25% on steel and 10% on aluminium ;
- Determination by US DOC that it was essential for US to achieve 80 % capacity utilisation to provide its industry long term viability; and
- Only a few countries that include Australia, Argentina, Brazil, and South Korea have received limited waivers from addl. duties.
- **Sec.201 investigation examines serious injury to US domestic industry**: On Washing machines and solar panels- China produces 60% of world's solar cells and 71% of modules.
- USITC investigations determined serious injury; Duties imposed ranging from 20 % to 50 % over a three year period-
- Interesting that LG and Samsung have decided to set up washing machine plants in Tennessee and South Carolina; some revival on solar front as well.

The Chinese Defence

- Presents a comprehensive defence in its 80 page White Paper of 25 Sept.;
- Trade issues exist due to different economic structures, development stages and balance of advantages- nothing abnormal;
- In any case US exports to China have grown 5 times since 2001 much faster than its exports to rest of world;
- Trade deficit computation should not merely focus on merchandise trade but on all areas of economic cooperation;
- China's subsidies WTO compliant; China has made huge effort to protect IPR and enforcement; foreign companies have voluntarily entered into technology contracts; equity co-operation requirement normal; and
- Several of US policies and practices have also hurt China.

Are these disputes likely to be resolved soon?

- Unlikely that Sections 201 and 232 cases will be resolved soon even as some countries may seek to negotiate waivers. In fact it could escalate if US threat to impose auto tariffs is carried out;
- With Dispute Settlement Body (DSB) of WTO creaking to a halt, disputes raised on several of these issues may not get heard. Tariffs could run their course for some time. US disagreeing to AB reform proposals may be with this precise intent;
- As for Section 301 duties imposed on China, a process has been set in motion as per temporary truce agreed between Presidents Trump and Xi at Buenos Aires on 1st December 2018;
- A time limit of 90 days was initially set for an agreement otherwise which trade war will continue and tariffs on US\$ 200 bn. could be hiked from 10% presently to 25%.The deadline has been extended last week.

Key commitments by China during truce

- China will purchase ‘very substantial’ amount of agricultural, energy, industrial and other products from US to reduce trade imbalance; agricultural purchases to start immediately;
- Both sides have been negotiating on ‘structural changes’- President Trump tweeted last week that US has made substantial progress in their trade talks with China on important issues including IPR protection, technology transfer, agriculture, services, currency and several other issues.; and
- President Xi open to approving Qualcomm-NXP deal. China agrees to designate ‘fentanyl’ a controlled substance.
- Will know soon if there will be some respite from the trade war. In any case, focus may also shift to WTO reform for which leading proponents already preparing; China may also find it easier to concede ground if it is done in a multilateral frame work;

“ Whether we like Trump or not, and I do not like Trump, but I think he should be credited with one thing, which is to have put this issue of WTO reform on the table”

Statement by Pascal Lamy, former EU Trade Commissioner and former Director General of WTO

Issues being thrown up for WTO Reform

- Fixing the current crisis facing DSB of WTO;
- Tightening of WTO rulebook on domestic subsidies;
- Disciplines on State owned enterprises (SOEs) to ensure they operate on commercial principles;
- Requiring greater transparency on regulation and protection of IPR;
- Review 'developing country' self designation and concept of special and differential treatment ; and
- Address new issues like e-commerce, investment facilitation, MSMEs, gender etc.

Points to ponder

- The US-China trade dispute manifests deeper differences, about transparency and open economic governance on market principles, not just about bilateral trade deficits - will they ever get bridged?
- ‘Very substantial’ purchases by China and some agreements on ‘structural issues’ may alleviate tensions; China’s likely strategy will be to bide time and give minimally to buy peace, from one dispute to another;
- It is clear that issues related to China’s governance and openness are spilling over to WTO reform proposals. Developing countries need to be careful that solutions to the China problem do not get multilateralised for them as well reducing flexibilities;
- Even other developed countries (EU, Japan etc.,) are under pressure from US thanks to tariffs on steel and threats in the form of auto tariffs- they are not averse to appeasing US through WTO reforms in respect of transparency, subsidies, IP enforcement and other rules.
- Meanwhile they will pursue market access through plurilaterals and FTAs with interested countries, even as WTO may be used for tightening up on rules;
- How do we cope with all these challenges?

Thank You !