

DIVERGENCE, CONVERGENCE OR CROSSVERGENCE OF CHINESE AND U.S. APPROACHES TO REGIONAL INTEGRATION: EVOLVING TRAJECTORIES AND THEIR IMPLICATIONS

WANG Heng*

Table of Contents

I. INTRODUCTION	150
II. NEW DEVELOPMENT OF THE CHINESE AND U.S. TRADE APPROACHES	152
A. The New Direction of Chinese Trade Approach	153
B. The New Direction of the U.S. Trade Approach	157
III. DIVERGENCE.....	160
A. The Objectives of Regionalism	160
B. The Instruments for Regionalism.....	162
C. The Approaches to Multilateralism	165
D. The Role in Rulemaking.....	167
IV. CONVERGENCE	170
A. The Objectives of Regionalism	170
B. The Instruments for Regionalism.....	175
C. The Approaches to Multilateralism.....	176
D. The Role in Rulemaking	177
V. CROSSVERGENCE: TWO SIDES OF ONE COIN?	177
A. Crossvergence: Sectoral Examples.....	177
1. Investment.....	177
2. Environment.....	180
B. Why Is There Crossvergence?	183
VI. CONCLUDING REMARKS	184

* Associate Professor and Co-director of CIBEL (China International Business and Economic Law) Initiative, Faculty of Law, the University of New South Wales; University Visiting Professorial Fellow, Southwest University of Political Science and Law (SWUPL). I am grateful to Peter K. Yu, David A. Gantz, Tomer Broude, Donald Lewis, Shen Wei, Mark Feldman, Jingxia Shi, Pasha L. Hsieh, Bronwen Morgan, Daniel Joyce, Simon Lester, Julien Chaisse, Congyan Cai, Manjiao Chi, and Yixin Xu for insightful comments. I also thank participants at 2017 Tsinghua-UNSW Workshop, Oxford University One Belt One Road Summit, the conference “The Emergence of New and Dynamic China-Africa Economic Relationships” and my lecture at SWUPL for the comments, and Melissa Vogt for her able assistance. I would like to thank the editors of Tsinghua China Law Review for their excellent work. Remaining errors are of the author’s alone.

DIVERGENCE, CONVERGENCE OR CROSSVERGENCE OF CHINESE AND U.S. APPROACHES TO REGIONAL INTEGRATION: EVOLVING TRAJECTORIES AND THEIR IMPLICATIONS

WANG Heng

Abstract

Trends in Chinese and U.S. approaches to regional integration are likely to profoundly affect other states and even the future of global economic governance. Showing a possible paradigm shift, the Belt and Road Initiative (BRI) and North American Free Trade Agreement (NAFTA) renegotiation reflect the latest major developments in China and the U.S. regarding regional integration. In particular, the U.S. pursues managed trade, shifts to bilateralism, and adopts an aggressive approach. This article analyses a core question: will Chinese and U.S. trade approaches converge, diverge or both, and why? For the analysis of the convergence or divergence, four aspects will be covered: the objectives of regionalism, the instruments for regionalism, the approaches to multilateralism, and the role in rulemaking. This paper argues that Chinese and U.S. trade approaches are likely to diverge and converge, leading to crossvergence (a simultaneous convergence and divergence of regulatory approaches). Divergence can be found in fundamental areas and particularly the approaches to regionalism and multilateralism. Convergence appears to occur only in selected areas (e.g. investment and intellectual property). Uncertainties exist since both the BRI and trade policies of the Trump Administration are under development. The interaction between Chinese and American approaches will affect the shaping of the international economic legal order.

I. INTRODUCTION

The development of further globalization (e.g. the 11 Trans-Pacific Partnership (TPP) countries' support of the pact) and de-globalization (e.g. the Trump Administration's trade policy) profoundly affects regional integration. As two major economies that have different trade¹ approaches, China and the U.S. play a crucial role in regional integration and may considerably influence other economies and the globe. The interaction between the Chinese and U.S. approaches may affect the future of global governance.

Recent regional integration practices of the U.S. and China show a possible paradigm shift. For China, the Belt and Road Initiative is the major development of regional integration that explores new trade routes.² It is the feature point of an era of proactive trade policy in China. The BRI involves a large number of jurisdictions and has an increasingly broad coverage, ranging from investment and trade to economic cooperation and culture. A large portion of China's future

¹ Unless otherwise stated, trade is understood in its broad sense here as the case with free trade agreements, which extends to finance, investment and non-trade concerns (e.g. environment and labor).

² International Centre for Trade and Sustainable Development, *Bridges Negotiation Briefing: A Guide to the WTO's Eleventh Ministerial Conference* (2017), https://www.ictsd.org/sites/default/files/2017_bridges_negotiation_briefing_-_final5.pdf.

outbound investment and trade growth is expected to take place in BRI jurisdictions.³

For the U.S., the engagement in regional integration has largely focused on the renegotiation of the North American Free Trade Agreement (NAFTA), although there is considerable rhetoric of bilateral trade relations with Asian trading partners (e.g. the possible renegotiation of the U.S.-Korea Free Trade Agreement).⁴ Since the U.S. has withdrawn from the TPP, the Trump Administration's NAFTA renegotiation is the most important, latest movement of the U.S. toward regional integration. Regardless of the NAFTA renegotiation outcome, it suggests a fundamental shift in the U.S. trade approach away from multilateralism and mega-regionalism (particularly the TPP).

In the context of regional integration, this paper analyses possible trends in the Chinese and U.S. trade approaches that have not yet been fully explored. These approaches may, in the future, converge or diverge. There is also a third possibility: crossvergence, which means a simultaneous convergence and divergence of regulatory approaches.⁵

This article will explore a key question in light of the latest trade practice in regional integration (particularly the BRI and the NAFTA renegotiation): will Chinese and U.S. trade approaches converge, diverge or both, and why? The paper will not focus on the Sino-U.S. trade relationship due to lack of the scope and the pre-existence of significant literature on this issue. Instead, it will examine the approaches of the two states when they engage with other parties to understand the possible trend of their development.

The paper proceeds in five parts. Part I analyzes the latest development of the Chinese and U.S. trade approaches to regional integration to set out the analytical framework. Part II to V analyze the likelihood of the convergence, divergence and crossvergence of these approaches, examining why there is such movement, so as to better understand their future trajectories and implications. In this process, four aspects will be covered to explore the possible convergence or divergence: the objectives of regionalism, the instruments for regionalism, the approaches to multilateralism, and the role in rulemaking. The last section provides a short conclusion, reflecting on

³ John Cremer, *Law firms gear up to serve clients tackling issues surrounding belt and road initiative* (Nov. 1, 2016, 5:37 PM), SOUTH CHINA MORNING POST, <http://www.scmp.com/specialreports/business/topics/one-belt-one-road/article/2041878/law-firms-gear-serve-clients>.

⁴ International Centre for Trade and Sustainable Development, *supra* note 2, at 4.

⁵ Yu, Peter K., *TPP, RCEP, and the Crossvergence of Asian Intellectual Property Standards* in GOVERNING SCIENCE AND TECHNOLOGY UNDER THE INTERNATIONAL ECONOMIC ORDER: REGULATORY DIVERGENCE AND CONVERGENCE IN THE AGE OF MEGAREGIONALS, 277–97 (Peng Shinyi, Liu Han-Wei & Lin Ching-Fu eds., 2018).

the differences between the observations of convergence and divergence and the possible continuation of crossvergence.

At the beginning, two points deserve attention. First, the BRI and the Trump Administration's trade policy cannot be completely separated from the pre-existing one. There are at least two reasons: One is that both are a continuation of its previous trade practice, although substantial difference exists and will be explored. The other is that the holistic approach of combining the latest development with previous policy helps better understand its evolvement.

Second, the article provides a tentative conclusion. It is too early to reach firm conclusions, given a number of uncertainties and dynamics and lack of available information. However, the conclusion helps better understand the development of these trade approaches. As moving targets, the BRI and the NAFTA renegotiation are developing and changing. Obviously, the trade policy of the Trump Administration is still very much under development. One may argue that the BRI until now remains largely a vision or framework, and has not brought many normative innovations in trade. One commentator even argues "[a]part from its emphasis on infrastructure development, it is not yet clear how such a model differs from the other international initiatives."⁶ Generally, China's trade approach used to vary according to the demands of trade partners, which is evidenced by malleability as the striking feature of China's free trade agreements (FTAs).⁷ It remains to be seen how China interacts with a large number of BRI states who have totally different positions, and whether the BRI could provide international public goods. As another major dynamic, China's investment policy is in transition from post-establishment protections to binding investment liberalization obligations with advanced economies (particularly in the investment treaty negotiations with the U.S. and EU). It is not clear whether and how this shift will occur in the BRI.

II. NEW DEVELOPMENT OF THE CHINESE AND U.S. TRADE APPROACHES

The section will provide a brief survey of the latest developments in the two countries' trade approaches. It does not intend to represent a thorough analysis of the entirety of these trade approaches, which would require vastly more breadth and depth in a separate paper. Given space limits, this Part aims to focus on major aspects that help understand the trend in the two countries' trade approaches.

⁶ Yiping Huang, *Understanding China's Belt & Road Initiative: Motivation, framework and assessment*, 40 CHINA ECONOMIC REVIEW 314, 320 (2016).

⁷ Jun Zhao & Webster Timothy, *Taking Stock: China's First Decade of Free Trade*, 33 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 65, 99 (2011).

A. The New Direction of Chinese Trade Approach

The BRI has revealed the possible new direction of China's trade approach. At the very beginning, one may inquire what are the rules and documents that apply to BRI-related trade. Other than domestic law, a number of rules and documents among governments or international organizations apply to BRI-related trade: (i) BRI-specific documents between governments that explicitly refer to the BRI, such as the Memorandum of Arrangement on the BRI with New Zealand (China-New Zealand MOA); and (ii) BRI-related rules that do not refer to the BRI but could be utilized by traders and investors under the BRI, most of which are preferential trade and investment agreements (PTIAs). This paper will focus on the BRI-specific documents, while the BRI-related rules will be analysed when needed. These rules and documents have reflected a number of trends.

First, the BRI reflects China's shift from a reactive trade approach to a proactive one, the effect of which will be seen in the coming years. China's proactive approach aims to promote regional integration and enhance its role in global governance. This is an unprecedented move away from the previous low-profile and passive approach.⁸

China has taken a number of measures at home to promote trade under the BRI, which differing from the responsive approach under the WTO accession. Notably, China has taken the initiative to promote free trade zones (FTZs) whose number and coverage has been increased. FTZs contribute to the development of the BRI in various ways.⁹ FTZs may develop into transit hubs for the BRI.¹⁰ Moreover, FTZs could experiment with regulatory approaches at home (e.g. the regulation of outbound investment), which can be applied nationwide to promote investment under the BRI. Proactive judicial decisions in FTZs could help China affect BRI-related rules, which may involve, *inter alia*, the recognition of new business rules, and the refusal to recognize and enforce arbitration awards and foreign judgments arising from "unreasonable" existing norms.¹¹

China is also proactive in shaping the regional economic order through the BRI. China has been pursuing regional economic cooperation in different scenarios, particularly the Regional

⁸ Hong Yu, *Motivation behind China's "One Belt, One Road" Initiatives and Establishment of the Asian Infrastructure Investment Bank*, 26 J. CONTEMPORARY CHINA 353, 357 (2017).

⁹ China State Council Information Office, *SCIO briefing on First China International Import Expo* (Nov. 3, 2017), http://www.china.org.cn/english/scio/2017-11/03/content_41840481_2.htm. (Shanghai FTZ promotes the development of the BRI)

¹⁰ See, e.g. HKTDC, *China (Shaanxi) Pilot Free Trade Zone* (May 10, 2017), <http://hkmb.hktdc.com/en/1X0A9NQD/hktdc-research/China-Shaanxi-Pilot-Free-Trade-Zone> (Xi'an International Port Area serves as "an inland hub port for international transit along the proposed routes of the Belt and Road Initiative, a centre for open finance innovation and a platform for trade co-operation and cultural exchanges between Europe and Asia").

¹¹ Rong He, *On China's Judiciary Participation in the Formation of International Economic Rules*, 1 CHINESE REV. INT'L. L. 3, 11, 15 (2016).

Comprehensive Economic Partnership (RCEP). However, China does not lead the RCEP negotiations.¹² In the BRI, China takes the leading role with high-profile measures. These proactive efforts cover a wide range of aspects: (i) regional organizations, most notably the Asian Infrastructure Investment Bank (AIIB) and New Development Bank (NDB);¹³ (ii) funding arrangements, including the Silk Road Fund (SRF); (iii) negotiation forum, particularly the Belt and Road Forum for International Cooperation (BRF); (iv) BRI-specific documents, including guiding principles (e.g. Guiding Principles on Financing the Development of the Belt and Road¹⁴), joint statements (e.g. Chongqing Joint Statement related to quarantine cooperation, and Joint Statement on the Belt and Road Food Safety Cooperation¹⁵), intergovernmental agreements (e.g. Intergovernmental Agreement on the Peaceful Use of Nuclear Energy with the government of Thailand), Memorandum of Understanding (e.g. Memorandum of Understanding regarding the water resources with the government of Malaysia),¹⁶ letter of intent (e.g. the letter of intent with UN Economic and Social Commission for Asia and the Pacific (ESCAP)¹⁷), initiatives (e.g. initiatives for intellectual property and trade cooperation¹⁸), and consensus (e.g. Suzhou Consensus of the Conference of Presidents of Supreme Courts of China and Central and Eastern European Countries (Suzhou Consensus)).¹⁹

It is worth noting that China has attached a lot of attention to the development of institutions or mechanism related to the BRI, including the AIIB, the SRF, and the BRF. From structural and institutional perspectives, this institutional development helps create

¹² See, e.g. Minister Gao Hucheng Attended the Fourth Ministerial Meeting of Regional Comprehensive Economic Partnership (2016), http://fta.mofcom.gov.cn/enarticle/rcepen/enrcepenews/201608/33080_1.html (China “supports the ASEAN to lead the negotiation”).

¹³ National Development and Reform Commission et al., *Action Plan on the Belt and Road Initiative Part IV* (2015), http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.

¹⁴ Ministry of Finance of China, *Guiding Principles on Financing the Development of the Belt and Road* (2017).

¹⁵ OFFICE OF THE LEADING GROUP FOR THE BELT AND ROAD INITIATIVE, BUILDING THE BELT AND ROAD: CONCEPT, PRACTICE AND CHINA’S CONTRIBUTION 26 (2017).

¹⁶ *List of Deliverables of the Belt and Road Forum for International Cooperation*, CHINA.ORG.CN, (June 7, 2017), http://www.china.org.cn/chinese/2017-06/07/content_40983146.htm.

¹⁷ Letter of Intent between the United Nations Economic and Social Commission for Asia and the Pacific and the Ministry of Foreign Affairs, People's Republic of China on Promoting Regional Connectivity and the Belt and Road Initiative (2016).

¹⁸ Common Initiatives for Strengthening Cooperation between Countries along the “Belt and Road” in the Field of Intellectual Property (2016), CCPIT PATENT <http://www.ccpit-patent.com.cn/node/3445>; *Initiative on Promoting Unimpeded Trade Cooperation along the Belt and Road Released in Beijing* (2017), <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201705/20170502578235.shtml>.

¹⁹ Suzhou Consensus of the Conference of Presidents of Supreme Courts of China and Central and Eastern European Countries (May 5, 2017), Sohu, http://www.sohu.com/a/73518080_117927 [hereinafter Suzhou Consensus].

structures in a manner that China prefers, and its framework covers input (participation), throughput (deliberation), or output (material results).²⁰ The AIIB, the NDB, and the SRF are deemed by China as part of financial integration under the BRI.²¹ The over-arching Chinese strategic vision for the AIIB clearly envisages its prominent role in the BRI through, *inter alia*, its work with other arrangements (e.g. the SRF) to partially finance BRI infrastructure projects.²²

Second, the BRI is a non-treaty based initiative,²³ and often uses non-treaty means. One may argue that the BRI is a non-treaty based project in the sense that there is no treaty concluded among the BRI countries that establishes the BRI. Overall, the BRI has a loose connection with norms.²⁴

The BRI frequently uses project documents and soft law. Many BRI countries have yet to develop mature legal systems.²⁵ The BRI utilizes project documents such as investment protocols to address BRI countries' legal and corporate structures.²⁶ As public-private partnerships (PPPs) are utilized in the BRI to detach complicated political issues,²⁷ relevant documents play an important role. Legal documentation will address "deal and operational" uncertainties and the financial risks for BRI investors.²⁸

China often pursues soft law under the BRI without enforceable disciplines. Most, if not all, of the BRI-specific documents are soft law, which deal with different aspects of the BRI. Soft law is understood to include hortatory rather than legally binding obligations.²⁹ As indicated above, the flexible soft-law instruments address various aspects of the BRI, such as trade facilitation, quarantine, food safety cooperation, to name a few. Examples of soft law in the BRI include the China-New Zealand MOA, and the Suzhou Consensus. The China-New Zealand MOA calls for, among other things, the upgrade of the China-New Zealand FTA and cooperation

²⁰ Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229, 250 (2012).

²¹ National Development and Reform Commission et al., *supra* note 13, Part IV.

²² David M. Ong, *The Asian Infrastructure Investment Bank: Bringing "Asian Values" to Global Economic Governance?*, J. INT'L. ECON. L., 14 (2017).

²³ Sonia E. Rolland, *Making International Economic Law Work: Integrating Disciplines and Broadening Policy Choices*, 48 GEORGETOWN J. INT'L L. 371, 372–73 (2017).

²⁴ An Baisheng (安佰生), *Meiyou WTO de Zhongguo* (没有WTO的中国) [China without the WTO] (Dec. 17, 2017), <https://mp.weixin.qq.com/s/tHl4DnirkHfl6RYUZdrTWg##>.

²⁵ Cremer, *supra* note 3.

²⁶ Lucy Hornby, *China's "One Belt One Road" plan greeted with caution*, FT.COM (Nov. 20, 2015), <https://www.ft.com/content/5c022b50-78b7-11e5-933d-efcdc3c11c89#axzz4A75 QiDiA>.

²⁷ Donald J. Lewis & Diana Moise, *OBOR Roadmaps: The Legal and Policy Frameworks*, 14 TRANSNAT'L DISP. MGMT. 1, 1, 10 (2017).

²⁸ Cremer, *supra* note 3.

²⁹ Andrew T. Guzman & Meyer Timothy L., *International Soft Law*, 2 J. Legal Analysis 171, 172 (2010).

at multilateral level (e.g. the AIIB).³⁰ The soft-law instruments could be important to BRI traders and investors. For instance, the Suzhou Consensus reflects some efforts to improve, *inter alia*, judicial efficiency and “clear, precise and predictable jurisprudence”.³¹

The use of soft law in the BRI is largely attributable to the decentralized nature of the BRI and the difficulties of concluding hard law with the large number of BRI states. There is no clear center for rule-making, central institution or a BRI-wide treaty under the BRI. Existing treaties are insufficient to address investment issues. The WTO norms only deal with very limited trade-related aspects of investment. As discussed below, PTIAs signed by China are often old ones that have do not provided sufficient investment protection. It is difficult for BRI states to agree on binding treaty obligations due to legal, political, economic and social differences. It is easier to conclude soft law than hard law, since soft law avoids the complexity of treaty ratification.

Third, China’s approach in the BRI highlights trade liberalization and facilitation,³² rather than deep regulatory disciplines. It emphasizes the removal of trade and investment barriers. Unimpeded trade is a priority of the BRI,³³ such as easing customs and quarantine processes.³⁴ This helps explain why the WTO Agreement on Trade Facilitation is the only specific trade agreement named in the BRI Action Plan, and why its implementation is highlighted.³⁵ China utilizes different venues to promote trade facilitation, including BRI-related projects such as the Shanghai Cooperation Organization.³⁶

This approach often means the reduction of export costs (e.g. reduced customs clearance costs and mutual recognition of regulations³⁷) and market opening without the need for deep structural reform. As pointed out by Puig, the BRI will need to “open FTAs if it is to free the movement through that network into preferential market

³⁰ Memorandum of Arrangement on Strengthening Cooperation on the Belt and Road Initiative Between the Government of the People’s Republic of China and the Government of New Zealand Paragraphs III.2, III.4 (2017).

³¹ *Suzhou Consensus*, *supra* note 19, at paragraph VII.

³² Trade and investment facilitation has been repeatedly emphasized in the context of the BRI. *See, e.g., Full Text of President Xi’s Speech at Opening of Belt and Road Forum*, XINHUA NET (May 14, 2017), http://news.xinhuanet.com/english/2017-05/14/c_136282982.htm; *Full Text of Xi Jinping’s Report at 19th CPC National Congress*, XINHUA NET (Nov. 3, 2017), http://news.xinhuanet.com/english/special/2017-11/03/c_136725942.htm.

³³ National Development and Reform Commission et al., *supra* note 13, at Part IV.

³⁴ *Id.* at Part IV (The BRI Action Plan calls for enhanced customs cooperation such as mutual recognition of regulations and mutual assistance in law enforcement, and improved bilateral and multilateral cooperation in inspection and quarantine, certification and accreditation, as well as standard measurement).

³⁵ *Id.* at Part IV.

³⁶ Donald J. Lewis & Diana Moise, *TRANSNAT’L. DISP. MGMT.*, 25–26 (2017).

³⁷ National Development and Reform Commission et al., *supra* note 13, at Part IV.

access for its products.”³⁸ However, all these developments are not likely to impose deep regulatory requirements. This is due to at least two reasons. Internally, it is not China’s priority to undertake more stringent regulatory obligations as they could have systematic implications. Externally, new regulatory disciplines could hardly be accepted by many BRI states that are developing countries.

B. The New Direction of the U.S. Trade Approach

The pre-Trump trade policies are deemed to emphasize “multilateral and other agreements designed to promote incremental change in foreign trade practices, as well as deference to international dispute settlement mechanisms.”³⁹ From the perspective of the Trump Administration, it advocates new trade policy that are different in four aspects: (i) highlights sovereignty, (ii) enforces U.S. trade laws, (iii) uses leverage to secure market access, and (iv) negotiates fairer and more effective new trade pacts for the U.S. and the world trading system.⁴⁰

These statements are vague. It is hard to know exactly which approach the U.S. will take or whether the current U.S. administration will settle on any specific approaches. One may even doubt whether the U.S. actually has a clear and coherent trade strategy at this stage, or whether this is a passing moment. In any case, the U.S. approach is very precarious at the moment. This Part will discuss the salient development of the U.S. trade approach reflected in the recent practices.

First, the U.S. trade approach pursues managed trade rather than trade liberalization. Reducing the U.S. trade deficit is a key pillar of President Trump’s policy.⁴¹ Trade deals pursued by the U.S. are “trade balance agreements” or “trade deficit agreements” rather than free trade agreements.⁴² Such an approach leads to managed trade,⁴³ instead of pure trade liberalization, and increases the chance of a trade war. In the NAFTA renegotiation, managed trade is reflected in the U.S. negotiation requests such as those targeting auto imports and

³⁸ Gonzalo Villalta Puig, *Unimpeded Trade? The Significance of Free Trade Areas to the Belt and Road Initiative of the People’s Republic of China*, in LEGAL DIMENSIONS OF CHINA’S BELT AND ROAD INITIATIVE 132, (Lutz-Christian Wolff & Xi Chao eds., 2016).

³⁹ See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf>.

⁴⁰ *Id.* at 7.

⁴¹ See Marianne Schneider-Petsinger, *Trade Policy Under President Trump: Implications for the U.S. and the World*, <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/2017-11-03-trade-policy-trump-schneider-petsinger-final.pdf>.

⁴² C. Fred Bergsten, *The U.S. Agenda: Trade Balances and the NAFTA Renegotiation*, A PATH FORWARD FOR NAFTA 17 (C. Fred Bergsten & Monica de Bolle eds., 2017).

⁴³ *Id.* at 17–19.

refined sugar, which may involve rules of origin (ROOs) and export restrictions.⁴⁴

The underlying rationale of managed trade is arguably the Trump Administration's zero-sum "America First" foreign policy. As part of this policy, the U.S. trade approach requires "put[ting] American workers and businesses first when it comes to trade."⁴⁵ The overarching purpose of U.S. trade policy under the Trump Administration is to "expand trade in a way that is freer and fairer for all Americans."⁴⁶

However, the definition of fairness in the U.S. current trade policy is not clear. The reduction of the U.S. trade deficits with several key countries has been "the primary goal of its aggressive trade policy."⁴⁷ Commentators observe that President Trump seems to equate the U.S. bilateral deficit with "unfair trade."⁴⁸

It is common for the U.S. government to prioritize American interests in U.S. trade negotiations, but the current U.S. trade approach has "an obsessive concern about bilateral trade balances and narrow special interests in the United States, as opposed to broader national and regional interests."⁴⁹ Therefore, the trade policy of the Trump Administration reflects a mercantilist approach anchored in economic nationalism.⁵⁰

Second, the U.S. is shifting from multilateralism and mega-regionalism to bilateralism in regional integration. For the WTO dispute settlement system, the Trump Administration has recently held up the filling of two Appellate Body vacancies at a time when a heavy case backlog has accumulated.⁵¹ Moreover, the U.S. government may neglect or derogate from the rulings of the multilateral trade system if it is in its national interest.⁵² It can be explained by the Trump Administration's plan to defend national sovereignty over trade

⁴⁴ Chad P. Bown et al., *U.S. Trade Representative "Surprised and Disappointed" Statement from Latest NAFTA Talks—Annotated and Explained* (Nov. 1, 2017), <https://piie.com/blogs/trade-investment-policy-watch/us-trade-representative-surprised-and-disappointed-statement>.

⁴⁵ *America First Foreign Policy* (Dec. 2, 2017), WHITE HOUSE, <https://www.whitehouse.gov/america-first-foreign-policy>.

⁴⁶ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 39, at 1.

⁴⁷ Bergsten, *supra* note 42, at 13.

⁴⁸ *Id.* at 15.

⁴⁹ *Id.* at 4.

⁵⁰ David P. Fidler, *President Trump, Trade Policy, and American Grand Strategy: From Common Advantage to Collective Carnage*, 12 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 1, 1–31 (2017).

⁵¹ Rosalind Mathieson, *U.S. Block of WTO Appeals Body Compromises System, Director Says* (Nov. 9, 2017), <https://www.bloomberquint.com/global-economics/2017/11/08/u-s-block-of-wto-appeals-body-compromises-system-azevedo-says>; see Paul Blustein, *China Inc. in the WTO Dock: Tales from a System under Fire* (Dec. 20, 2017), <https://www.cigionline.org/publications/china-inc-wto-dock-ales-system-under-fire>.

⁵² Kyle Handley & Limão Nuno, *Trade under T.R.U.M.P. policies* in *ECONOMICS AND POLICY IN THE AGE OF TRUMP* 145 (Chad P. Bown ed. 2017).

policy.⁵³ In WTO negotiations, the U.S.' continued "period of reflection" at the WTO has also kept members unsure of what role the U.S. will play in the multilateral trade system.⁵⁴

Regarding regional agreements, the U.S. withdrew from the TPP. The U.S. government now prefers bilateralism over multilateralism.⁵⁵ It plans to focus on bilateral negotiations with remaining TPP countries, and hold trading partners to "higher standards of fairness."⁵⁶ Although the Trump Administration has not started new bilateral negotiations at the time of writing,⁵⁷ it prioritizes the renegotiation of the NAFTA.⁵⁸ As Freund has pointed out recently, the NAFTA could well be renegotiated as two bilateral agreements.⁵⁹

Third, the new U.S. administration adopts an aggressive and confrontational approach. This is reflected externally in the NAFTA renegotiation, and internally the implementation of the U.S. domestic law including contingency protection and border taxes.⁶⁰

The confrontational approach is explicitly called for in the President's Trade Policy Agenda, requiring the use of "all possible leverage" to secure market access for U.S. producers.⁶¹ President Trump's NAFTA renegotiation stance looks "more aggressive than ever",⁶² including the threat of possible NAFTA withdrawal. Notably, the Trump Administration intends to eliminate the NAFTA Chapter 19 dispute settlement mechanism that subjects anti-dumping (AD) and countervailing (CVD) measures to a binational panel.⁶³ This is a major shift towards a unilateral and aggressive approach to avoid the NAFTA check on trade remedy measures. On a related note, domestic measures are more frequently proposed involving various grounds,

⁵³ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 39, at 2–3.

⁵⁴ *U.S. Trade, U.S. role in WTO talks unclear as others prep for ministerial outcomes*, Inside U.S. Trade (July 28, 2017), <https://insidetrade.com/daily-news/us-role-wto-talks-unclear-others-prep-ministerial-outcomes>.

⁵⁵ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 39, at 1 (*The goals of the U.S. trade policy can be 'best accomplished by focusing on bilateral negotiations rather than multilateral negotiations'*) (2017).

⁵⁶ *Id.* at 6.

⁵⁷ Until now, the U.S. has not initiated new bilateral trade agreement negotiations. The U.S.-China BIT negotiations seem to stagnate.

⁵⁸ The possibility of the U.S.' withdrawing from the NAFTA cannot be excluded.

⁵⁹ Caroline Freund, *Trump's Confrontational Trade Policy*, 52 *INTERECONOMICS* 63, 64 (2017).

⁶⁰ *Id.* at 63.

⁶¹ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 39, at 5.

⁶² Kevin Carmichael, *Trump's NAFTA renegotiation stance looks more aggressive than ever* (July 19, 2017), <http://www.canadianbusiness.com/economy/trumps-nafta-renegotiation-stance-looks-more-aggressive-than-ever/>.

⁶³ See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, SUMMARY OF OBJECTIVES FOR THE NAFTA RENEGOTIATION (July 17, 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf>.

tools and areas ranging from national security,⁶⁴ to trade remedies,⁶⁵ and to intellectual property.⁶⁶ This echoes the strict enforcement of U.S. trade law as one of top priorities of the Trump Administration regarding trade,⁶⁷ and the U.S. trade policy's call to "identify all trade violations and to use every tool at the federal government's disposal to end these abuses."⁶⁸

The U.S.' aggressive approach is attributable to a number of factors, including the difficulties in negotiating new bilateral pacts, the need to enforce U.S.-style trade norms, and the use of confrontation as leverage in trade negotiations. However, it is not clear whether the aggressive approach can reach its goal.

III. DIVERGENCE

Given the latest development in trade practices, there is increasing evidence that these approaches may converge or diverge, depending on particular issues. Divergence can be discerned between the approaches of the U.S. and China. This Part will analyze a substantive divergence in the American and Chinese positions in four aspects. As probably the most obvious and inherent divergence in terms of recent developments, China emphasizes regionalism and supports multilateralism under the BRI, while the U.S. appears to move from multilateralism and regionalism to bilateralism.⁶⁹ It is noteworthy that the following divergence does not mean that there is no common ground between the U.S. and China in these aspects. Examples of the similarities will be discussed in the following sections.

A. *The Objectives of Regionalism*

China and the U.S. have different objectives regarding regionalism. Through the BRI, China aims to advance regional economic cooperation and improve its role in global governance. This echoes the rise of China. The BRI appears to be China's effort to affect

⁶⁴ U.S. DEPARTMENT OF COMMERCE, SECTION 232 INVESTIGATION ON THE EFFECT OF IMPORTS OF ALUMINIUM ON U.S. NATIONAL SECURITY (2018), <https://www.commerce.gov/page/section-232-investigation-effect-imports-aluminum-us-national-security>.

⁶⁵ The U.S. has self-initiated antidumping and countervailing duty cases against China in aluminium, which was used by the U.S. Department of Commerce for the first time in 20 years. Lori Ann LaRocco, *U.S. launches anti-dumping case against Chinese aluminium producers using rare aggressive tactic* (Nov. 28, 2017), <https://www.cnbc.com/2017/11/28/us-launches-antidumping-case-against-chinese-aluminum-sheet.html> (*The self-initiated case was reportedly to shield the businesses from possible retaliation*).

⁶⁶ PRESIDENTIAL MEMORANDUM FOR THE UNITED STATES TRADE REPRESENTATIVE, (Aug. 14, 2017), WHITE HOUSE, <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-united-states-trade-representative/>.

⁶⁷ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 39, at 2–4.

⁶⁸ *America First Foreign Policy*, *supra* note 45.

⁶⁹ Both China and the U.S. use unilateral and bilateral instruments.

transnational legal orders, which encompass “legal rules and norms that have effects across borders without any binding agreement among states, whether they are created by international organizations, intergovernmental networks, or private actors, and whether they are of a hard or soft law nature.”⁷⁰ The Initiative is an overarch structure to expand China’s role on the regional and then the world stage. China’s intention in the BRI is to assert greater influence on international economic governance, which starts from a regional trade and investment initiative.⁷¹ The BRI highlights the creation of “an open, inclusive and balanced regional economic cooperation architecture.”⁷² Based on regionalism, the BRI Action Plan explicitly calls for “new models of international cooperation and global governance.”⁷³ For instance, China intends to utilize the BRF to promote the development of “a more fair, reasonable and balanced global governance system.”⁷⁴ However, China does not intend to set high-standard trade norms or deal with trade deficit,⁷⁵ at least in the short term.

Regionalism is viewed differently from the perspective of the U.S. A major difference is that the Trump Administration aims to set high-standard regulatory requirements and address trade balance through regionalism. On the one hand, the NAFTA negotiations follow the pre-Trump policy in setting stringent regulatory requirements in regionalism. The NAFTA renegotiation seeks “the highest standards covering the broadest possible range of goods and services”,⁷⁶ which reflect 21st century standards.⁷⁷ For instance, the NAFTA negotiations prioritize the strong subsidy disciplines that apply to state-owned enterprises (SOEs) beyond the WTO norms,⁷⁸ and strict provisions on transparency regarding technical barriers to trade (TBT),⁷⁹ and enforceable environment obligations that are subject to the FTA dispute settlement mechanism.⁸⁰ These generally resemble the stringent regulatory standards in the TPP.

On the other hand, the emphasis on trade balance and the shift away from multilateralism and mega-regionalism (e.g. the TPP) represent

⁷⁰ Shaffer, *supra* note 20, at 233.

⁷¹ Huang, *supra* note 6, at 318.

⁷² National Development and Reform Commission et al., *supra* note 13, at Part I.

⁷³ *Id.* at Part I.

⁷⁴ Ministry of Foreign Affairs Holds Briefing for Chinese and Foreign Media on President Xi Jinping's Attendance and Chairing of Related Events of the BRF (Apr. 18, 2017), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1455115.shtml.

⁷⁵ Full Text of President Xi's Speech at Opening of Belt and Road Forum, XINHUA NET (May 14, 2017), http://news.xinhuanet.com/english/2017-05/14/c_136282982.htm (Chinese government seems to show its willingness to increase import by announcing the China International Import Expo starting from 2018 in the BRF).

⁷⁶ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 63, at 3.

⁷⁷ *Id.* at 3.

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 6.

⁸⁰ *Id.* at 13.

new differences between the Chinese and U.S. trade approaches. The U.S. approach to regionalism seems to be less about global governance. Instead, the emphasis is on trade balance, which reflects the underlying zero-sum America First policy and a confrontational trade approach. The U.S. therefore endeavours to utilize instruments such as ROOs in the NAFTA renegotiation to increase automotive production in the U.S.,⁸¹ which is one of the difficult issues in the NAFTA renegotiation. These measures have market closing features.⁸² The emphasis on trade balance will lead to the possible unraveling of global cooperation, and the U.S. will “no longer be the leader in opening global markets.”⁸³ The U.S.’ shift away from multilateralism and mega-regionalism could also be deemed as a U.S. move away from its leadership role in global governance and in the shaping of new-generation rules, at least to some degree. Having said that, the U.S. remains a major rule maker in trade norms.

B. The Instruments for Regionalism

China and the U.S. utilize different instruments for regionalism. Other than existing PTIAs, China relies on soft law to engage with BRI countries without setting new enforceable regulatory disciplines. This is the case with BRI-specific documents, and China’s PTIA rules on non-trade concerns. The BRI Action Plan is self-explanatory and indicates that the BRI highlights policy communication and objectives coordination but does not “seek conformity”.⁸⁴ BRI-specific documents utilize soft law to address prioritized areas such as trade facilitation and other cooperation.

China’s approach as reflected in the BRI is less “intrusive” and contains less stringent rules compared with high-level provisions in U.S.-style rules. Neither BRI-specific documents nor China’s PTIAs create substantial WTO-extra obligations that extend beyond the coverage of WTO norms, or WTO-plus obligations that set stricter requirements than the WTO counterpart. It is the continuation of China’s FTA practice that focuses “more on accommodation than conversion”.⁸⁵ In contrast with the adversarial posturing and legalistic decision-making procedures in Western multilateral negotiations, China’s soft law approach under the BRI resembles the ASEAN way, involving “a high degree of discreetness, informality, pragmatism, expediency, consensus-building, and non-confrontational bargaining

⁸¹ Gary Clyde Hufbauer & Jung Euijin, *NAFTA Renegotiation: U.S. Offensive and Defensive Interests vis-à-vis Canada* (Jun. 2017), <https://piie.com/publications/policy-briefs/nafta-renegotiation-us-offensive-and-defensive-interests-vis-vis-canada>.

⁸² *Id.*

⁸³ Freund, *supra* note 59, at 64.

⁸⁴ National Development and Reform Commission et al., *supra* note 13, at Part VIII.

⁸⁵ Peter K. Yu, *Sinic Trade Agreements*, 44 U.C. DAVIS L. REV. 955, 1009–1011 (2011).

styles.”⁸⁶ Essentially, the BRI is a kind of experiment in stronger regionalism without stringent new rules.

The U.S. often relies on hard law to impose high-level regulatory requirements, which could go deeper or beyond WTO norms. Through regionalism, the U.S. pursues high-standards and enforceable regulatory requirements. The U.S. government indicates that its PTIAs “must adhere to high standards” in intellectual property, digital trade, agriculture, labor, and the environment.⁸⁷ In the NAFTA renegotiation, the U.S. generally prefers binding obligations. The NAFTA renegotiation is observed to be “a reopening and renegotiating of deep agreement provisions on labor and environmental standards, intellectual property and digital trade protections, state owned enterprises, and rules of origin.”⁸⁸ The renegotiation emphasizes strong enforcement in a number of areas including intellectual property,⁸⁹ anti-corruption,⁹⁰ competition policy,⁹¹ and origin rules.⁹² These steps will lead to WTO-extra and WTO-plus obligations. The former includes anti-corruption and competition policy, while a telling example of the latter is intellectual property. Notably, this situation is not limited to NAFTA renegotiation. For instance, the Trump Administration, as one of the key objectives of its trade policy,⁹³ will focus on enforcement of labor provisions that already exist in pacts and which could also expand to the contexts other than the NAFTA.

This is not to say that the BRI does not utilize hard law, or that the U.S. does not utilize soft law. They do, for example BRI-related rules such as PTIAs. However, the BRI-specific documents are nearly all soft law, while most rules of the U.S. PTIAs contain binding obligations. Overall, China’s approach is in stark contrast to the U.S. trade approach on regulatory disciplines in a wide range of areas particularly SOEs, data flows (such as cross-border data transfers, and the prohibition of data localization), labor, regulatory coherence, competition, transparency, anti-corruption, and the environment. For instance, regulatory disciplines under the U.S. trade approach are

⁸⁶ Amitav Acharya, *Ideas, identity, and institution-building: From the “ASEAN way” to the “Asia-Pacific way”*?, 10 THE PAC. REV. 319, 329 (1997).

⁸⁷ See National Security Strategy of the United States of America, WHITE HOUSE (Dec. 19, 2017), <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

⁸⁸ Emily J. Blanchard, *Renegotiating NAFTA: The role of global supply chains* in ECONOMICS AND POLICY IN THE AGE OF TRUMP 181 (Chad P. Bown ed., 2017).

⁸⁹ OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *supra* note 63, at 10–11.

⁹⁰ *Id.* at 14.

⁹¹ *Id.* at 11.

⁹² *Id.* at 6.

⁹³ See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 2 (Mar., 2017), <https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf>.

much more stringent than the Chinese counterparts in WTO-covered areas such as services and intellectual property. This is case with the Trade in Services Agreement (TiSA) in terms of scheduling approach (e.g. the ratchet mechanism binding future liberalization of existing limitations, which applies to national treatment commitments⁹⁴), which has not been adopted in China's PTIAs. More dramatic regulatory differences between the U.S. and China can be found in WTO-plus areas (e.g. labor standards). For the U.S. trade pacts, there is a continuum of gradually increasing coverage of enforceable labor and environmental treaty obligations in recent years.⁹⁵ However, China's FTAs do not contain a chapter on labor. The BRI is not likely to substantially reduce such differences, at least in the short term.

Why is there divergence regarding the instruments for regionalism? On the part of the U.S., first, regulatory obligations help to provide regulatory protection to investors and traders. Taking the Transatlantic Trade and Investment Partnership (TTIP) negotiations as an example, the U.S. appears to highlight regulatory cooperation to enhance regulators' ability to protect their citizens.⁹⁶ Second, regulatory authority is "a species of power" against other regulatory jurisdictions, and states dominating regulatory governance of the world economy may advance their economic and non-economic interests.⁹⁷ The U.S. to date wishes to promote an approach across its major trading partners, under which the measures' impact on trade are assessed and measures that are deemed unnecessary (e.g. excessively restrictive) to reach stated objectives will be reviewed.⁹⁸ Third, the U.S. wants to shape new international norms that are largely modelled after the U.S. law. The Trump Administration's proposal for NAFTA renegotiation appears to be very in line with existing U.S. trade laws.⁹⁹

⁹⁴ Australian Department of Foreign Affairs and Trade, *Trade in Services Agreement (TiSA) Scheduling Approach* (2017), <http://dfat.gov.au/trade/agreements/negotiations/tisa/Documents/tisa-scheduling-approach.pdf>.

⁹⁵ David A. Gantz, *Introduction to U.S. Free Trade Agreements*, 5 BRIT. J. AM. LEGAL STUD. 299, 311 (2016).

⁹⁶ Peter Chase & Jacques Pelkmans, *This Time It's Different: Turbo-Charging Regulatory Cooperation in TTIP*, RULE-MAKERS OR RULE-TAKERS? EXPLORING THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP 17 (Daniel S. Hamilton & Pelkmans Jacques eds., 2015).

⁹⁷ Richard B. Stewart, *State Regulatory Capacity and Administrative Law and Governance under Globalization* 2 (IILJ Working paper 2016/1), https://wp.nyu.edu/megareg/wp-content/uploads/sites/3134/2016/03/Stewart_IILJ-MegaReg_2016-1.pdf.

⁹⁸ See Petros C. Mavroidis, *Regulatory Cooperation: Lessons from the WTO and the World Trade Regime* (January 2016), THE E15 INITIATIVE, <http://e15initiative.org/publications/regulatory-cooperation-lessons-wto-world-trade-regime/>.

⁹⁹ William Mauldin et al., *Trump Nafta Blueprint Raises Concerns in Canada and Mexico*, WALL ST. J., Mar. 30, 2017 <https://www.wsj.com/articles/trump-nafta-blueprint-raises-concerns-in-canada-and-mexico-1490911670>.

The TPP often reflects the U.S. practice, which is the case with its intellectual property rules.¹⁰⁰

From the Chinese perspective, the soft law approach works well with “variable geometry” in the BRI. Despite the lack of binding obligations, soft law has various advantages of flexibility, informality, and consensus building through information sharing and persuasion without the concerns over treaty ratification or litigation.¹⁰¹ Soft law provides elasticity that is crucial to “variable geometry” in regional integration, which indicates flexibility in the participation of various states in specific integration projects.¹⁰² Soft law is also an important way for China to explore a suitable framework without being subject to stringent obligations.

The different approaches essentially reflect the crucial difference between China’s position on non-interference and the U.S. position on conditionality. As a principle of the BRI, it upholds the Five Principles of Peaceful Coexistence, including mutual non-interference in each other’s internal affairs.¹⁰³ More broadly, this crucial difference not only reflects the different regional approaches (e.g. American and Chinese FTAs), but also explains the different approaches to the World Bank and AIIB, and many other U.S.-China disagreements in international economic law.

C. The Approaches to Multilateralism

China and the U.S. have different approaches to multilateralism. Designed to “uphold the global free trade regime”,¹⁰⁴ the BRI supports the multilateral trading system. There are different views about the future of the BRI in this respect. For instance, it is observed that the BRI may help shape a new kind of multilateralism—“one that exists outside the structures of pre-existing international organizations, but can have significant development impacts if guided appropriately.”¹⁰⁵ It is more likely that the BRI will be based on the WTO norms at this stage. Reflecting the high-level consensus, the Joint Communiqué of Leaders Roundtable of BRF contains a best endeavour clause to

¹⁰⁰ Caroline Freund, *Other New Areas: Customs Administration and Trade Facilitation, Anticorruption, Small and Medium-Sized Enterprises, and More*, in *ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES* 70 (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

¹⁰¹ Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 709–10 (2010).

¹⁰² Simon Chesterman, *Asia’s Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUR. J. INT’L. 945, 959 (2016).

¹⁰³ See National Development and Reform Commission et al., *supra* note 13, at Part IV.

¹⁰⁴ *Id.* at Part I.

¹⁰⁵ Aniket Shah, *Building a Sustainable “Belt and Road”* (2018), <https://www.cirs.org/en/horizons/horizons-spring-2016--issue-no-7/building-a-sustainable-‘belt-and-road-’>.

promote a multilateral trading system “with WTO at its core.”¹⁰⁶ Similar support may be found in other BRI documents.¹⁰⁷

In contrast, the hallmark of the new U.S. administration’s trade policy is its preference for bilateralism over multilateralism and regionalism.¹⁰⁸ The U.S. trade approach now prefers bilateral trade agreements to plurilateral and multilateral ones.¹⁰⁹ The Trump Administration not only held up the filling of two Appellate Body vacancies, but also may disregard WTO rulings that it sees as an affront to U.S. sovereignty.¹¹⁰ As a recent example, the United States Trade Representative (USTR) has indicated that the U.S. loss in the China non-market economy dispute, brought by China to the WTO, would be “cataclysmic” for the WTO.¹¹¹

A number of reasons may be identified for the divergence regarding multilateralism. Regarding China, first, it intends to play an increasingly prominent role in not only regionalism but also multilateralism as part of its rise as a great power. In the past 16 years following the WTO accession, China has gained experience and expertise regarding WTO negotiations and dispute settlement. This, combined with China’s huge trade volumes, lays a foundation for China’s possible ascendancy in the multilateral trading system. Second, multilateralism generally benefits China in terms of market access and the treatment of Chinese businesses. Multilateralism supports free trade and provides the predictability that China heavily relies on. Third, most of the BRI jurisdictions are WTO members, and a number of BRI states are currently involved in negotiations regarding accession to the WTO (e.g. Azerbaijan). The WTO norms could play a role in BRI-related trade, since a BRI-wide FTA is difficult given the huge variations among the BRI jurisdictions.

¹⁰⁶ *Full Text: Joint Communiqué of Leaders Roundtable of Belt and Road Forum*, XINHUA NET (May 15, 2017), http://news.xinhuanet.com/english/2017-05/15/c_136286378.htm.

¹⁰⁷ Initiative on Promoting Unimpeded Trade Cooperation along the Belt and Road Released in Beijing, May 16, 2017. (“The participants also reaffirm their support for the multilateral trading system, with the WTO as its cornerstone...”)

¹⁰⁸ It remains to be observed whether the U.S. is trying to improve the WTO or abandoning it. For instance, the U.S. has a new proposal to crack down on WTO Members that fail to notify the WTO in a timely fashion. Simon Lester, *U.S. Proposal on WTO Notifications*, International Economic Law and Policy Blog (Oct. 31, 2017), <http://worldtradelaw.typepad.com/ielpblog/2017/10/us-proposals-on-wto-notifications.html>.

¹⁰⁹ Center for Strategic and International Studies, *U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative* (Sep. 18, 2017), https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170918_U.S._Trade_Policy_Priorities_Robert_Lighthizer_transcript.pdf?kYkVT9pyKE.PK.utw_u0QVoewnVi2j5L.

¹¹⁰ Eric Beech, *Trump Administration Would Ignore WTO Rulings It Sees as Anti-U.S.: FT* (Mar. 1, 2017), <http://www.reuters.com/article/us-usa-trump-wto-idUSKBN16832U>.

¹¹¹ Lighthizer: U.S. loss in China NME dispute would be “cataclysmic” for WTO, INSIDE U.S. TRADE (June 21, 2017), <https://insidetrade.com/daily-news/lighthizer-us-loss-china-nme-dispute-would-be-cataclysmic-wto>.

In respect of the U.S., first, it is arguably easier to negotiate and enforce bilateral trade agreements than plurilateral and multilateral trade pacts¹¹² although the bilateral trade negotiations could be challenging. The Trump Administration prefers bilateral trade pacts to ensure its priorities prevail.¹¹³ Trade issues can hardly be addressed efficiently due to the slow progress of the WTO negotiations. In fact, China faces similar difficulties regarding regionalism and multilateralism. However, it seems that China does not pursue a host of new stringent trade obligations at this stage. Therefore, the slow pace of the WTO negotiations may not be a major problem to China. Second, the Trump Administration is doubtful of the WTO mechanisms and particularly the dispute settlement system. It is argued that the WTO norms could fail to cope with all China-related trade issues since China's economic structure is *sui generis*, and have evolved in a manner largely unforeseen by members negotiating WTO law.¹¹⁴ Robert Lighthizer, the USTR, recently indicated that the WTO is "not equipped to deal with" the trade pattern of China, and can hardly "manage mercantilism on this scale."¹¹⁵ More broadly, the U.S. government raises doubts about the WTO's procedures, particularly concerning how the WTO deals with trade disputes. This is evidenced by the remarks of Treasury Under Secretary for International Affairs David Malpass: "multilateralism has gone substantially too far, to the point where it is hurting U.S. and global growth."¹¹⁶ The third reason is the increased attention of the U.S. to bilateral trade deficit rather than multilateral trade balance,¹¹⁷ with the former being the top priority in NAFTA talks.

D. The Role in Rulemaking

China has not been a leading trade rule maker in most cases, particularly regarding regulatory disciplines, while rulemaking until quite recently has been a key issue from the American perspective. For the U.S., this was the case with the TPP before the Trump Administration.¹¹⁸ It largely remains so after the U.S. withdrew from

¹¹² See Center for Strategic and International Studies, *supra* note 109.

¹¹³ D. Ravi Kanth, *U.S. stays opposed to global investment facilitation* (Apr. 17, 2017), <http://www.livemint.com/Politics/3rwWFZGItvVIsM86dWEsoO/U.S.-stays-opposed-to-global-investment-facilitation.html>.

¹¹⁴ Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261, 261–24 (2016).

¹¹⁵ Center for Strategic and International Studies, *supra* note 109.

¹¹⁶ William Reinsch, *What is President Trump Thinking on Trade?* (Jan. 11, 2018), https://trdevistas.csis.org/president-trump-thinking-trade/?utm_source=Members&utm_campaign=eb9b0a139b-EMAIL_CAMPAIGN_2018_01_12&utm_medium=email&utm_term=0_e842221dc2-eb9b0a139b-188595225.

¹¹⁷ See Hufbauer & Euijin, *supra* note 81, at 3.

¹¹⁸ Cristian Rodriguez Chiffelle, *4 things to know about the TPP trade deal* (2015), <https://www.weforum.org/agenda/2015/10/4-things-to-know-about-the-tpp-trade-deal/> (the first question

the TPP, as reflected in the depth of NAFTA renegotiation. The updated NAFTA renegotiation objectives highlight the USTR's aim of updating NAFTA provisions to "the best 21st century standards."¹¹⁹ On a related note, the TTIP between the U.S. and EU is far more than trade and reflects the commitment to "high rules-based standards and core principles of international order."¹²⁰ For instance, it seems that the U.S. aims to promote rules on non-trade concerns. The recent U.S. approach in all of its trade pacts is to link social issues (such as workers' rights and the environment) to trade.¹²¹ The Trump Administration has proposed moving labor rights and environmental standards into "the core" of the NAFTA, rather than existing in a side agreement, and highlighting their enforcement (i.e. enforcement of domestic labor law in NAFTA parties and enforcement of environment obligations under the NAFTA dispute settlement system).¹²² All these steps lead the formulation of new regulatory norms.

In the BRI, China largely follows existing trade norms with limited normative development. The BRI Action Plan highlights investment and trade cooperation as "a major task",¹²³ but does not refer to major normative development. Following the fundamental principle of the BRI, the Initiative will abide by "international norms".¹²⁴ Within these norms, the WTO rules and PTIAs are applicable to BRI-related trade. Traditionally, China's PTIAs stick to a relatively conservative approach to new trade norms (e.g. regulatory disciplines on SOEs and data flows). Several FTAs that China recently concluded with BRI countries (i.e. Georgia and Maldives) are modelled on WTO norms. In areas other than FTAs, China also largely aligns with international practices rather than develops new rules. As a major step that is related to the BRI, the AIIB seems to follow the international practice rather

of the press conference led the U.S. Trade Representative Michael Froman to "send a message to the Chinese, including a path forward for freer trade to the Asia-Pacific region"); Chen Weihua & Weili Heng, *Obama Backs TPP so China Doesn't 'Set The Rules'*, China Daily U.S.A (Jan. 13, 2016, 12:00AM), http://usa.chinadaily.com.cn/epaper/2016-01/13/content_23066027.htm (the then U.S. President Barack Obama stated that "[w]ith TPP, China doesn't set the rules in that region, we do," in a speech in the House of Representatives).

¹¹⁹ See Office of the United States Trade Representative, *Summary of Objectives for the NAFTA Renegotiation* (Nov. 2017), <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

¹²⁰ Daniel S. Hamilton & Jacques Pelkmans, *Rule-makers or rule-takers? An introduction to TTIP*, in INTERNATIONAL AFFAIRS, 92 (3): 732–33 (2016).

¹²¹ Daniel C.K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17 CHICAGO J. INT'L L. 370, 400 (2016).

¹²² See Office of the United States Trade Representative, *Summary of Objectives for the NAFTA Renegotiation* (Jul. 17, 2017).

¹²³ See National Development and Reform Commission *et al.*, *supra* note 13, at Part IV.

¹²⁴ *Id.* at Part II.

than propose “an alternative to the current model”.¹²⁵ China will expand its trade network and develop BRI projects, but may not be a rule maker in the short term.

Why is it difficult to produce normative development under the BRI at this stage? For one thing, the reliance on existing norms is probably due to the capacity limitations of China and to the need to increase the legitimacy of the related agreements. For instance, Chinese government and businesses do not have a lot of experience running cross-border projects, and most of the Chinese outward FDI projects are not profitable.¹²⁶ Meanwhile, it is time consuming to negotiate binding treaty obligations with BRI states, which involve complicated legal, economic and political considerations. The development of new binding treaty obligations involves various considerations and complex legal issues in a large number of BRI states. Most of the BRI states are low-income economies,¹²⁷ who may not be in a position to take high-level regulatory disciplines. It is difficult to sort out a number of legal issues in possible normative developments. Taking investment as an example, these issues include ISDS, regulatory autonomy, and investment liberalization, if China wants to pursue it in the future. China may encounter difficulties in upgrading PTIAs since some BRI countries (e.g. Central Asian states), as host states, may not have the incentive to do so given the ISDS cases they have encountered and their underdeveloped domestic legal systems.¹²⁸ This may partially explain why the recently concluded China-Georgia FTA does not include a chapter on investment as other recent China FTAs do, although the China-Georgia bilateral investment treaty (BIT)¹²⁹ needs to be upgraded. The investors have to instead rely on the short-form China-Georgia BIT concluded in 1993 that limits ISDS to the amount of compensation for expropriation.¹³⁰ Even if new regulatory obligations are envisaged, these regulatory disciplines require a high degree of trust and confidence among regulators. It will take time to secure such trust given the large variations among the BRI states. Therefore, new disciplinary obligations under the BRI-related PTIAs, if there are any, are likely to be comparatively light.

¹²⁵ *China's AIIB: A Surprisingly Normal Bank* (2016), <http://country.eiu.com/article.aspx?Country=China&articleid=244763608&topic=Politics>.

¹²⁶ See Huang, *supra* note 6, at 321.

¹²⁷ *Id.* at 317.

¹²⁸ Sai Ma, *Energy Dispute Settlement and the One Belt One Road Initiative (“OBOR”)*, 14 TRANSNAT’L DISP. MGMT. 1, 12 (2017).

¹²⁹ China-Georgia Bilateral Investment Treaty (Jul. 3, 1993).

¹³⁰ *Id.* at art. 9.3.

IV. CONVERGENCE

Despite the divergence, this Part will sketch out possible convergence by recourse to illustrative snapshots of changing practice. It should be noted that convergence could only occur in a rather general sense since the rules of China and the U.S. could still be markedly different from each other.

The U.S. and China could have some kind of potential convergence regarding certain specific objectives of regionalism in selected areas (particularly trade facilitation, investment protection and intellectual property), the instruments for regionalism, and the approaches to multilateralism. However, the possible convergence in the role in rulemaking will take time if it eventually occurs.

A. The Objectives of Regionalism

1. Trade

The U.S. and China converge on certain specific objectives of regionalism to reduce trading costs and strengthen the protection of intellectual property. The possible converge involves certain aspects of trade, particularly trade facilitation and intellectual property. Concerning trade facilitation, the NAFTA renegotiation will set high standards for implementing WTO agreements on trade facilitation and customs valuation.¹³¹ The success of the BRI would also depend on, inter alia, the creation of a system that has reasonable consistency and is not unimpeded by complex customs procedures.¹³² Therefore, the BRI shows particular concerns for the simplification and harmonization of trade procedures (e.g. customs clearance).¹³³ It helps to partially explain why China has taken a number of steps in this regard: good governance has been incorporated into the Joint Communiqué of Leaders Roundtable of BRF,¹³⁴ and China pledges to strengthen trans-regional customs cooperation to support the BRI.¹³⁵ In particular, trade facilitation involves good governance in terms of transparency and impartiality.¹³⁶

¹³¹ See Office of the United States Trade Representative, *supra* note 122, at 5.

¹³² William H. Overholt, *One Belt, One Road, One Pivot* (Sep. 26, 2015), <http://theoverholtgroup.com/media/Article-Southeast-Asia/One-Belt-One-Road-One-Pivot-Global-Asia-Corrected-Oct2015.pdf>.

¹³³ See Puig, *supra* note 38, at 107.

¹³⁴ See *Joint Communiqué of Leaders Roundtable of Belt and Road Forum*, *supra* note 106, at paragraph 11.

¹³⁵ State Council of the People's Republic of China, *China pledges trans-regional customs co-op for Belt and Road* (May 27, 2015), http://english.gov.cn/state_council/ministries/2015/05/27/content_281475115756220.htm.

¹³⁶ Heng Wang, *The Agreement on Trade Facilitation and Its Implications: An Interpretative Perspective*, 9 ASIAN J. WTO INTL. HEAL. 445, 453 (2014).

High-level intellectual property protection has been pursued by the U.S. Despite differences in areas such as traditional knowledge, the U.S. and China have similar positions in various aspects of intellectual property (e.g. patents) and fashion TRIPS-plus obligations. China has deployed selective adaptation strategies to incorporate beneficial features from the outside norms without transplanting the harmful and unsuitable elements.¹³⁷ With the fast development of intellectual property in China, it is natural that China converges with the U.S. in many respects. TRIPS-plus standards have taken centre stage and served as the template for all recent U.S. FTAs, such as the prohibition of removal or alteration of "rights management information".¹³⁸ China also accepts TRIPS-plus standards such as punitive damages in intellectual property law, and that attorney fees of the right holders be paid by the infringer.¹³⁹ China has converged with the U.S. in a number of TRIPS-plus obligations. The telling examples include the enforcement of copyrights (e.g. the ratification of the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT)),¹⁴⁰ the protection of rights management information,¹⁴¹ and undisclosed test data and other data regarding pharmaceutical and agricultural chemical products.¹⁴²

China intends to protect its intellectual property in the BRI, which is a major concern for Chinese governments and high-tech companies that engage in BRI projects. The increasing intellectual property-related activities in the BRI will accelerate the emergence of the crossover point that the protection and enforcement of intellectual property will be in China's own interests.¹⁴³ This is the reason why the BRI has significantly influenced China's intellectual property strategy at the national level.¹⁴⁴ Externally, the Chinese government has endeavoured to strengthen international cooperation on intellectual property recently by consensus building among BRI states and by

¹³⁷ Peter K. Yu, *supra* note 5, at 15.

¹³⁸ Robert E. Lutz, *Linking Trade, Intellectual Property and Investment in the Globalizing Economy: The Interrelated Roles of FTAs, IP and the United States* in *INTELLECTUAL PROPERTY AND FREE TRADE AGREEMENTS IN THE ASIA-PACIFIC REGION* 166 (Christoph Antons & Hilty Reto M. eds., 2015).

¹³⁹ Zhang Guangliang, *China's Stance on Free Trade-Related Intellectual Property: A View in the Context of the China-Japan- Korea FTA Negotiations*, 24 *ASIA PACIFIC. L. REV.* 42–45 (2016).

¹⁴⁰ Michael Handler & Bryan Mercurio, *Intellectual Property* in *BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS* 329 (Simon Lester et al. eds., 2016) (Nearly all of the U.S. FTAs contain a clause requiring the parties to ratify or accede to the WCT and WPPT (or affirm that they have done so)). Zhang, *supra* note 139, at 52 (China ratified the WCT and WPPT in 2007).

¹⁴¹ CHINA-KOREA FREE TRADE AGREEMENT, Cn-Kr, art. 15.9, July 1, 2015.

¹⁴² Guo Shuai, *A Story of Convergence of IPR Regimes: The IPR Chapter in the China-Korea Free Trade Agreement*, 2 *CHINESE J. GLOBAL GOVERNANCE* 164, 183 (2016) (similar protection exist under the China-Switzerland FTA and the Korea-U.S. FTA).

¹⁴³ Jyh-An Lee, *The New Silk Road to Global IP Landscape*, in *LEGAL DIMENSIONS OF CHINA'S BELT AND ROAD INITIATIVE* 421 (Lutz-Christian Wolff & Xi Chao eds., 2016).

¹⁴⁴ *Id.* at 417.

working with WIPO. For the former, China calls for increased cooperation in, among other things, intellectual property (including international technology transfer centers¹⁴⁵) under the BRI.¹⁴⁶ The recent common initiatives for strengthening cooperation under the BRI aim for increased intellectual property protection through regulatory cooperation.¹⁴⁷ For the latter, an agreement on enhancing BRI intellectual property cooperation was signed by the Chinese government and WIPO.¹⁴⁸ However, BRI countries are far from reaching consensus on intellectual property protection and many developing BRI countries may prefer lenient intellectual property protection. It is yet to be seen how China could promote intellectual property protection in the BRI. In addition, the TRIPS-plus standards discussed above are usually adopted in China's domestic law. Most of them have not been incorporated into China's FTAs. Therefore, the U.S.-style intellectual property standards generally remain higher than their Chinese counterparts.

2. Investment

The difference between Chinese and U.S. approaches to investment may be narrowed. In particular, two countries may have similar objectives regarding investment treatment, investment protection, and market access.¹⁴⁹ Under the BRI, China has particular concerns for investment treatments and protection,¹⁵⁰ as well as market access for investment. The BRI Action Plan proposes to remove investment barriers, and pushes forward negotiations on investment protection agreements and double taxation avoidance agreements to protect investors.¹⁵¹ Essentially, China defines its investment policy interests no longer only defensively as host countries, but also offensively as home countries interested in protecting its investors abroad and facilitating their operations.¹⁵² This is because China often serves as an investment exporting state, as is the case within the BRI.

¹⁴⁵ National Development and Reform Commission et al., *supra* note 13.

¹⁴⁶ *Joint Communiqué of Leaders Roundtable of Belt and Road Forum*, *supra* note 106, at paragraph 15(j).

¹⁴⁷ Common Initiatives for Strengthening Cooperation between Countries along the "Belt and Road" in the Field of Intellectual Property, *supra* note 18.

¹⁴⁸ World Intellectual Property Organization. *WIPO Director General Visits Belt and Road Forum and China Supreme People's Court* (May 18, 2017), http://www.wipo.int/about-wipo/en/offices/china/news/2017/news_0001.html.

¹⁴⁹ The ChAFTA rules will probably converge with deep FTAs concerning investment protection. Heng Wang, *The RCEP and Its Investment Rules: Learning from Past Chinese FTAs*, 3 CHINESE J. GLOBAL GOVERNANCE 160, 166 (2017).

¹⁵⁰ Puig, *supra* note 38, at 107.

¹⁵¹ National Development and Reform Commission et al., *supra* note 13, at Part IV.

¹⁵² Karl P. Sauvant, *China Moves the G20 toward An International Investment Framework and Investment Facilitation*, SOC. SCI. ELECTRONIC PUB. 6 (2017).

It should be noted that such convergence had started before the initiation of the BRI. For quite some time, China's approach to investment treaties has been "Americanized to large degree".¹⁵³ China's investment treaties have moved towards the counterpart of the U.S. concerning investment treatments, investment protection, and dispute settlement.¹⁵⁴ China has adopted many U.S. positions in its recent investment agreements (such as indirect expropriation, on which China has largely followed the 2012 U.S. Model BIT). The desire for enhanced investment access is reflected in China's FTA strategy.¹⁵⁵ That said, the BRI has not progressed as far as the U.S.-China BIT negotiation that will contain the pre-establishment national treatment and negative list approach for investment.

In the BRI, investment treatments, investment protection, and market access in particular are a pressing task. China needs market access for its investment under the BRI. Investment treatments and protection are crucial. On the one hand, China needs favourable investment treatment and strong investor protection to reduce the risks of BRI projects. China could relocate its labor-intensive industries to many BRI countries.¹⁵⁶ However, a commentator points out that the BRI makes investments largely in states where other nations and international financial institutions have been reluctant to invest.¹⁵⁷ Chinese investors face serious challenges when investing overseas.

On the other hand, many of China's PTIAs with BRI countries have not provided sufficient investment treatments and protection. Except for a number of partners (e.g. Timor-Leste, Bhutan, Maldives, Nepal, Afghanistan, Montenegro, Iraq and Palestine), China had concluded various types of investment agreements with 60 BRI countries.¹⁵⁸ Around two-thirds of the BRI BITs do not provide for national treatment, with the rest limited to national treatment for post-entry investment and even with further restrictions (e.g. "to the extent possible").¹⁵⁹ Most of China's investment treaties with countries along the BRI were entered into during the 1980s or 1990s, a period in which China pursued treaties with developing states.¹⁶⁰ On a related note, the

¹⁵³ Cai Congyan, China-U.S. BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications, 12 J. INT'L ECON. L., 457 (2009).

¹⁵⁴ Id. at 485-86.

¹⁵⁵ State Council, Opinions on Speeding up the Implementation of Free Trade Area Strategy Article 3(9) (2015).

¹⁵⁶ Justin Yifu Lin, One Belt and One Road" and Free Trade Zones-China's New Opening-up Initiatives, 10 FRONTIERS ECON. IN CHINA 585, 589 (2015).

¹⁵⁷ Avery Goldstein, A Rising China's Growing Presence: The Challenges of Global Engagement, in CHINA'S GLOBAL ENGAGEMENT: COOPERATION, COMPETITION, AND INFLUENCE IN THE 21ST CENTURY 9 (Avery Goldstein & Jacques Delisle eds., 2017).

¹⁵⁸ Anna Chuwen Dai, The International Investment Agreement Network Under the "One Belt One Road" Initiative, 14 TRANSN'L DISP. MGMT., 7 (2017).

¹⁵⁹ Id. at 11.

¹⁶⁰ Vivienne Bath, "One Belt, One Road" and Chinese Investment 7, in SOCIAL SCIENCE ELECTRONIC PUBLISHING (2016).

vast majority of these treaties do not offer unrestricted investor-state arbitration, and only treaties with 13 BRI countries after 1997 are third-generation Chinese treaties that have such access.¹⁶¹ These agreements still contain significant omissions including important jurisdictions that have faced many investment treaty claims.¹⁶² It means that investment treaties and protection can hardly be enforced. In addition, China's BIT with Indonesia has been terminated. Indonesia has received at least six investor-state arbitrations and has as a consequence terminated many of its BITs, including its BIT with China.¹⁶³ The insufficient investment rules lead China to call for stronger investment treatments and protection under the BRI. However, China has not emphasized ISDS in the BRI at this stage, probably because ISDS is sensitive and could affect regulatory autonomy.

Investment treatments, investment protection and market access are also pursued by the U.S. in the NAFTA renegotiation. Major NAFTA renegotiation objectives include the incorporation of rules to reduce or eliminate barriers to U.S. investment in NAFTA countries, and secure for U.S. investors "important rights consistent with U.S. legal principles and practice."¹⁶⁴ It is likely that the investment protection provisions will remain relatively stable, since current NAFTA rules have not been operating to the detriment of U.S. investors and, historically, the U.S. government has been "a major champion of the forms of investment protection provisions set out in NAFTA".¹⁶⁵ The convergence between the U.S. and China also generally fits the broad trend. Some commentators have suggested that substantive obligations show trends of convergence in the Asia Pacific, for example, regarding fair and equitable treatment (such as current practice reflecting consistent efforts to clarify the scope of the standard).¹⁶⁶ It arguably fits with the broader trend as reflected in the G20 Guiding Principles, which call for "legal certainty and strong protection to investors and investments" (including access to effective mechanisms for dispute prevention and settlement, as well as to enforcement procedures).¹⁶⁷ More broadly, there is the convergence of

¹⁶¹ See Matthew Hodgson & Bryan Adam, *Bumps in the Road: Identifying Gaps in China's Belt and Road Treaty Network*, 3 Transnational Dispute Management (2017), <http://www.transnational-dispute-management.com/article.asp?key=2475>.

¹⁶² *Id.* at 2.

¹⁶³ Bath, *supra* note, at 11–12.

¹⁶⁴ Office of the United States Trade Representative, *supra* note 63, at 9.

¹⁶⁵ John W. Boscariol et al., *The Art of Trade: Knowing the U.S. Position in NAFTA Negotiations* (July 20, 2017), https://www.mccarthy.ca/article_detail.aspx?id=7371.

¹⁶⁶ Mark Feldman, et al., *The Role of Pacific Rim FTAs in the Harmonisation of International Investment Law: Towards a Free Trade Area of the Asia-Pacific*, in 7 SOCIAL SCIENCE ELECTRONIC PUBLISHING (2016).

¹⁶⁷ See *G20 Guiding Principles for Global Investment Policymaking* (2016).

policy interests between home and host countries, as well as between advanced economies and a growing number of emerging markets.¹⁶⁸ Overall, there has been a realignment of Western and other interests that suggests convergence in foreign investment law.¹⁶⁹ That said, several developing countries including Indonesia are currently questioning the legitimacy of BITs. Moreover, as discussed in the section on crossvergence, the U.S. position on investment could be subject to change and uncertainties exist.

B. The Instruments for Regionalism

The use of soft law and hard law in regional integration needs to be discussed on a case-by-case basis. The U.S. and China are similar only in the general sense that they adopted both soft law and hard law. China frequently uses soft law under the BRI. In furtherance of the BRI goal of unimpeded trade,¹⁷⁰ China also relies on hard law in certain circumstances of the BRI (i.e. the WTO norms and existing PTIAs). WTO norms are largely hard law. So do China's PTIA rules in WTO-covered areas and investment, but not in non-trade concerns.

The U.S. often prefers hard law in the NAFTA renegotiation. Meanwhile, the U.S. approach to the NAFTA renegotiation will adopt soft law in certain limited circumstances (e.g. competition) if the U.S. government generally follows the norms under the TPP. The TPP, for instance, uses soft-law language on transparency issues in the chapter on competition policy,¹⁷¹ in which the parties "recognize the value" of transparency and "endeavor to maintain and update information" on national competition laws, policies, and enforcement activities through the APEC Competition Law and Policy Database.¹⁷² In addition, the TPP provides private petitioners with a soft-law assurance of a right to bring an action for redress directly, which, where this is not available, is backed by a minimum hard-law right to petition the authority for action.¹⁷³ As an example of these soft-law commitments, the TPP provides that "each Party should adopt or maintain laws or other measures that provide an independent private right of action" that provides a right to a person to seek redress for

¹⁶⁸ Sauvart, *supra* note 152, at 6.

¹⁶⁹ Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUR. J. INT'L L. 974, 975 (2016).

¹⁷⁰ The BRI has identified five goals, which are policy coordination, facilities connectivity, unimpeded trade, financial integration and people-to-people bonds. National Development and Reform Commission, et al., *supra* note 13, at Part IV.

¹⁷¹ R. Michael Gadbaw, *Competition Policy*, in 2 ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOLUME 2: INNOVATIONS IN TRADING RULES 87, (Jeffrey J. Schott & Cimino-Isaacs Cathleen eds., 2016).

¹⁷² TRANS-PACIFIC PARTNERSHIP AGREEMENT, art. 16.7, Feb. 4, 2016.

¹⁷³ Gadbaw, *supra* note 171, at 86.

injury caused by a violation of national competition laws through “injunctive, monetary and other remedies.”¹⁷⁴

Therefore, China and the U.S. adopt the combination of hard-law and soft-law mechanisms to promote regional integration. They converge in using hard law mainly in WTO-covered areas and investment. Soft law is used by the two states in issues on which the parties find it difficult to reach consensus, and/or want to maintain flexibility (like competition).

C. The Approaches to Multilateralism

Common ground can be found in the inflection points of divergence. The approach to multilateralism is the most recent and major divergence between Chinese and U.S. trade approaches. China and the U.S. rely on WTO norms even though they diverge regarding the approach to multilateralism. Good examples include the TBT and sanitary and phytosanitary (SPS) measures, trade facilitation, and intellectual property. Both China and the U.S. will rely on the WTO regarding the TBT and SPS concerns. As discussed above, the BRI supports WTO norms including those on the TBT and SPS issues. At the very beginning of the NAFTA renegotiation objectives on the TBT and SPS measures, the WTO rights and obligations or the WTO TBT Committee’s decisions are explicitly recognized.¹⁷⁵

Another prominent example is that both countries support the implementation of the WTO rules regarding trade facilitation and intellectual property. These two issues appear to be prioritized areas of the BRI, in which China relies on WTO norms. For instance, the WTO Agreement on Trade Facilitation is the only specific trade agreement named in the BRI Action Plan, and its implementation is highlighted.¹⁷⁶ In the NAFTA renegotiations, an objective is to build on and “set high standards for implementation of WTO agreements involving trade facilitation.”¹⁷⁷ In the same vein, it also emphasizes “accelerated and full implementation” of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), particularly regarding the enforcement obligations under TRIPS.¹⁷⁸ Obviously, the Trump Administration will support and utilize WTO norms in these issues.

¹⁷⁴ TRANS-PACIFIC PARTNERSHIP AGREEMENT, art. 16.3, Feb. 4, 2016 .

¹⁷⁵ Office of the United States Trade Representative, *supra* note 63, at 5, 6.

¹⁷⁶ National Development and Reform Commission et al., *supra* note 13, at Part IV.

¹⁷⁷ Office of the United States Trade Representative, *supra* note 63, at 5.

¹⁷⁸ *Id.* at 9.

D. The Role in Rulemaking

For the role in rulemaking, the U.S. and China are rather different. Despite her aspiration, China has not yet become a rule maker. China wants to shape the international economic legal order in a favorable manner in the long term, which will take time. It is observed that there is clear evidence that China is unwilling to remain a “rule taker”.¹⁷⁹ For instance, China may introduce its own social issues from a perspective that is different from its Western counterparts. In the long term, it is observed that China’s preferences for environmental and social safeguards may gradually be adopted via the BRI through, inter alia, BRI projects and soft-law instruments.¹⁸⁰

V. CROSSVERGENCE: TWO SIDES OF ONE COIN?

A. Crossvergence: Sectoral Examples

Chinese and U.S. approaches to trade reflect crossvergence,¹⁸¹ which means a simultaneous convergence and divergence of regulatory approaches. There is crossvergence in both divergent and convergent issues. To better understand crossvergence, it will be helpful to look at specific economic sectors. Investment and environment are typical examples of crossvergence. Investment is at the core of the BRI, and is also an important issue in U.S. trade policy. Among non-trade concerns on which the U.S. and China largely diverge, environment is attracting more attention under the BRI and is also an important issue in the NAFTA renegotiation given the constituents’ concerns.¹⁸² However, crossvergence is not limited to sectors like investment and environment or to the U.S. and China. It could exist in other sectors including intellectual property or in a broader geographic area. For instance, crossvergence seems to gradually emerge in Asia concerning sectors such as intellectual property standards.¹⁸³

1. Investment

As discussed above, both states are likely to converge in areas such as investment treatments, investment protection, and market access. However, divergence remains between the approaches of the U.S. and China in fundamental aspects such as underlying considerations.

¹⁷⁹ Chesterman, *supra* note 169, at 966.

¹⁸⁰ Hillman, *China’s Belt and Road Initiative: Five Years Later*, 10 (2018), <https://www.csis.org/analysis/chinas-belt-and-road-initiative-five-years-later-0>.

¹⁸¹ For the discussion of crossvergence in the context of international business studies, see David A. Ralston, *The Crossvergence Perspective: Reflections and Projections*, 39 JOURNAL OF INTERNATIONAL BUSINESS STUDIES 27, 27–40 (2008).

¹⁸² Schneider-Petsinger, *supra* note 41, at 32.

¹⁸³ Peter K. Yu, *supra* note 5, at 11.

China may pursue PTIAs for different reasons than the U.S.¹⁸⁴ Due to space limit, this part will not discuss it in detail but some examples will be given here. First, both states have different regulations of outbound investment. The Trump Administration has indicated a preference for keeping American investment at home and is exploring ways to curb outbound American investments,¹⁸⁵ including the changed position on ISDS as discussed below. China generally appears to encourage outbound investment under the BRI. The BRI projects are deemed as encouraged sectors under Chinese government's outbound investment guideline,¹⁸⁶ although China has also tightened the regulation of outbound investment. China's recent tightened regulation of outbound private investment aims to ensure that the overseas deals are genuine, and to fight against those used for transferring assets abroad or for money laundering.¹⁸⁷ Keeping investment at home might also be considered by China, but such consideration probably has not played a key role as the case in the U.S.

Second, the U.S. domestic law seems to serve as a kind of threshold for investment protection, which differs from China's practice. The U.S. approach aims to ensure that U.S. investors obtain important rights in the NAFTA countries that act consistently with "U.S. legal principles and practice."¹⁸⁸ These considerations may not exist in China's investment agreements. Instead, China often relies on the draft PTIAs provided by the trading partners given that China lacks its own PTIA model and that Chinese domestic law does not serve as a benchmark in the PTIAs.¹⁸⁹

Third, the objectives of the U.S. BITs include the encouragement of adoption in foreign states of market-oriented domestic policies that treat private investment fairly.¹⁹⁰ Different from the private investment issues in the U.S. BITs, a substantial amount of Chinese outbound investment is conducted by SOEs. Given this feature and its *sui generis* economic structure, China has not sought to use regional

¹⁸⁴ For the analysis of China's and U.S. BITs, see, e.g. Kate Hadley, *Do China's BITs matter? Assessing the effect of China's investment agreements on foreign direct investment flows, investors' rights, and the rule of law*, 45 GEO. J. INT'L L. 255, 261, 262 (China could sign BITs with developing countries for reasons other than promoting investment) (2013).

¹⁸⁵ Reinsch, *supra* note 116.

¹⁸⁶ Greg Pilarowski & Lu Yue, *China Further Tightens Control of Outbound Direct Investment* (Aug. 28, 2017), <http://www.pillarlegalpc.com/en/news/wp-content/uploads/2017/08/PL-China-Regulation-Watch-ODI-Restriction-2017-08-28.pdf>.

¹⁸⁷ Sara Hsu, *China Tightens Overseas Investment To Reduce Risks*, FORBES (Dec. 22, 2017), <https://www.forbes.com/sites/sarahsu/2017/12/22/china-tightens-overseas-investment-to-reduce-risks/#7a8dda61772c>.

¹⁸⁸ Office of the United States Trade Representative, *supra* note 63, at 9.

¹⁸⁹ Wang, *supra* note 149, at 174.

¹⁹⁰ Hadley, *supra* note 184, at 261.

integration to promote market-oriented domestic policies regarding investment in the same matter as the U.S. has.

Given these factors, both countries diverge on concrete investment issues. Due to the divergence, difficult issues in China's BIT talks with the U.S. include SOEs,¹⁹¹ performance requirements,¹⁹² transparency of rules, transfer and financial services. Different views exist in the negotiation on issues including labor, human rights, environment, corporate social responsibility, sustainable development,¹⁹³ national security review¹⁹⁴ and competition policy issues.¹⁹⁵ Taking labor as an example, differing from the U.S., China's investment treaties do not incorporate clauses concerning workers' rights or labor conditions.¹⁹⁶ The difference is likely to remain at least in the short term.

Looking into the future, potential new divergence in investment between the U.S. and China could arise regarding ISDS. It appears that the Trump Administration is suggesting major changes on ISDS. One may argue that there is skepticism towards ISDS from the Trump Administration, at least by some measures, and a tendency to keep U.S. industry at home. For NAFTA country investors in the U.S., the U.S. government wants to ensure under the NAFTA renegotiation that they are not accorded greater substantive rights than domestic investors.¹⁹⁷ For U.S. firms investing in NAFTA countries, the U.S. may not continue to "encourage and guarantee U.S. companies to invest in Mexico and Canada primarily for export to the United States."¹⁹⁸ It suggests that the U.S. government should no longer be responsible for guaranteeing legal protections for American businesses investing in NAFTA countries.¹⁹⁹ This is probably the reason why USTR's current NAFTA renegotiation position is to make

¹⁹¹ David Dollar, *The Future of U.S.-China Economic Relations* in BROOKINGS BIG IDEAS FOR AMERICA 133–34 (Michael E. O'Hanlon ed. 2017) (The U.S. may impose further restrictions on SOE investments from China).

¹⁹² Although China has agreed to a "basic" provision on performance requirements in the China-Korea FTA, there is considerable differences between the U.S. and China on performance requirements.

¹⁹³ Mo Li (莫莉), *Zhong Mei he Zhong Ou Shuangbian Touzi Xieding Tanpan Nandian Hezai* (中美和中欧双边投资协定谈判难点何在) [*The Difficulties of Negotiating Sino-U.S. and Sino-EU Bilateral Investment Treaties*] (Apr. 12, 2017), <http://finance.sina.com.cn/roll/2017-04-12/docifycezv3229656.shtml>.

¹⁹⁴ David A. Gantz, *Challenges for the United States in Negotiating a BIT with China: Reconciling Reciprocal Investment Protection with Policy Concerns*, 5 ARIZ. J. INT'L & COMP. L. 203, 242 (2014).

¹⁹⁵ Lauren Gloudeman & Nargiza Salidjanova, *Policy Considerations for Negotiating a U.S.-China Bilateral Investment Treaty*, 12–21 (2016), https://www.uscc.gov/sites/default/files/Research/Staff%20Report_Policy%20Considerations%20for%20Negotiating%20a%20U.S.-China%20Bilateral%20Investment%20Treaty080116.pdf.

¹⁹⁶ Daniel C. K. Chow, *Rising Nationalism: China's Regulation of Investment Trade* in CHINA'S GLOBAL ENGAGEMENT 84 (Jacques de Lisle & Avery Goldstein eds., 2017).

¹⁹⁷ Office of the United States Trade Representative, *supra* note 63, at 9.

¹⁹⁸ Office of the United States Trade Representative, *Closing Statement of USTR Robert Lighthizer at the Fourth Round of NAFTA Renegotiations*, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/october/closing-statement-ustr-robert> (last updated October 2017).

¹⁹⁹ Bown et al., *supra* note 44.

new investment provisions in a revised NAFTA subject to opt-in provisions. Under the proposal, countries would have to “opt-in” to participate in ISDS,²⁰⁰ which arguably makes ISDS largely ineffective.²⁰¹ Moreover, one of the notable additions to the NAFTA renegotiation objectives in November 2017 is “the maintenance of strong U.S. domestic industries” when it comes to ISDS.²⁰² All these differ from the previous practice.

Meanwhile, China’s position has not been consistent in this regard, probably due to the demands of different PTIA partners. In some recent PTIAs, China has imposed serious limits on the scope of ISDS. These include the China-Canada BIT,²⁰³ one of its most advanced investment treaties, and the recent China-Australia FTA (ChAFTA).²⁰⁴ In contrast, the China-Korea FTA, another advanced recent FTA, has few limits regarding the ISDS’ scope.²⁰⁵ The most recent China-Sri Lanka FTA also has comprehensive ISDS mechanisms to protect investors.²⁰⁶ China’s position may depend on, inter alia, whether China will receive a large number of ISDS claims in the future or whether China may be concerned about such a possibility. However, China is likely to take a slightly pro-investor approach under the BRI regarding ISDS since China exports more investment than it imports from BRI states.

2. Environment

Environment is one of the areas that there is crossvergence. On one hand, the differences between China and the U.S. regarding the environment may be narrowed in the general sense that both sides promote environmental protection. Arguably both states move towards a similar direction at different paces, which is different from issues such as data flows where the two countries appear to move towards different directions.

The NAFTA renegotiation has strengthened environmental protection as reflected in its renegotiation objectives, including bringing environmental provisions into the core of the NAFTA and

²⁰⁰ *Id.*

²⁰¹ Jenny Leonard, *Sources: USTR considering ISDS proposal that would require NAFTA countries to opt in*, INSIDE U.S. TRADE (Aug. 19, 2017), <https://insidetrade.com/daily-news/sources-ustr-considering-isds-proposal-would-require-nafta-countries-opt>.

²⁰² Office of the United States Trade Representative, *Summary of Objectives for the NAFTA Renegotiation*, 9 (2017) <https://ustr.gov/sites/default/files/files/Press/Releases/Nov%20Objectives%20Update.pdf>.

²⁰³ China-Canada BIT Article 20 (2014).

²⁰⁴ ChAFTA Article 9.12.2 (the arbitration claim under ISDS is limited to the violation of national treatment) (2015).

²⁰⁵ China-Korea FTA Article 12.12.1. 2015.

²⁰⁶ MOFCOM, *Head of MOFCOM International Department Interpreting China-Sri Lanka FTA* (2017), available at http://fta.mofcom.gov.cn/article/chinamedf/chinamedfnews/201712/36400_1.html.

providing strong environmental obligations that are enforceable through FTA dispute settlement mechanism.²⁰⁷ Under the NAFTA renegotiation, measures to upgrade environmental standards echo provisions of the TPP.²⁰⁸

China's BRI approach seems to emphasize environmental protection although it does not go as far as the NAFTA renegotiation. Generally, China's BRI approach to the environment is still at its early stage, but environment seems to have attracted more attention in China than before. China's move on the environment is probably a kind of response to the possible concerns over its outbound investment.²⁰⁹ It is also consistent with China's "ecological civilization" approach to development and diplomacy.²¹⁰

China's environmental measures under the BRI involves the development of infrastructure projects, international agreements (including PTIAs) and financing, while the effects remain to be seen. The BRI Action Plan calls for sustainable development,²¹¹ as well as the promotion of "green" infrastructure construction and operation, and conserving ecological environment and protecting biodiversity.²¹² In particular, a guidance and a cooperation plan for the environment were issued by the Chinese government in 2017 outlining more details. The ecological and environmental cooperation plan for the BRI highlights cooperation rather than imposing detailed obligations.²¹³ That being said, the BRI converges with the 2030 Agenda for Sustainable Development of the United Nations (the Agenda) under this plan, since the BRI aims to provide an effective impetus to the accomplishment of environmental targets in the Agenda.²¹⁴ Another separate guidance on the green BRI calls for, among others, the incorporation of environmental protection requirements into FTAs, the negotiation for and the implementation of environment and trade agreements,²¹⁵ the implementation of the Guidelines for Environment

²⁰⁷ Office of the United States Trade Representative, *supra* note 63, at 13.

²⁰⁸ Schneider-Petsinger, *supra* note 41 at 22.

²⁰⁹ David H. Shinn, *The Environmental Impact of China's Investment in Africa*, 49 CORNELL INTERNATIONAL LAW JOURNAL 25, 66 (Chinese government has become more sensitive to environmental concerns relating to overseas investment by Chinese businesses) (2016).

²¹⁰ Wenyan Wu, *China's 'Digital Silk Road': Pitfalls Among High Hopes*, *The Diplomat* (Nov. 3, 2017), available at <https://thediplomat.com/2017/11/chinas-digital-silk-road-pitfalls-among-high-hopes/>.

²¹¹ National Development and Reform Commission et al., *supra* note 13, at Part I.

²¹² *Id.* at Part IV.

²¹³ "Yidai Yilu" Shengtai Huanjing Baohu Hezuo Guihua ("一带一路" 生态环境保护合作规划) [*The Belt and Road Ecological and Environmental Cooperation Plan*], <http://www.mep.gov.cn/gkml/hbb/bwj/201705/W020170516330272025970.pdf> (last updated May, 2017).

²¹⁴ *Id.* at Part I(III).

²¹⁵ Guanyu Tuijin Lüse "Yidai Yilu" Jianshe de Zhidao Yijian (关于推进绿色 "一带一路" 建设的指导意见) [*Guidance on Promoting Green Belt and Road*] Part III(i)(4) (Apr. 26, 2017), http://www.mep.gov.cn/gkml/hbb/bwj/201705/t20170505_413602.htm.

Protection for Overseas Investment and Cooperation, and enterprises' fulfilment of environmental social responsibility.²¹⁶

In addition, Chinese policy banks and the China-led international developmental financing institutions are also involved in the process of protecting environment. Relating to the BRI, these banks and international developmental financing institutions, at least officially, have advanced the environment and social sustainability, for example, by creating obligations in the recipients of funds to reduce emissions and mitigate climate change.²¹⁷

There is also similar movement regarding China's PTIAs, which started to incorporate environmental issues,²¹⁸ but exempt them from the dispute settlement mechanism. Within a dedicated chapter on environment and trade, the China-Korea FTA provides for the review of the impact of the FTA implementation on environment after its entry into force.²¹⁹ China's recent BITs, such as the pact with Tanzania, also provides for environmental measures.²²⁰

On the other hand, one could argue that the two states largely diverge in respect of the environment given their considerable differences. For instance, the approaches of the two states remain fundamentally different concerning rule enforcement. The U.S. emphasizes the strong enforcement of treaty obligations on the environment. The NAFTA renegotiation highlight "strong and enforceable environment obligations".²²¹ In contrast, China tends to rely on soft law and regulatory cooperation regarding the environment under the BRI. Instead, China's approach seems to focus on voluntary compliance by enterprises through guidelines and social responsibility. The voluntary guidelines, which are not mandatory and lack penalties to infractions, may have their limits in disciplining the behavior of businesses.²²² On a related note, the Trump Administration's renunciation of the Paris Agreement contrasts with China's support of the Paris Agreement. It is yet to be seen how China's approach would develop, given the variance in environment rules among BRI countries and the early stage of environment rules in China's PTIAs.

²¹⁶ *Id.* at Part III(iii)(2).

²¹⁷ Maria Adele Carrai, *It Is Not the End of History: The Financing Institutions of the Belt and Road Initiative and the Bretton Woods System*, 14 TRANSNATIONAL DISPUTE MANAGEMENT 1, 17 (2017).

²¹⁸ For the analysis of environmental provisions in China's BITs, see Chi Manjiao, *The "Greenization" of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China's Future Bit-Making*, 18 J. INT'L ECON. L., 511-42 (2015).

²¹⁹ CHINA-KOREA FREE TRADE AGREEMENT, Cn-Kr, art. 16.6.1., July 1, 2015.

²²⁰ CHINA-TANZANIA BILATERAL INVESTMENT TREATY, Cn-Tz, art. 10, Mar. 24, 2013.

²²¹ Office of the United States Trade Representative, *supra* note 63, at 13.

²²² Shinn, *supra* note 209, at 66.

B. Why Is There Crossvergence?

The phenomenon of crossvergence is possibly due to a number of reasons. Generally, the convergence side is due to the fact that both countries take a pragmatic and proactive²²³ approach. Convergence suggests the common interests of China and the U.S. as major trading states. It is reflected in opening markets, reducing trading costs (e.g. trade facilitation), protecting outbound investment, guarding intellectual property in trade and investment, and addressing environmental concerns arising from economic activities.

The divergence side reflects deeper differences between the two countries in legal, political, economic, and social aspects. Overall, China is to increase its voice in global governance by creating a new economic network under the BRI, which is promoted through soft law and support to multilateralism with the aim of building consensus. The U.S. shifts to managed trade to address bilateral deficits, while it continues to promote new-generation regulatory disciplines to offer regulatory protection to its stakeholders.

It is difficult for the U.S. and China to completely converge or diverge regarding trade approaches. On the one hand, substantial gaps between the U.S. and China can hardly be narrowed in the short term. Underlying factors, such as China's economic policy that is different from the U. S's, affect trade policies. More broadly, there are the fundamental dissimilarities between the Beijing Consensus and Washington Consensus, reflected in areas such as investment.²²⁴ The BRI seems to follow the Beijing Consensus in terms of the emphasis on self-determination while adapting to free trade.²²⁵

On the other hand, it will be difficult for the two countries to completely diverge. This is attributable to, inter alia, similar economic considerations of these two states as major trading nations, including considerations like the reduction of trading costs, the protection of intellectual property and investment. Moreover, direct engagement between the two countries on multilateral, regional and bilateral bases helps to narrow the gap at least to some extent. At the bilateral level, the U.S.-China BIT negotiations have played a key role in narrowing the differences despite the challenge in finalizing the negotiation. The engagement at a multilateral and regional level could be found in the WTO dispute settlement and negotiations, the G20, and the Asia-Pacific Economic Cooperation and so forth. Although multilateralism is facing serious difficulties given the attitude of the U.S. on issues

²²³ For the U.S. trade policy, see Center for Strategic and International Studies. Sept. 18, 2017. ('...we must be proactive...')

²²⁴ Guan Wenwei, *Beijing Consensus and Development Legitimacy: The Evolution of China's Foreign Direct Investment (FDI) Regime from a Law & Development Perspective*, 12 ASIAN J. COMP. L., 115–39 (2017).

²²⁵ *Id.* at 138.

such as the appointment of Appellate Body members, multilateral norms still substantially affect the trade approaches of the two states. Both the BRI and the recent NAFTA renegotiation are largely based on pre-existing multilateral norms. As discussed above, the NAFTA renegotiation relies on the WTO rules in issues such as the TBT and SPS concerns. So does the BRI. In addition, the indirect engagement between the U.S. and China may exist in various contexts, such as during the RCEP and other FTA negotiations. It helps to explain why some provisions of China's FTA resemble that of the TPP provisions in which the U.S. played a key role.²²⁶ This could be attributable to the fact that several of China's FTA partners (e.g. Australia and Korea) have also concluded trade pacts with the U.S. These partners may bring their provisions with the U.S. into their negotiations with China.

VI. CONCLUDING REMARKS

For the Chinese and the U.S. trade approaches, the scenario could be more complicated than a binary choice between convergence and divergence. Essentially, the new feature of the Trump Administration's trade approach is that the U.S. has taken a managed trade approach that prioritizes trade balances. China takes a seemingly soft approach to engage with BRI countries and increase its role in global governance. The article reveals that the BRI and the NAFTA renegotiation may essentially facilitate crossvergence between the Chinese and U.S. approaches. One may argue that divergence is fundamental compared with convergence that occurs in arguably isolated issues. Following the new development of the Chinese and U.S. trade practices, the divergence could be more obvious than before.

Crossvergence is likely to continue. Both the U.S. and China endeavor to "upload" their rules into transnational law,²²⁷ while their norms could be rather different. For instance, both countries converge in their efforts to update the initiatives or trade pacts to reflect changing times and conditions in areas such as e-commerce and digital trade. China is building digital BRI,²²⁸ while the NAFTA renegotiation will update the pact with rules on digital trade and data.²²⁹ However, major rules pursued by both states could diverge. In digital trade and cross-border data flows, the U.S. pursues rules to prevent

²²⁶ For the comparison between China's FTAs and the TPP regarding investment provisions, see, e.g. Wang, CHINESE JOURNAL OF GLOBAL GOVERNANCE, 160–81 (2017).

²²⁷ For the operational definition of transnational law, see Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 745–46 (2005).

²²⁸ Steven Viney et al., *One Belt, One Road: China heralds 'Digital Silk Road'; foresees internet-era power shift soon*, <http://www.abc.net.au/news/2017-12-05/china-presents-foundations-of-digital-silk-road-at-internet-meet/9223710> (last updated Dec. 5, 2017).

²²⁹ Office of the United States Trade Representative, *supra* note 63, at 8–9.

measures that restrict cross-border data flows and require the use or installation of local computing facilities.²³⁰ These rules are not likely to be accepted by China in the short term.

The crossvergence is not necessarily limited to China and the U.S. It may reflect the broader issues such as world PTIAs' shift from investment proliferation to investment reorientation,²³¹ on which both the Chinese and U.S. approaches are developing. The interaction between China and the U.S. could produce "spillover" effects in their relations with other parts of the world such as China's interaction with Europe and Canada in the context of possible PTIAs. For the world trade law landscape that is at a critical juncture, it remains to be seen whether and how the interaction between the approaches of the two countries will lead to certain changes in the international economic legal order.

²³⁰ *Id.* at 9.

²³¹ United Nations Conference on Trade and Development, *World Investment Report 2015*, 123–24, http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf (last updated Jun. 24, 2015).