Christoph Herrmann · Markus Krajewski
Jörg Philipp Terhechte
Editors

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Jörg Philipp Terhechte
Editors

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Editors
Christoph Herrmann
Faculty of Law
University of Passau
Passau, Germany

Markus Krajewski
Faculty of Law
University of Erlangen-Nürnberg
Erlangen, Germany

Jörg Philipp Terhechte
Competition and Regulation Institute
Leuphana University of Lüneburg
Lüneburg, Germany

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Editorial EYIEL 6 (2015)

This sixth volume (2015) of the European Yearbook of International Economic Law puts a special emphasis on non-tariff barriers (NTBs) to trade and the world trade order. With the steady reduction of tariff rates since the entry into force of the GATT 47, focus in the past years has been on the vast and complex landscape of non-tariff barriers to trade. Practitioners as well as scholars seemingly struggle with the multitude of measures pooled under that expression as no single, acknowledged definition of the term exists and its relation to the term "non-tariff measures" remains equally blurred. Particularly in practice and on the multilateral level, there appears to be some awkwardness when it comes to coping with NTBs as multilateral trade rules often seem to be in conflict with national regulatory autonomy in the pursuit of policy objectives. This volume undertakes to shed some light on the problems of non-tariff barriers to trade that can act as NTBs that arise in various fields.

In his Distinguished Essay, *Robert Howse* examines how border taxes and regulatory measures can be implemented as WTO-compliant climate mitigation strategies. He starts from the assumption that unilateral actions may be more effective to approach the problem of climate change as long as multilateral agreement seems out of reach. Analysing particularly, but not exclusively, previous GATT and WTO jurisprudence, *Robert Howse* comes to find that WTO law is not in principle opposed to the introduction of border carbon adjustment but would have to satisfy strict standards of non-discrimination.

Timothy Lyons explores the interaction between customs and non-tariff barriers. Starting from the impact that customs-related NTBs have, he reveals the changing responsibilities of customs authorities, particularly in the EU, from mere financial interests to security and environmental concerns. He provides an overview of when such NTBs usually occur as well as of international bodies and agreements that aim to regulate customs NTBs. *Timothy Lyons* further points to the problem to uniformly apply customs regulations that arise within the EU with its 28 Member States, internally as well as externally.

Nikita Lomagin approaches the topic of NTBs from an economic perspective. He offers an overview of quantitative and qualitative evaluations of NTBs. He highlights the difficulties that economists face when they attempt to estimate the effects that NTBs have due to the sheer number and complexity of such measures. *Nikita Lomagin* outlines the different approaches that have been taken so far and illustrates that the evaluations show that the effect is indeed significant. He further draws on recent developments regarding import bans and their economic effects, particularly focusing on Russia and the EU.

Akbar Rasulov critically discusses the Horizontal Mechanism, a proposal within the WTO Negotiating Group on Market Access to introduce procedures for the resolution of disagreements in the field of non-tariff measures that shall be conducted outside the legal framework of the Dispute Settlement Understanding. He finds this shift from substance to procedure to be a mere symptom of the underlying problem of the complexity and great variety of NTBs that has not yet been solved in international trade law.

Gracia Marín Durán unfolds the variety of problems that the issue of process and production methods as non-tariff barriers to trade entails. She does this in light of two recent WTO rulings, i.e. *US – Tuna II and EC – Seal Products*, and places the arguments around product-related and non-product-related process and production methods in the context of the scholarly debate. *Gracia Marín Durán* then examines—based on existing WTO case law—to what extent measures relating to the process and production methods are covered by the TBT Agreement, as well as the scope of WTO members' obligations under the TBT Agreement in relation to GATT obligations. She comes to the conclusion that the approach currently followed by the dispute settlement bodies leads to the outlandish result that less trade-restrictive labelling requirements based on process and production methods are subject to the strict TBT disciplines, while more restrictive regulations based on process and production methods are not.

Nikolay Mizulin and *Huijian Zhu* assess NTBs and private conduct in the context of labelling, an area that has so far received only little attention. They undertake to answer the question whether WTO law does in fact cover the conduct of privates by thoroughly examining previous GATT and WTO case law, focusing on the Agreement on Technical Barriers to Trade (TBT) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). They conclude that seemingly private conduct that can be traced back to a member's regulatory requirements can, in line with existing case law, be addressed with WTO rules; further, under the TBT and the SPS Agreement members are under an obligation to control private conduct with measures reasonably available to them.

The elimination of NTBs plays a significant role in the ongoing TTIP negotiations between the US and the EU, as *Christian Pitschas* illustrates. He focuses on efforts with regard to standard setting, providing an outline of the negotiators' ambitions as expressed in the regulatory chapter and further comparing it to the respective process in the WTO Agreements.

In the section on regional integration, we have a special emphasis on relations between East Asia and the European Union.

Shotaro Hamamoto portrays the landscape of Japan's Economic Partnership Agreements (EPAs). Japan has started to actively engage in concluding such agreements only in 2002 as it very much relied on the multilateral system before that. Nonetheless, *Shotaro Hamamoto* demonstrates very clearly that Japan has since then been keeping up with the general trend towards regional trade agreements and is now also actively involved in several negotiations on "mega" trade agreements.

Won-Mog Choi assesses the close trade relations between Korea and the EU that have recently been intensified through the Korea–EU Free Trade Agreement. He analyses the key features of the Korea–EU Free Trade Agreement and finds that it does not only further shape relations between these two partners but rather marks a stepping stone for future preferential trade agreements. This is particularly so because it contains areas that are currently still difficult to negotiate on the multilateral level such as non-tariff barriers, sustainable development or cultural cooperation. *Won-Mog Choi* further notes that this comprehensive approach illustrates what he calls aggressive regionalism and serves as an example of a paradigm shift in the design of regional trade agreements that should have to move beyond the regulation of mere economic issues.

Locknie Hsu takes a closer look at the trade and investment relations between the EU and East Asia. She thereby puts a special emphasis on the EU–Singapore Free Trade Agreement as it is the first of the EU's FTAs with an Asian State that will contain an investment chapter. The EU–Singapore FTA is further to be regarded as a stepping stone as it might pave the way for other agreements between the EU and ASEAN States as long as an EU–ASEAN FTA cannot be achieved.

In his essay, *Chien-Huei Wu* takes a critical look at the EU's ambitions to counterbalance China and the US in East Asia and doubts whether the existent policy tools suffice to achieve the aspired goal. He unfolds the many-faceted view the EU has of Asia—as a threat, a strategic partner and a market—and provides an overview of the EU's strategy papers on Asia during the past 20 years. *Chien-Huei Wu* further sets out the instruments and fora used to shape EU–Asia relations and ultimately comes to conclude that neither the ambitions of the EU as a civilian power nor its competences or more apparent interest in the Balkans, Eastern Europe and the Mediterranean seem to equip it for a credible East Asia policy that could achieve the aim of counterbalancing China and the US in the region.

Julien Chaisse provides a comprehensive overview of investment treaties or preferential trade agreements with chapters on investment concluded by Asian States. He illustrates the broad range of investment treaty practices among those States, quantitatively as well as qualitatively, and identifies the Trans-Pacific Partnership as possibly shaping the EU's future investment negotiations in Asia. *Julien Chaisse* concludes that for the EU, with its newly gained competences in the field of foreign direct investment, Asia holds great opportunities but possibly also difficulties considering that there are currently 187 intraregional investment agreements in force in Asia.

In the section on International Economic Institutions, *Catharine Titi* portrays recent developments in investor–State dispute settlement in general and within the

ICSID system in particular. In light of the ongoing (reform) discussions about investor–State arbitration, she traces trends that affect the system. *Catharine Titi* thereby focuses on current EU negotiations and the issue of shared responsibility of the EU and its Member States, mass claims and claims relating to sovereign bonds, as well as the adoption of the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration adopted in July 2013.

Jan Bohanes and *Karolyn Salcedo* provide us with a sound outline of WTO rulings during the year 2013.

Joy Kategekwa portrays recent institutional trends in the WTO and the challenge going forward. She highlights the significance of an organisation whose purpose it is to promote global trade in a post-crisis time with still stagnating economic growth rates and increasing numbers of trade restrictions among G-20 States. Further developments examined by *Joy Kategekwa* include the areas of accession to the WTO, the dispute settlement system and technical assistance. She also discusses the outcome of the last Ministerial Conference in Bali in December 2013 and concludes that the very spirit leading to the success of Bali should be put to use to move forward in the Doha negotiations.

Andrea Wechsler describes WIPO's global copyright priorities and developments during the year 2013 and provides a detailed examination of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled. She illustrates recent developments from the fields of trademarks, patents, innovation and developing policies to environmental and anti-piracy policies. *Andrea Wechsler's* analysis of the new Marrakesh Treaty sheds light on the treaty's backgrounds and objectives and emphasises the paradigm shift that it presents through the introduction of mandatory ceilings rather than minimum exceptions with regard to copyrights.

After book reviews by *Wolfgang Weiß*, *Christian Pitschas* and *Christian Tams*, we have introduced a new section with new publications in the field of international economic law.

This volume could not have been put together without the help of numerous people. Our thanks go once more to Dr. Brigitte Reschke of Springer and her team. Evin Dalkilic and Dr. Stephanie Weitendorf took care of the editing, the list of contributors, etc. Many thanks for the fantastic job.

Passau, Germany — Christoph Herrmann
Erlangen, Germany — Markus Krajewski
Lüneburg, Germany — Jörg Philipp Terhechte

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List of Contributors

Jan Bohanes is Senior Counsel at the Advisory Centre on WTO Law, where he acts as a legal counsel to developing country governments on all matters of WTO law. He also represents ACWL member governments in WTO dispute settlement proceedings and participates in capacity-building activities in Geneva and abroad. He previously worked as an advisor to judges of the WTO Appellate Body and spent several years in private legal practice at the Geneva office of the law firm Sidley Austin. He has also worked in the Southern African region, advising governments on their regional economic integration efforts. He teaches international trade law, among others, at the University of Barcelona and is a regular speaker at conferences on international trade law matters. He is a member of the New York Bar. A more detailed biography, including a comprehensive list of publications, can be found at http://www.acwl.ch/e/about/staff_bohanes.html.

Julien Chaisse is Associate Professor at the Chinese University of Hong Kong (CUHK) and Director of the Center for Financial Regulation and Economic Development (CFRED). Julien Chaisse is an award-winning specialist in international economic law, with particular expertise in the regulation and economics of foreign investment. Apart from his academic activities, Julien Chaisse is the World Trade Advisors' Chief Legal Counsel and Director of World Trade Advisors International Trade Law Group. He regularly serves as a consultant to international organisations, governments, private investors, and multinational law firms regarding cutting-edge issues related to international economic law.

Won-Mog Choi is Professor of International Trade Law and Director of the WTO Law Center, Ewha Womans University School of Law at Seoul. He is also a member of the editorial board of many journals, including the Journal of International Economic Law (Oxford), the Law and Development Review, and the Indian Journal of International Economic Law, and a member of the New York Bar. Professor Choi received his legal education in the United States (Georgetown Law, S.J.D. and LL.M.) and Korea (Seoul National University, M.P.A. and LL.B.). Prior to joining the faculty of Ewha, he worked for the Ministry of Foreign Affairs

and Trade of Korea for 11 years as a diplomat and legal officer in charge of numerous trade issues, including WTO dispute settlements, trade remedy issues, and FTAs. Currently advising the Korean Government on trade law and policy issues and working as a columnist of major newspapers in Seoul, Professor Choi has actively published books and articles.

Shotaro Hamamoto is Professor of International Law at the Kyoto University and Professeur invité, Paris I (2009) and Sciences Po de Paris (2012). He holds an LL.B. (Kyoto) and an LL.M. (Kyoto), as well as a Docteur en droit (Paris II). He has served as Counsel and Advocate for the Japanese Government in Whaling in the Antarctica (ICJ, Australia v. Japan, New Zealand intervening, 2010-), Hoshinmaru (ITLOS, Japan v. Russia, 2007), and Tomimaru (ITLOS, Japan v. Russia, 2007) and as Assistant for the Spanish Government in Fisheries Jurisdiction (ICJ, Spain v. Canada, 1997–1998). He is a Japanese Representative to the UNCITRAL WG II (Arbitration/Conciliation) (2010-) and to the OECD Investment Committee (2011) and has served as an Arbitrator, Japan Sports Arbitration Agency (2008-). His fields of research include theory of international law, international dispute settlement, law of the sea, international investment law, international sports law, and institutional law of the European Union.

Robert Howse received his B.A. in philosophy and political science with high distinction, as well as his LL.B. with honors, from the University of Toronto, where he was coeditor-in-chief of the Faculty of Law Review. He also holds an LL.M. from Harvard Law School. Robert Howse has been a Visiting Professor at, among other institutions, Harvard Law School, Tel Aviv University, the Hebrew University of Jerusalem, and the University of Paris 1 (Pantheon-Sorbonne). His books include Leo Strauss - Man of Peace (2014, Cambridge University Press), The Regulation of International Trade (with Michael Trebilcock and Antonia Eliason, fourth edition, 2013), and The WTO System: Law, Politics, and Legitimacy (2007). He is also a co-translator and principal author of the interpretative commentary Alexandre Kojeve, Outline of a Phenomenology of Right (2000). Robert Howse has been a frequent consultant or adviser to government agencies and international organisations such as the OECD, UNCTAD, and the Inter-American Development Bank. He has also been a consultant to the investor's counsel in a number of investor–State arbitrations. Howse is a member of the Board of Advisers of the NYU Center for Law and Philosophy. He serves in the editorial advisory boards of the London Review of International Law, The Journal of World Investment and Trade, Transnational Legal Theory, and Legal Issues of Economic Integration. He is a co-founder of the New York City Working Group on International Economic Law.

Locknie Hsu is Associate Professor and former Associate Dean at the School of Law, Singapore Management University. After completing her LL.B. studies at the top of her class at the National University of Singapore, she practised with a law firm in Singapore before proceeding to receive an LL.M. degree at Harvard University. She specialises in international trade and investment law, related public

health issues, and dispute settlement mechanisms. She currently teaches trade and investment law, which focuses on WTO disputes and investment treaty arbitrations. She has published widely on trade and investment law, treaty dispute settlement mechanisms, arbitration law, and sovereign wealth funds and has spoken at numerous international conferences and training workshops for officials.

Joy Kategekwa is an investment and trade law specialist with over 10 years of professional experience in trade negotiations, legal advisory to developing countries in negotiations, training, and analytical research. She currently works in the WTO's unit for least developed countries, where she leads the organisation's support to African delegations in the DDA negotiations. She also services negotiations on strengthening special and differential treatment provisions in the special session of the Committee on Trade and Development. She received her Ph.D. in Law from the University of Berne, her LL.M. in International Trade and Investment Law from the University of the Western Cape and her LL.B. from Makerere University. Her research interests lie in international and regional trade in services and the links between trade and development.

Nikita Lomagin is Professor of Global Economics in the Department of Economics at Saint Petersburg State University. He holds degrees in history and law (St. Petersburg State University) and a Doctor of Science in History (Russian Academy of Sciences). He teaches courses on international organisations, international economic law, energy security, IR theory, and foreign policy analysis. He has published numerous articles, chapters, and books, as well as edited volumes.

Timothy Lyons QC, Barrister, practises as a lawyer advising and representing businesses, governments, and individuals from around the world in relation to tax, customs, and trade law matters. A substantial proportion of his work involves EU law generally, and he has appeared in the Court of Justice of the EU as well as in courts at every level in the UK. He has published widely, and his book EC Customs Law (Oxford University Press) is highly regarded as a standard textbook. He is a Visiting Professor at the London School of Economics and Porto University.

Gracia Marín Durán is Lecturer in International Economic Law and Director of the LL.M. Programme in International Economic Law at the University of Edinburgh School of Law. Her research interests lie generally in WTO law (with a specific focus on the balance between trade liberalisation and environmental/public health protection, development issues, and regional integration), as well as in the law of the EU external trade and sustainable development policies. Her recent publications have focused on the use and promotion of regulatory standards in the EU's external economic policies, as well as on the balance between trade liberalisation and other public policy objectives under the WTO Agreement on Technical Barriers to Trade. Prior to joining the academia in February 2011, she served as trade officer at the Delegation of the European Union to the Republic of South Africa (2009–2011) and worked at the Legal Affairs Division of the World Trade Organization (2007).

Nikolay Mizulin is Partner of Mayer Brown Europe–Brussels LLP. He advises clients on all aspects of international and EU trade law, with particular emphasis on trade remedies, WTO dispute settlement, trade negotiations, and customs. He has been involved in several high-profile WTO disputes, providing assistance to governments as well as the private sector.

Christian Pitschas is an attorney-at-law based in Geneva and specialises in international trade/WTO and EU regulatory law. He studied law at the Free University of Berlin and the University of Geneva. He subsequently obtained an LL.M. degree at the University of Georgia School of Law focusing on international trade law and was funded by a Fulbright scholarship. He also wrote a doctoral thesis on the international responsibility of the European Community for breaches of international obligations. Prior to opening his office in Geneva, he worked with a major international law firm in Brussels. Before that, he was a lecturer in EU and public international law at the Free University of Berlin and law clerk at the Court of Appeals in Berlin.

Akbar Rasulov teaches international law at the University of Glasgow. He holds degrees from the University of World Economy and Diplomacy (Uzbekistan), the University of Essex, the University of Hull, and Harvard Law School. He joined the Uzbek Bar in 2003. His main research interests include international law (mainly international law and development, international law of nationalism, and international public order), legal theory, and law and economics.

Karolyn Salcedo works as Technical Attaché at the World Customs Organization in Brussels. Prior to that, she was a legal officer at the Legal Department of the Directorate-General of Customs of the Dominican Republic, where she provided legal advice on trade and customs matters. She is a former seconded staff member at the Advisory Centre on WTO Law (ACWL). Previously, Karolyn Salcedo was in private practice in the Dominican Republic, focusing on corporate affairs and intellectual property. She holds a law degree from the Pontificia Universidad Catolica Madre y Maestra in Santo Domingo, Dominican Republic, as well as an LL.M. in International Economic Law and Policy (IELPO) from the University of Barcelona, Spain. She is admitted to legal practice in the Dominican Republic.

Christian J. Tams is Professor of international law at the University of Glasgow. He is a qualified German lawyer and holds LL.M. and Ph.D. degrees from the University of Cambridge. His research focuses on the law of State responsibility, international investment law, and questions of dispute settlement. In addition to his academic work, he has advised States in proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea. He is a member, *inter alia*, of the German Court of Arbitration for Sports, the ILA Committee on Non-State Actors, and the scientific council of the United Nations Association (Germany). More information can be found at http://www.gla.ac.uk/schools/law/staff/christiantams.

Catharine Titi is Postdoctoral Research Fellow at the University Panthéon-Assas Paris 2. She holds a Ph.D. in Law from the University of Siegen, in Germany, and has completed earlier studies in Greece, France, and the United Kingdom. She also holds a postgraduate qualification from the Courtauld Institute of Art, London, and has previously worked in management consulting for PwC, UK. She has published in a variety of academic journals in English and French on international investment law and investment arbitration and has contributed to edited volumes, such as the Yearbook on International Investment Law & Policy (Oxford University Press). Her monograph on The Right to Regulate in International Investment Law was published in 2014 by Nomos and Hart Publishing.

Andrea Wechsler is Full Professor of Economic Law at Pforzheim University (Germany), Visiting Professor at Hanken School of Economics (Finland), and Affiliated Research Fellow at the Max Planck Institute for Intellectual Property and Competition Law (Germany). Her main research interests are international, European, and Asian economic law and its theory; international trade; trade agreements; business transactions; international commercial arbitration and mediation; law and technology; as well as (comparative) legal method and the economic analysis of the law. She has published and taught extensively in the areas of international economic law, intellectual property and competition law, Chinese law, and the economic analysis of said fields. Prior to joining Pforzheim University, Andrea Wechsler was Assistant Professor at Hanken School of Economics (Finland). Before moving to Finland, she was both Max Weber Fellow at the European University Institute (Italy) and Schöller Fellow at the Dr. Theo and Friedl Schöller Research Center for Business and Society (Germany). Before joining the European University Institute, Andrea Wechsler worked both as Research Fellow at the Max Planck Institute for Intellectual Property and Competition Law and Coordinator of the International Max Planck Research School for Competition and Innovation (IMPRS-CI). Further work experience includes management consulting, court clerking at the European Court of Justice in the Chambers of Judge Ninon Colneric, and lecturing in the China-EU School of Law. Andrea Wechsler holds the following degrees: an M.A. in Jurisprudence from the University of Oxford; an LL.M. from Columbia University School of Law, including the Parker Certificate of Achievement in International and Comparative Law; an LL.M. from the Ludwig Maximilians University Munich; and a Ph.D. from the Ludwig Maximilians University Munich. She also holds a Chinese language diploma from Beijing University.

Wolfgang Weiß born in 1966, studied law and economics at the University of Bayreuth (Germany), where he also received his doctorate in law and his Habilitation. He holds a Chair in Public Law and Public International Law at the German University of Administrative Sciences in Speyer. Besides, he is affiliated with Oxford Brookes University, where he was a Reader and Professor previously. Wolfgang Weiß' main research areas are public international law and WTO law, European constitutional and administrative law, and German public law.

Chien-Huei Wu is currently Associate Research Professor in Academia Sinica, Taipei, Taiwan. He received his Ph.D. degree at the European University Institute, Florence, in 2009. Before pursuing his doctoral degree in Florence, he worked for the Ministry of Justice in Taiwan as a district attorney. In 2011–2012, he advised the Ministry in drafting prisoner transfer legislation in Taiwan with a view to facilitating the prisoner transfer between Taiwan and China, and Taiwan and Germany. He also regularly advises the Ministry of Economic Affairs and Ministry of Health and Welfare on trade and public health issues. His research interests cover EU external relations law and international economic law. He follows closely EU–China and EU–ASEAN relations and pays particular attention to Asian regionalism and WTO–IMF linkage. He has published a monograph by Martinus Nijhoff entitled "WTO and the Greater China: Economic Integration and Dispute Resolution."

Huijian Zhu is an Associate Researcher at the Institute for European Studies, Brussels. Previously, he worked as a barrister and member of Mayer Brown's Government & International Trade group in Brussels, focusing his practice on trade remedies, litigation before the EU courts, and WTO dispute settlement.

Part I
Topics

Distinguished Essay: Non-tariff Barriers and Climate Policy: Border-Adjusted Taxes and Regulatory Measures as WTO-Compliant Climate Mitigation Strategies

Robert Howse

Introduction

Is it legal or legitimate in the multilateral trade regime for a State to take unilateral measures against the failure of other States to regulate carbon emissions? Everyone agrees that unilateral action is a second best to a comprehensive multilateral approach. Yet, as the impasse in the Kyoto process illustrates, collective action problems have plagued the effort to achieve such an approach. Leading economists, such as Joseph Stiglitz, have suggested that unilateralism is far better than doing nothing in the presence of a critical and urgent global challenge.[1]

The prospect of unilateral action creates a new set of costs for States that are holding out in multilateral fora and thus increases the incentives on these States to work toward a cooperative outcome. For the states taking unilateral action on the other hand, the incentives nevertheless remain strong to favour cooperation. Unilateral approaches, while significantly contributing to reductions in emissions, do not reach those emissions unconnected to goods and services traded with the countries taking unilateral measures, whereas a multilateral approach would do so, leading to far greater reductions.

The threat of unilateral action makes it most costly for a State to adopt a hold-out strategy in multilateral fora dealing with climate mitigation, free riding on the efforts

This paper, primarily addressed to non-WTO specialists, draws on my more technical and extensive analysis of these issues in a coauthored work with Antonia Eliason. I also draw on my epilogue to Bartels, The Inclusion of Aviation in the EU ETS: WTO Law Considerations, ICTSD Issue Paper No. 6 (2012).

[1] Stiglitz (2006), p. 1.

R. Howse (✉)
NYU School of Law, 40 Washington Square South, Room 314J, New York, NY 10012, USA
e-mail: howserob@gmail.com

C. Herrmann et al. (eds.), *European Yearbook of International Economic Law 2015*,
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of others. Hence, not surprisingly, hold-out States have attempted to draw a line in the sand concerning unilateralism, relying on various arguments and concepts that are assumed to have a legal foundation. The basic claim is that States may not unilaterally regulate global environmental externalities, except to the extent that these externalities are also local ones, occurring within their territorial boundaries. This paper focuses largely on those legal arguments that invoke the rules of the World Trade Organization, embodied in treaties such as the General Agreement on Tariffs and Trade (GATT),[2] the General Agreement on Trade in Services (GATS),[3] and the Agreement on Technical Barriers to Trade (TBT).[4] Here, the GATT in particular will be emphasised in working through the issues, because the conceptual challenges are similar with GATS and TBT, as they have been interpreted in recent jurisprudence. However, since treaties such as these are to be interpreted in light of general international law, the paper will also consider claims that the kind of unilateral action in question violates customary international law norms concerning extraterritoriality. The paper will argue that border carbon adjustment measures can be designed in such a way as to be WTO compliant and will provide a guide to which design features will contribute to WTO compliance and which might compromise it.

Internalising global externalities means requiring that, through tax or other border carbon measures, climate externalities are attributed to goods and services produced in whole or in part in jurisdictions that do not regulate or underregulate carbon emissions. This is economically rational and environmentally desirable (as a second best option). As Helm et al. summarise, the lack of a carbon price "effectively comprises an implicit subsidy to dirtier production in non-regulated markets [. . .]. Free trade can reduce welfare when there is a global externality that has not been internalized" [references omitted].[5]

Such measures could undermine the contrary policies of countries that have chosen to "subsidise" economic growth and development by not making producers pay for the global environmental externalities that their economic activities generate. The countries in question often characterise such policies as their sovereign right, balancing environmental and growth concerns as they think is best for that society. But, of course, it is one thing to subsidise domestic economic development; it is another thing to do so at the expense of the global commons, imposing a large part of the costs on the rest of the world and distorting the allocation of productive resources not only domestically but globally.

At this point, the argument moves from sovereignty to historical equity: it is claimed that today's developed countries achieved economic progress for over a century by doing just this. Therefore, it is a matter of fairness now to allow today's developing countries to pursue such policies, despite the cost to the global public

[2] General Agreement on Tariffs and Trade 1947, 55 U.N.T.S. 194, incorporated by reference into the General Agreement on Tariffs and Trade 1994, 1867 U.N.T.S. 187.

[3] General Agreement on Trade in Services, 1869 U.N.T.S. 183.

[4] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120.

[5] Helm et al. (2012), p. 368 (370–372).

good. This argument is in part reflected in the concept of differentiated responsibilities in the Kyoto climate regime, although it is more often used to excuse holding out from responsibilities altogether. But how sound is the argument? Today's developed countries also built their economies in prior centuries through military aggression, colonial oppression, and slavery. Yet one does not hear arguments that historical equity means permitting such practices now so that developing countries can catch up. This is *not* by any means to dismiss arguments in global justice that developing countries may be entitled to *redistributive* measures to assist them in *meeting* climate mitigation responsibilities, such as climate finance, technology transfer, and so on.

Classifying Border Carbon Adjustment Measures

Helm et al. distinguish between three types of border carbon adjustment (BCA) measures: "(i) border taxes (as tariffs on imports and, less commonly, rebates on exports); (ii) mandatory emissions allowance purchase by importers; and (iii) embedded carbon product standards [reference omitted]. In every case the objective is to extend a domestic carbon pricing scheme to traded goods."[6]

Before beginning our analysis of the legal issues under the WTO, it is worthwhile considering the ways in which border carbon adjustment can have positive environmental and economic impacts:

As a second-best to a global carbon price, BCA will reduce *some* of the distortion in prices caused by the failure to internalise the costs of carbon emissions in other jurisdictions. It will thus lead to somewhat more efficient consumption and production decisions, with the positive effect of relatively less consumption of "dirty" products and relatively more of "clean" ones.

BCA can counter some of the effects of so-called carbon leakage. Carbon leakage occurs where a country introduces measures to internalise carbon externalities associated with domestic production, with the result that firms shift production to jurisdictions that do not require internalisation. In some scenarios, "carbon leakage" can actually result in domestic measures to internalise carbon externalities *adding to* rather than reducing global carbon emissions (for example, where the shift in the location of production results in greater output in the "dirty" jurisdiction). Using a newly developed general equilibrium model, Elliott et al. estimate that adding border adjustment to a domestic carbon tax would eliminate approximately 50 % of carbon leakage.[7]

BCA may have the dynamic effect of inducing the exporting State to introduce its own measures internalising the carbon externalities of its exports, so they are not

[6] Helm et al. (2012), p. 368 (369).

[7] Elliott et al. (2010), p. 465.

subject to the BCA of the importing country. Helm et al., using a game-theoretic model, suggest that this effect is indeed plausible, as the exporting country government would benefit from collecting the revenue from producers rather than letting the importing country do so.[8]

As already noted, BCA reduces the extent to which "hold out" States in multilateral climate negotiations can free ride; it thus increases the likelihood that such States will ultimately decide to cooperate. On the other hand, in the case of the States imposing the BCA, the incentive to cooperate remains strong since a BCA can only internalise a certain portion of externalities in other jurisdictions, those associated with imported products, and thus is very much a second best to a multilateral cooperative solution.

Finally, a BCA can address the loss of competitive advantage to domestic producers from the burden imposed upon them to internalise externalities, where they are competing with producers from jurisdictions that do not do so. While often stated as a political goal of BCA, this goal is not (as an end in itself) compatible with the principles of free trade upon which the WTO is based. However, to the extent that loss of competitive advantage leads to carbon leakage—relocation to another jurisdiction that is nonregulating—the ultimate aim is not fair trade or a level playing field but avoiding the harmful environmental effects associated with carbon leakage.

Border Adjustment of a Domestic Carbon Tax Under WTO Rules

Where the underlying measure internalising carbon externalities is a *tax* applied to domestic production, the WTO rules concerning the border adjustment of the measure are quite clear. The border adjustment will be explicitly permissible under the GATT where (1) it is in the form of "a charge equivalent to an internal tax" and (2) the charge is imposed consistently with the general rules of the GATT concerning nondiscrimination in taxation between domestic and imported products (GATT, Article II:2(a)). These principles apply regardless of whether the tax is imposed with respect to the product itself or an input into the product.

A red herring that has sometimes been introduced into discussions of the application of these rules to border carbon adjustment is the notion that the rules only apply where what is taxed is some input physically incorporated into the product and that carbon is not such an input. An example of this red herring is the analysis in a recent paper published by the WTO Secretariat: "Even if a precedent may exist for taxing inputs that are not physically incorporated, GHG emissions are not an input but an output."[9] This is a mere semantic confusion that plays on the

[8] Helm et al. (2012), p. 368 (386).

[9] Low et al. (2011), p. 8, n. 9.

frequent use of the phrase "carbon tax," which suggests that what is taxed is the carbon itself rather than *products* the consumption or production of which results in *carbon externalities*. But, of course, strictly speaking, as a legal or administrative matter, the tax is *applied* to products or inputs in products, which are traded across borders, and not the actual emissions. The important point is that the WTO rules do not restrict the *policy purposes* of taxes that are eligible for border adjustment, with one exception: the rules on nondiscrimination necessarily exclude taxes that have the purpose of discriminating against imports (i.e., protecting domestic producers).

In the GATT *Superfund* case, the Panel found to be GATT consistent a border adjustment that involved applying to imported substances a charge that was equivalent to a domestic US tax on the chemicals used in the production of the imported substances; the domestic tax was aimed at addressing the environmental externalities of the chemicals in question. The Panel held: "the tax adjustment rules of the General Agreement distinguish between taxes on products and taxes not directly levied on products they do not distinguish between taxes with different policy purposes. Whether a sales tax is levied on a product for general revenue purposes or to encourage the rational use of environmental resources, is therefore not relevant for the determination of the eligibility of a tax for border tax adjustment. For these reasons the Panel concluded that the tax on certain chemicals, being a tax directly imposed on products, was eligible for border tax adjustment independent of the purpose it served."[10] Mattoo and Subramanian misread *Superfund* as premised upon the notion that the inputs have been physically incorporated into the final product that is crossing the border.[11] But this consideration was never mentioned by the *Superfund* Panel, for the simple reason that it is irrelevant. As the language of the GATT Panel report indicates, the important consideration is that the tax is "directly imposed" on *products* at the border; the concern with *inputs* is simply a matter of the underlying policy purpose of accounting for the environmental externalities generated by the production of those inputs outside the US, and, again, as the Panel indicates, the policy purpose is irrelevant to determining eligibility for border tax adjustment. In sum, the legal reasoning of the Panel is lucid on its own terms and displays why the Panel did not consider it relevant to mention or address the consideration of the inputs being physically incorporated into the product that is taxed.

In the *Superfund* case, the complainant had argued that a border adjustment of an environmental tax was impermissible under GATT rules, unless the environmental externalities created by the taxed products occurred within the taxing jurisdiction. The European Economic Community considered this to be an implication of the polluter-pays principle. However, the Panel found that such a notion had no place in WTO law and that the imported substances could be border adjusted even if the chemicals used in their production created environmental externalities exclusively

[10] GATT, report of the Panel, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, BISD 34S/136, para. 5.24.

[11] Mattoo and Subramanian (2013), p. 7.

outside the United States.[12] An environmental tax can be border adjusted even if, in the case of the imported products, the externalities in question are created exclusively outside the taxing jurisdiction, *a fortiori* an environmental tax dealing with global carbon externalities (i.e., effects on climate change) must be, in principle, border adjustable.

This brings us to the general rules on nondiscrimination in taxation. Article III:2 of the GATT requires that (1) "like" domestic and imported products be taxed identically and (2) "directly competitive and substitutable" products be subject to similar taxation.

With respect to the obligation to tax identically "like" products, the WTO Appellate Body has held that the determination of "likeness" entails a case-by-case analysis of the physical characteristics of products, consumer tastes and perceptions, end uses, and customs classifications.[13]

Notably, the Appellate Body has also held, in the *EC – Asbestos* case, that the differing health effects of products may affect consumers' perceptions as to whether products are "like" or not. Recently, in reconsidering the criteria for likeness in the context of interpreting a nondiscrimination provision in a different treaty (the TBT Agreement), the Appellate Body reaffirmed "that regulatory concerns and considerations may play a role in applying certain of the 'likeness' criteria (that is, physical characteristics and consumer preferences) and, thus, in the determination of likeness under Article III:4 of the GATT 1994."[14] To the extent that consumers are concerned about climate change, or the kinds of impacts that climate change may have on their lives, it makes sense from this perspective to view products as "unlike" where they have different carbon footprints. Thus, whatever likeness means in Article III:2, it should not be interpreted so as to shut the door to using tax measures to internalise carbon externalities of imported products. In the recent *US – Tuna II* case, which concerned a US measure that, *inter alia*, prohibited the representation of tuna as "dolphin-safe" except for the use of label where specific criteria were enforced by the US government to determine dolphin safety, the determination under the national treatment obligations of the WTO TBT Agreement of whether the US measure was "even-handed" was unaffected by the fact that the measure entirely concerned production methods for tuna that did not affect its physical characteristics. The TBT Agreement defines "technical regulations" to include processes and production methods (PPM) that are "related" to characteristics of products; the Appellate Body did not consider it necessary even to address whether the US measure was a PPM in this sense, but it assumed that it was.

[12] GATT, report of the Panel, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, BISD 34S/136, para. 5.25.

[13] WTO, report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 20.

[14] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 117.

Obviously, the Appellate Body does not see the concept of product characteristics as in any way limited to physical characteristics.[15]

With respect to the obligation in Article III:2 to tax "directly competitive and substitutable products" not dissimilarly, in the *Canada – Renewable Energy* case, the Appellate Body observed: "What constitutes a competitive relationship between products may require consideration of inputs and processes of production used to produce the product."[16] Notably, there was no qualification or limitation to those inputs or processes of production that affect the physical characteristics of the product.

Thus, neither the requirement to tax "like" products the same, nor that similar taxation of "directly competitive and substitutable products" prevents a WTO member imposing a tax at the border that accounts for the carbon externalities created by the production of the imported product. These disciplines do, however, have important implications for the *design* of a border carbon adjustment tax.

If the underlying regulatory consideration motivating the tax is climate change mitigation, then Article III:2 of the GATT would normally require that a domestic product and an imported product be taxed the same to the extent that they have the same carbon footprint. Leading proposals for domestic carbon taxes typically stipulate that the domestic tax is imposed on fossil fuels themselves and not on finished products the production of which has involved emissions from the consumption of fossil fuels.[17] In order for like products to be taxed identically, the domestic tax on

[15] Cf. WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R.

[16] WTO, report of the Appellate Body, *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS426/AB/R/; WTO, report of the Appellate Body, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/AB/R, WT/DS426/AB/R, para. 5.63.

[17] The Carbon Tax Center provides a summary of current and past proposals for carbon pricing. Two carbon-pricing schemes have been proposed during the first session of the 113th Congress. First, the Sanders-Boxer "Climate Protection Act" was introduced on 14 February 2012. The Act proposes a carbon tax of $20 per ton of CO_2 content, rising 5.6 % annually over a 10-year period. The Act also contains border-adjusting provisions: § 196(a) imposes a fee "on any manufacturer, producer, or importer of a carbon polluting substance." Second, the House Progressive Caucus has recently introduced a carbon tax in its 'Back to Work' Budget proposal, which contains a $25 per ton price on CO_2, also increasing at 5.6 % per year.

Previous legislative sessions have considered a range of climate pricing schemes, from carbon taxes to border-adjusting cap-and-trade proposals. The "Save Our Climate Act of 2009" (H.R. 594) would have imposed a carbon-content tax starting at $10 per ton of CO_2 and increasing by $10 every year. The "America's Energy Security Trust Fund Act of 2009" (H.R. 1337) contained both a carbon-content tax on fossil fuels starting at $15/ton of CO_2, increasing by $10 each year, and border adjusting measures in § 4693, which would have imposed a carbon equivalency fee on imports of carbon-intensive goods from noncarbon taxing nations. The "Raise Wages, Cut Carbon Act of 2009" (H.R. 2380) included an upstream carbon tax starting at $15 per ton of CO_2, which would have risen to $100 in 30 years; the Act imposed an equivalent tax on imports and credits for exports. The "American Clean Energy and Security Act of 2009" (H.R. 2454) included a cap-and-trade proposal aimed at reducing U.S. carbon emissions by 17 % by 2020 and 83 % by 2050. The bill also included provisions to "prevent an increase in greenhouse gas emissions in countries other

fossil fuels must be calibrated with the border adjustment on finished products such that, for example, an imported ton of steel that has a given carbon footprint is taxed identically to a domestic ton of steel with the same carbon footprint. So let's say that the domestic tax is based on assumptions that burning quantity *x* of coal produces *y* level of emissions; on this basis, the tax is set at amount *z* per ton of coal. A border adjustment consistent with Article III:2 of the GATT would entail determining what quantity of coal is "embedded" in the finished product. One way of doing this is to make certain assumptions about production processes. For a product that has many stages of production, this is a complex undertaking, especially if some of these stages have occurred in different jurisdictions. The national treatment obligation of the GATT applies to each individual imported product in competitive relationship to a domestic product and is not satisfied merely by the application of a criterion that may be even-handed in general or across the board as between domestic and imported (*US – Section 337* case) products.[18] If a particular imported product has been produced using energy-efficient or clean technology, it may have a better carbon footprint than would be indicated using rough assumptions about what level of emissions is required to produce a given quantity of that product. This difficulty is not even solved if the domestic tax is designed as a consumption tax on finished products because the amount of carbon emitted used to produce a car in the US, for instance, may be higher than that emitted to produce a competing or "like" car in Germany or Japan. Determining the baseline using assumptions about typical domestic production processes would likely violate the requirement of national treatment in Article III:2 of the GATT. In a very different context, a GATT Panel considered a claim that setting a minimum price for beer by Canadian provincial authorities violated the national treatment obligation of the GATT (in this case with respect to regulatory measures rather than taxation); a violation was found on the ground that the minimum price had been set on the basis of the production costs of major Canadian producers and thus disadvantaged imported beer that was produced more efficiently.[19]

An attractive solution would be to give the producer of an imported product the option to establish the actual amount of carbon emitted in the production of the product using any scientifically sound methodology; in such a case, the tax would be calculated based on this figure rather than a baseline informed by the importing member's general assumptions concerning production processes for the product in question.

Alternatively, Mattoo and Subramanian suggest that the exporting country be given the opportunity to impose export taxes based upon the carbon intensity of the

than the U.S." by requiring importers of certain products to purchase emission allowances. For an additional summary and comparison of recent and current proposals, see Carbon Tax Center (2013).

[18] GATT, report of the Panel, *United States – Section 337 of the Tariff Act of 1930*, L/6439, BISD 36S/345.

[19] GATT, report of the Panel, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, DS17/R, BISD 39S/27.

exported products. Such taxes are, generally speaking, legal under the WTO framework. This might be attractive to the exporting country since in this scenario, it receives the taxation revenue that might otherwise be collected by the importing country. One difficulty with a carbon border tax adjustment scheme that provides an exception for States that implement instead an equivalent carbon export taxation scheme is that some WTO members, most notably China, have bound themselves not to apply export duties as a condition of accession to membership in the WTO.

It might constitute a violation of the most-favoured-nation (MFN) obligation in the GATT or the TBT Agreement to have an exemption that as a legal matter only some WTO members are able to take advantage of. In the *China – Raw Materials* case, the Appellate Body held that at least in the case of China's protocol of accession to the WTO, the Article XX exception could not be used to justify a departure from the undertaking not to impose export duties.[20]

Border Adjustment of Regulatory Measures

So far in the WTO, the concept of border adjustment has been given a legal meaning only in the context of taxation measures. As we saw already with the *Superfund* case in the GATT, the dispute settlement system had no difficulty applying border adjustment in an environmental policy context, where the underlying measure was a tax. However, the one existing operational border adjustment scheme, the aviation regulations of the European Union Emissions Trading System (ETS), temporarily suspended pending a possible multilateral solution at ICAO, applies to regulatory measures not taxation: the ETS requires that carbon allowances be obtained (by being either granted or purchased) in respect of emissions from aircraft taking off and landing on the territory of the EU, even if the emissions have in large part occurred in airspace outside the EU, and this applies to both European and non-European airlines. While the WTO issues posed by the ETS are to some extent issues under the GATS not the GATT as the service of air transportation is affected, to the extent that the measure affects the relative cost of transportation of imported goods, the nondiscrimination provisions of the GATT may also be implicated. Article III:4 of the GATT requires "no less favourable" treatment of imported products than that accorded "like" domestic products. The same considerations in determining likeness apply to Article III:4 as to III:2 GATT. But it will be noted, and it has been emphasised by the WTO Appellate Body, that "no less favourable" treatment is not the same as *identical* treatment. This is an important difference between nondiscrimination in the case of taxation measures versus regulatory measures. Nonidentical treatment is permitted in the case of regulatory measures, provided the treatment is even-handed as between domestic and

[20] WTO, report of the Appellate Body, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R.

imported products. One of the clearest articulations of the meaning of treatment no less favourable is to be found in the Appellate Body opinion in the *Dominican Republic – Cigarettes* case. There, the Appellate Body held: "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favorable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case."[21]

As the Appellate Body more recently noted in the *US – Clove Cigarettes* report, in *Dominican Republic – Cigarettes*, the higher cost imposed on importers "did not conclusively demonstrate less favourable treatment, because it was [. . .] a function of sales volumes."[22] This jurisprudence is reinforced by the recent case law of the WTO Appellate Body concerning the national treatment obligation in the TBT Agreement, where the Appellate Body emphasised that even where the measure, due to its design, had a detrimental impact on imported "like products," this impact would not constitute impermissible discrimination if it could be "exclusively" attributed to a "legitimate regulatory distinction."[23]

This suggests that where a measure with border adjustment imposes a regulatory burden on imports that is commensurate with the magnitude of the carbon externalities associated with the imported product, it is likely to be considered consistent with Article III:4 GATT. This would be the case even if a like imported product, coming from a high-emitting country, would have to present more allowances than a like domestic product; there is no discrimination because the greater regulatory burden is simply due to the larger quantity of carbon embedded in the product.

The difficult issue of regulatory design emerges where the domestic measure (for example, cap and trade) applies not to finished products but to production facilities. The methodology for calculating the quantity of carbon embedded in a given finished product would have to be such that it does not impose a disproportionate burden on imported products. This is not in principle difficult in the case of what is referred to in some literature as primary direct carbon.[24] Take the example of steel. Both a domestic producer and a foreign producer burn coal in order to produce steel. The domestic producer's regulatory burden is calculated in terms of its level of emissions, but with some information and a little arithmetic it is possible to estimate the additional cost per ton of steel that is represented by the requirement to present allowances in respect of the quantity of carbon emitted by the production facilities. For the border adjustment to be even-handed as required by GATT

[21] WTO, report of the Appellate Body, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, para. 96.

[22] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, T/DS406/AB/R, para. 179, n. 372.

[23] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, T/DS406/AB/R, para. 181. Now In *EC-Seal Products*, however, the AB has rejected the application of this approach to GATT III:4.

[24] Elliott et al. (2010), p. 465.

Article III:4, it would merely be necessary to ensure that the measure imposed on imported products at the border does not exceed this cost to domestic producers. Where, however, the carbon is embedded downstream, so that under the domestic scheme the allowances are required, for example, of the producer of an input purchased by the steel manufacturer, or of a utility that generates the electricity that the manufacturer of the steel purchases, the issue is more complicated. Depending upon elasticity, one may well predict that less than the full additional cost of the allowances will be passed on to the steel producer in higher prices for inputs or electrical power. It is thus a challenge to ensure that the amount of allowances that is required of imported products at the border does not result in a higher regulatory burden (i.e., greater additional cost per unit) for the producers of those finished products than for domestic producers of like finished products.

A different challenge for designing an even-handed border adjustment of a regulatory measure occurs where the domestic regulatory measure includes exemptions or special treatment for particular domestic industries or provides for certain quantities of free allowances. It is necessary to design the border adjustment such that domestic finished products are not advantaged over imports by these features of the underlying domestic emission control scheme.

In addition, as with carbon taxes, it is possible that using domestic baselines to determine the carbon embedded in imported finished products subject to border adjustment could result in discrimination if foreign production processes are different in such a way that the actual amount of embedded carbon in the imported product is less. Thus, again here, a BCA scheme should permit the producer of the importer product to provide information about actual embedded carbon as a basis for the calculation of the border adjustment. Finally, no matter how carefully some of the suggestions for regulatory design presented above are followed, there will be inevitably some asymmetry in the treatment of domestic and foreign products by virtue of the underlying domestic measure having a different design than the border adjustment applied to finished products. This is not fatal, however, to the effort to design a WTO-compliant BCA with respect to regulatory measures. As noted, in recent jurisprudence clarifying the meaning of "treatment no less favourable" in the context of the nondiscrimination provisions of the TBT Agreement (*US – Cloves*, *US – Tuna II*), the Appellate Body has held that there is no violation of national treatment where a negative differential impact on "like" imported products can be attributed exclusively to a "legitimate regulatory distinction."[25] Thus, negative asymmetry of treatment that can be shown to be an inevitable consequence of the operation of the scheme given its legitimate regulatory purposes will not result in a breach of Article III:4 GATT. Again, it should be recalled that in the *Superfund* case, the GATT Panel had no difficulty accepting the legality under the GATT of

[25] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R; WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R. This analysis was drafted before the AB ruling in *EC-Seal Products* and may now require reconsideration.

border adjustment in the context of a scheme to internalise environmental externalities, even if the externalities occurred outside the territory of the State imposing the measure.

Designing a Border Carbon Adjustment That Is Defensible Under the Exceptions in the GATT

The complexities in designing a BCA that ensures compliance with the national treatment obligations of the GATT, discussed above, suggest that it is also desirable to design a BCA with a view to being able to defend it as an exception under Article XX of the GATT, the general exception provision. Article XX(g) provides an exception to GATT disciplines for measures taken "relating to the conservation of exhaustible natural resources" provided that these are taken in conjunction with restrictions on domestic consumption and production (as interpreted by the Appellate Body, a kind of loose even-handedness requirement).

Based on the broad and evolutionary meaning of "exhaustible natural resources" adopted by the Appellate Body in *Shrimp-Turtle*, which incorporates contemporary conceptions of biodiversity and sustainable development, it is unlikely to be controversial that the earth's atmosphere constitutes an "exhaustible natural resource."[26] In a case not dealing with climate change, *Brazil – Tyres*, the Appellate Body used climate change as an example of a regulatory area where it might be necessary to give particular deference to a WTO member's choice of policy instruments under Article XX of the GATT because the results from a particular policy instrument may not easily be known *ex ante* but only be capable of evaluation over a long period of time (*Brazil – Tyres*).[27] In the passage in question, the Appellate Body essentially took judicial notice of climate change as a fact. This suggests that any effort on the part of a complainant against the BCA to challenge the scientific basis for climate mitigation would be futile.

In the *US – Shrimp* case, the Appellate Body held that in order for a measure to be "in relation" to the conservation of exhaustible natural resources, it needed to be capable of making a contribution to conservation of the resource in question. The economic studies referred to earlier in this paper, among others, provide a more than adequate basis for the conclusion that a BCA will make a contribution to climate change mitigation. In *US – Shrimp*, however, the Appellate Body also created some confusion by raising but not clearly answering the question of whether a territorial nexus of some kind was required to justify a measure under Article XX GATT. The Appellate Body suggested that *if* it was required, the nexus was

[26] WTO, report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R.

[27] WTO, report of the Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, para. 151.

satisfied in that case by the fact that some of the endangered sea turtles being protected by the US ban on imports of shrimp fished in a manner that led to high rates of turtle mortality were present in US waters.

Conceptually, a territorial nexus should not matter where the resource being protected is in the nature of a global commons. Nevertheless, in challenging the application of the EU ETS to carbon emitted by aircraft outside of EU airspace before the European Court of Justice, the Air Transport Association, with Continental Airlines, United Airlines, and American Airlines, strenuously argued that the measure in question should be considered as extraterritorial in a manner contrary to customary international law.[28] But there is no clear agreed meaning to "extraterritoriality" in general international law, beyond the prohibition of the exercise of police power or use of military force on the territory of another State without its consent (of course with certain narrow exceptions such as self-defense). There is no question that intra-European effects from emissions are in question, at a minimum to the extent that climate change is a global problem with effects everywhere. Further, as pointed out in the advisory opinion of Advocate General Kokott and the ruling of the Court of Justice of the European Union, the extension of the EU ETS clearly has jurisdiction over aircraft taking off and landing in its territory and the implementation of its scheme in no way required the assertion of regulatory authority on the territory of other States.[29] In other words, there was no question of "long arm" jurisdiction.

The case law of the World Court, from the early case of *S.S. Lotus* to the *Nicaragua* decision, confirms that there is no general rule of customary

[28] The claimants argued that the inclusion of flights outside the EU airspace create "an exterritorial rule which contravenes, on the one hand, the sovereign rights of third countries and, on the other, the freedom of the high seas." ECJ, Case C-366/10, *The Air Transport Association of America and Others v. The Secretary of State for Energy and Climate Change*. Opinion by Advocate General Kokott, para. 143.

[29] In her advisory opinion, the Advocate General straightforwardly addressed the question of extraterritoriality: "The fact that the calculation of emission allowances to be surrendered is based on the whole flight in each case does not bestow upon Directive 2008/101 any extraterritorial effect. Admittedly, it is undoubtedly true that, to some extent, *account is thus taken of events* that take place over the high seas or on the territory of third countries. This might indirectly give airlines an incentive to conduct themselves in a particular way when flying over the high seas or [in] the territory of third countries, in particular to consume as little fuel as possible and expel as few greenhouse gases as possible. However, there is no concrete *rule* regarding their conduct within the airspace outside the European Union" [emphasis in the original]; see Case C-366/10, *The Air Transport Association of America and Others v. The Secretary of State for Energy and Climate Change*. Opinion by Advocate General Kokott, para. 147. In the judgment of the Court, the question of territoriality was further addressed: "In laying down a criterion for Directive 2008/101 to be applicable to operators of aircraft registered in a Member State or in a third State that is founded on the fact that those aircraft perform a flight which departs from or arrives at an aerodrome situated in the territory of one of the Member States, Directive 2008/101, inasmuch as it extends application of the scheme laid down by Directive 2003/87 to aviation, does not infringe the principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject

international law that prohibits unilateral economic measures, even those aimed at putting pressure on other States to change their policies.[30] Thus, the holding of the Appellate Body in the *US – Shrimp* case, emphatically reaffirmed in its Article 21.5 judgment concerning US implementation of the original ruling,[31] is consistent with general international law: "conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of [. . .] Article XX [GATT]."[32] More recently in the *US – Tuna II* case, Mexico attempted to persuade the Appellate Body that the US measure enforcing a particular label and criteria for representing tuna as "dolphin-safe" that excluded tuna caught in a manner permitted by Mexico but prohibited by the US was "coercive" of Mexican policies and thus could not be a "legitimate objective" for purposes of the measure being permissible under Article 2.2 of the TBT Agreement. The AB held that considerations of whether the measure was aimed at least in part at the policies of other States did not affect the legitimacy of its objective both in environmental and consumer protection terms. Features of the scheme that Mexico described as "coercive" might only have some relevance in evaluating the trade restrictiveness of the means adopted to achieve the legitimate US goals. In sum, it is clear that, whether under the GATT Article XX or TBT Agreement, there is no general obstacle to a WTO member taking unilateral action to address a situation where another State has failed to adopt in its policies appropriate climate mitigation measures.

The most important issues of regulatory design posed by Article XX GATT relate to the chapeau or preambular paragraph, which sets out certain general conditions for the application of a measure if it is to be justified under Article XX GATT. With respect to the requirement in the chapeau that the measure be not applied so as to result in arbitrary or unjustifiable discrimination between countries where the same conditions prevail, under the Appellate Body approach in *Shrimp – Turtle*, the question will be to what extent the scheme provides flexibility to achieve the environmental objectives in question through approaches that may differ from that of the importing State but may be more appropriate to the conditions in the exporting country. Here, BCA schemes that provide for the recognition of equivalent emission control measures in the exporting country as fulfilling the

on that basis to the unlimited jurisdiction of the European Union." ECJ, Case C-366/10, *The Air Transport Association of America, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc v The Secretary of State for Energy and Climate Change*, ECR [2011] I-13755.

[30] PCIJ, *The Case of the S.S. Lotus (Fr. v. Turk.)*, 1927, Series A, No. 10; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ Reports 1986.

[31] WTO, report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Art. 21.5 of the DSU by Malaysia)*, WT/DS58/AB/RW, para. 137 et seq.

[32] WTO, report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 121.

requirements of the BCA will likely be compatible with the conditions of the chapeau. Where such equivalent measures do not exist, assessing whether there is adequate flexibility under the chapeau requirement will involve complex judgments of environmental policy and science and also about administrability and the reasonableness of compliance costs both to the government and to the exporters, of various alternative ways of introducing flexibility.

The concern under the chapeau to avoid arbitrary or unjustifiable discrimination is closely related to some of the issues about even-handedness discussed above with respect to national treatment. Thus, for example, the calculation of embedded carbon based on assumptions that apply to domestic production processes but may not reflect conditions in other WTO members might well be inconsistent with the chapeau.

In the *US – Shrimp* case, the Appellate Body held that it was a violation of the chapeau that the US had made serious attempts to find a negotiated, cooperative solution to the problem of protecting sea turtles with some WTO members but not with the complainant States. Rather than simply being seen as a simple finding of discrimination between different countries, this aspect of the Appellate Body ruling was widely viewed as imposing, through the chapeau, a requirement that efforts at a negotiated, cooperative solution be exhausted before unilateral action can be justified under Article XX GATT. In a subsequent ruling, however, where the Appellate Body interpreted the equivalent provision to Article XX GATT in the GATS (*US – Gambling*), it clarified that there is no obligation whatsoever to attempt a negotiated solution, much less exhaust efforts at a cooperative approach, before a unilateral measure can be justified under Article XX GATT.[33]

Conclusion

As the Appellate Body recently noted in its *US – Cloves* ruling, WTO rules on trade in goods "strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate" and "should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact on imports stems exclusively from legitimate regulatory distinctions."[34] Border carbon adjustment is not *per se* incompatible with any rule in the GATT or related WTO Agreements. But to be compatible with nondiscrimination obligations, above all national treatment, it must be as even-handed as possible in its treatment of imported products, given the largely inevitable asymmetry of design between the domestic measure and the

[33] Cf. WTO, report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R.

[34] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 174; see also para. 96.

border adjustment. While the need for such even-handedness poses certain challenges of regulatory design that have been discussed throughout this paper, even-handedness in the relevant sense is fully compatible with the environmental goal of setting price signals that result in the internalisation of the externalities in question to the fullest extent possible. It is not the economics of climate mitigation that may be in tension with the WTO rules but rather the politics since there are clearly domestic constituencies who will find it in their interests to seek features in a carbon scheme that may well be in tension with even-handedness as understood under WTO law. Can a winning political coalition be found for carbon scheme fully compatible with WTO law? This is a question beyond the competence of a mere WTO lawyer, but it is an all-important one for fully grasping the ultimate effects of WTO law on the prospects for climate change mitigation.

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The Interaction of Customs and Non-tariff Barriers

Timothy Lyons QC

Over 30 years ago, in October 1982, the French customs administration provided a well-known example of the relationship between customs law and administration on the one hand and non-tariff barriers on the other. It required Japanese video cassette recorders to pass through the customs office at Poitiers far from their usual point of entry into France, which was at Le Havre or Charles de Gaulle airport. The customs officers at Poitiers examined the goods in minute detail. A lorryload of Japanese cassette recorders had previously taken a morning to clear customs. Under the new regime, it took 2–3 months.[1]

The impact was dramatic. In August 1982, 53,013 Japanese cassette recorders had been imported into France. Between 8 and 30 November 1982, 900 crossed the border.[2] Predictably enough, there were complaints under GATT and infringement proceedings by the then Commission of the European Communities.

In this example, the customs authorities which were implementing the non-tariff barrier did not, of course, obtain from their activity any tariff revenue which could offset the damage done by the barrier. In that respect this particular non-tariff barrier was typical of such barriers generally. By contrast, a tariff barrier would have generated some benefit for France by, for example, providing resources for the EC to operate a beneficial common agricultural policy.

Had the barrier been kept in place over a longer period, the video cassette recorders would have become scarcer and so the non-tariff barrier would have raised the price of the cassette recorders, in the same way as the imposition of a

[1] For a summary of the issue, see World Bank (1987), p. 141 Box 8.3.

[2] GATT, European Economic Communities – Import Restrictive Measures on Video Tape Recorders, Communication from the Permanent Mission of Japan, L/5427 (21 December 1982).

T. Lyons (✉)
39 Essex Chambers, 39 Essex Street, London, WC2R 3AT UK
e-mail: timothy.lyons@39essex.com

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tariff would have done. In this respect again, the non-tariff barrier consisting of the activities of French customs would have been typical of non-tariff barriers generally.[3] Indeed, there is a similarity in impact not only between different non-tariff barriers but also between tariff barriers and non-tariff barriers. It has led to them both being treated as a single phenomenon for the purposes of some analyses.[4]

The Poitiers incident now, perhaps, seems like an episode from another age. It showed an undisguised intention to harm importation of a product with no or little attempt at any form of justification. But tensions in the world trading community can still today induce responses which cannot subsequently be justified, and customs authorities may still be used to erect non-tariff barriers such as the invalid imposition of anti-dumping duty.[5]

More mundanely, traders still suffer from events such as damage to perishable goods kept too long awaiting inspection by customs authorities. Much work is, of course, being carried out to counter situations such as these.[6] In July 2004 it was agreed by WTO members that negotiations should seek to clarify and improve certain articles of GATT 94 with the aim of further expediting the movement, release and clearance of goods, including goods in transit.[7] Those negotiations reached a conclusion in December 2013 in Bali with the improvements to GATT 94 being placed in section I of a new Trade Facilitation Agreement. Section II has provisions for developing and least developed countries. The agreement contains provisions on many areas affecting customs law and administration, for example, advance rulings, appeals, fees, charges and penalties, guarantees, authorised operator schemes, release of perishable goods, the streamlining of administration activity, temporary admission and transit, as well as provisions on customs cooperation and coordination.

The Agreement on Trade Facilitation set 31 July 2014 as the date on which a Protocol of Amendment would be inserted into Annex 1A of the WTO Agreement. It was to be open for acceptance until 31 July 2015. Members could not reach a consensus on the agreement by July 31 2014. Agreement on an amended protocol text was reached on November 27 2014. It does not fix a deadline for acceptance of the protocol. The Director General of the WTO said in July 2014 the delay which

[3] For a brief summary of the theoretical results of imposing non-tariff barriers such as import quotas, voluntary export restraint agreements, local content requirements and others, see Krugman et al. (2014), pp. 244–251.

[4] For example, in Wonnacott and Wonnacott (2005), p. 1 (1, fn. 1), the authors say: "We follow much of the literature in using 'tariffs' generically to include not only tariffs proper but also other trade barriers such as quotas."

[5] For an example of a case in which the Court of Justice held that a regulation imposing anti-dumping duty was invalid, see CJEU, C-338/10, *Grünwald Logistik Service GmbH (GLS)*, in which Regulation (EC) No 1355/2008 imposing duty of €531.2 per net weight tonne on certain preserved or prepared citrus fruits originating in China was held invalid for breaching the EU regulation governing the imposition of anti-dumping duty.

[6] See WTO, Bali Ministerial Declaration and decisions.

[7] WTO, Negotiating an agreement on trade facilitation.

then occurred "will have consequences" and they "are likely to be significant".[8] That is, no doubt, true in respect of the subsequent delays also. At the time of going to press four states had accepted the protocol. It comes into force only when two-thirds of WTO members have completed their domestic ratification process. Accordingly, it appears that it will be some considerable time before the protocol comes into force. It is, therefore, not considered in this chapter.

The ultimate fate of the Transatlantic Trade and Investment Partnership ("TTIP") between the EU and the USA is also very uncertain. The EU's summary of the state of negotiations on 29 July 2014 indicated, however, that rules of origin and customs and trade facilitation were being addressed in them too.[9]

Important as developments in relation to the Bali agenda and TTIP would be, this chapter is not concerned so much with current negotiations as with some aspects of the existing law, particularly as concerns the EU and its customs union. Clearly it is not possible to be comprehensive in a paper of this length, but some brief comments are made on four areas of interest. First, customs-related non-tariff barriers are considered in the context of trade diversion, the changing mission of customs authorities and the existence of international value chains. Then, secondly, there is a brief section on what such barriers are and who creates them. This is followed, thirdly, by a few notes on international methods of controlling them. Fourthly, there are short sections on EU law and internal and external customs-related non-tariff barriers followed, finally, by a conclusion.

Customs-Related Non-tariff Barriers in a Customs Union and a Changing World

The impact of customs-related non-tariff barriers and their removal is of particular significance in a customs union. That is especially true in relation to the EU because the EU's customs union is essential to the political and legal programme of creating a new legal order.[10] As the Treaty on the Functioning of the EU ("TFEU") states in Article 28: "The Union shall comprise a customs union. . .". Non-tariff barriers in the EU can cause not only economic damage but also more general damage to the EU's legal and political order. Non-tariff barriers which arise because of, for example, differences in the implementation of customs law by different Member States' customs administrations are a serious matter legally, politically and institutionally, as we note below. For the moment, however, it is proposed to look at the economic impact of customs-related non-tariff barriers in a customs union.

[8] WTO news (2014).

[9] European Commission, State of Play of TTIP negotiations after 6th round, 29 July 2014; see especially paras. 3.3 and 3.8, available at http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152699.pdf.

[10] For discussion of the political as well as the economic importance of customs unions, see Marant and De Vanssay (1994), p. 181 onwards.

Trade Diversion and Customs Non-tariff Barriers

Jacob Viner famously pointed out that the erection of a tariff barrier around the customs union and the dismantling of tariff barriers inside a customs union may lead to the diversion of trade. A customs union may make it worthwhile to stop purchasing goods from more efficient business outside the customs union and to start purchasing goods from less efficient businesses within the customs union. The goods of these less efficient businesses would have been more expensive than the goods coming from outside the customs union before the imposition of tariffs. Once tariffs are imposed, this may cease to be the case and trade diversion may result.[11]

In contrast to the position in relation to tariff barriers, however, it has been said that trade diversion which results from the erection of non-tariff barriers is not welfare reducing. Once, however, a common tariff surrounds a customs union, as it obviously does in the EU, the erection of non-tariff barriers is welfare reducing. To the extent that the non-tariff barrier results in trade diversion to businesses inside the customs union, there is a loss of tariff revenue.[12] It has also to be remembered that a non-tariff barrier created by the customs law or a customs administration not only fails to generate any offsetting customs revenue, it seems possible that, in contrast to barriers that protect security, health and safety or the environment, it may create no benefit at all. A customs union, like the EU, has a particular reason to dismantle non-tariff barriers generally because such action seems capable of limiting any damage that may arise by virtue of trade diversion caused by a customs union.

The economic damage caused by non-tariff barriers and the advantages flowing from their removal have to be considered against the background of the development of the mission of customs administrations. This mission is something to which the Union Customs Code of the EU pays particular attention. Changes in the pattern of international trade are also significant for any consideration of the damage caused by non-tariff barriers and the benefits of removing them. These two matters are considered next.

The Changing Mission of EU Customs Authorities

The range of responsibilities that customs administrations now have has led to them being much more than the collectors of duty. One commentator has said:

[11] See Viner (1950), pp. 41 and 135. Efficiency-reducing trade diversion may be offset; see Ornelas (2007), p. 207 onwards; see also Wonnacott and Wonnacott (1992), p. 119 onwards; El-Agraa and Jones (2000), p. 301 onwards; Tovias (1991), pp. 5–23; and Krugman et al. (2014), pp. 244–251, 291 and 293.

[12] See, generally, Tovias (1991), p. 5 (18), on which these comments are based.

> The role of Customs has changed significantly as a result of both evolutionary factors, including the increasing globalisation of trade, and revolutionary factors, such as the terrorist attacks of 9/11. The resultant shift in government policies and the way in which those policies are administered have brought us to a point where it is no longer possible to clearly define the role of 'Customs'.[13]

Changes in the role of customs have received particular official recognition in the EU. The EU's Union Customs Code, Article 3, contains the mission statement of customs authorities and provides in its first sentence that:

> Customs authorities shall be primarily responsible for the supervision of the Union's international trade, [in French: "la surveillance du commerce international de l'Union"] thereby contributing to fair and open trade, to the implementation of the external aspects of the internal market, of the common trade policy and of the other common Union policies having a bearing on trade, and to overall supply chain security.[14]

Only after the supervisory role of customs authorities has been highlighted does Article 3 go on to mention the protection of the financial interests of the EU and Member States. This is followed by references to responsibilities for protecting the Union from unfair and illegal trade, supporting legitimate business activity and "ensuring the security and safety of the Union and its residents and the protection of the environment". That is a very broad responsibility indeed.

Some official recognition in Article 3 that the broader role of customs authorities will bring with it certain challenges and a risk of harm may be perceived in the final area of activity that the article ascribes to customs authorities, namely, "maintaining a proper balance between customs controls and facilitation of legitimate trade".[15] Failure to maintain a "proper" balance may well result in a customs administration creating a new non-tariff barrier. The use of the ambiguous English word "proper" is, perhaps, unfortunate. The French version of the legislation offers greater clarity in requiring "un équilibre adéquat entre les contrôles douaniers et la facilitation du commerce légitime".[16] Whichever wording is used, however, proportionality will clearly be an essential element in any analysis of the activity of customs administrations within the EU. The extension of customs' mission means, however, that there is increased scope for customs authorities to create new non-tariff barriers and in new areas of activity.

[13] Widdowson (2007), p. 31 (36). See also WCO (2008).

[14] Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1.

[15] See Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1, Article 3(d).

[16] The Portuguese version, for example, refers to "equilíbrio adequado".

Customs-Related Non-tariff Barriers and Value Chains

David Ricardo famously used the trade between different nations to illustrate his insights into international trade.[17] In the words of Pascal Lamy, though:

> In the 19th Century, when Ricardo developed what was to become the foundations of international trade theory, countries exported what they produced. . ..Nowadays, more and more products are "Made in the World" rather than "Made in the UK" or "Made in France".[18]

Pascal Lamy went on to note two results of this state of affairs. First is that the concept of "origin", so familiar to customs lawyers, is no longer as relevant or meaningful as it was. That is worth noting given that the complexity of the rules of origin has been regarded as constituting a non-tariff barrier. The second result is that now it is not nations that compete against each other but value chains.

The protection of international value chains has become one of the key responsibilities of national customs' authorities.[19] It has always been clear that non-tariff barriers resulting from the activity of national customs' administrations may cause damage nationally. Given the use of value chains, however, it may be that a customs-related non-tariff barrier could damage the entirety of an international value chain, not just that part of it located in the customs authorities' home state. As a report on value chains for the G20 meeting in July 2014 noted, tariff barriers can have a tariff magnification effect that is particularly acute in long value chains. Furthermore:

> Non-tariff measures (NTMs) can also block the efficient operation of supply chains. NTMs consist of any policies (other than ordinary customs tariffs) that influence trade flows. Although non-tariff measures should not have protectionist intent, they nevertheless can have an impact on trade costs that is of much larger magnitude than tariffs.[20]

The joint effect of the extension of the mission of customs administrations and the role of value chains in international trade are acknowledged in recital (16) to the Union Customs Code, which says:

> The completion of the internal market, the reduction of barriers to international trade and investment and the reinforced need to ensure security and safety at the external borders of the Union have transformed the role of customs authorities giving them a leading role within the supply chain and, in their monitoring and management of international trade,

[17] Ricardo (1817). See chapter VI, Foreign Trade, pp. 156–157: "Under a system of perfectly free commerce, each country naturally devotes its capital and labour to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole [. . .] It is this principle which determines that wine shall be made in France and Portugal, that corn shall be grown in America and Poland, and that hardware and other goods shall be manufactured in England."

[18] See Pascal Lamy's speech to the French Senate, WTO News (2010).

[19] On the literature on international supply chain security, see, for example, Altemöller (2011), p. 21.

[20] OECD et al. (2014), pp. 30–31.

> making them a catalyst to the competitiveness of countries and companies. The customs legislation should therefore reflect the new economic reality and the new role and mission of customs authorities.[21]

One may question how new this "new economic reality" is. It certainly will not be new by the time the Union Customs Code is applicable. Nevertheless, it does make it more important than ever that non-tariff barriers are removed. It was only to be expected that they should be scrutinised once tariff barriers had been lowered. By the 1980s that scrutiny was very serious.[22] The Uruguay Round led to some specific measures, for example, the Agreement on Technical Barriers to Trade ("the TBT Agreement"), the Agreement on the Application of Sanitary and Photosanitary Measures and the Agreement on Import Licensing Procedures. The "new economic reality" would seem to add a new impetus to even more rigorous scrutiny.

No doubt, part of that scrutiny will be to examine precisely what customs non-tariff barriers are and who is responsible for them. We turn briefly to this next.

Customs-Related Non-tariff Barriers: What Are They and Who Creates Them?

These two questions may both seem simple but the answers are by no means as simple as the questions.

What Are Customs-Related Non-tariff Barriers?

There is no definition of a non-tariff barrier that is universally applicable and universally accepted and there is no accepted definition that relates exclusively to customs-related non-tariff barriers. The Executive Introduction to the OECD study on non-tariff barriers in 2005, "Looking Beyond Tariffs: The role of non-tariff barriers in world trade" stated:

> Under the broadest definition, NTBs comprise all measures other than tariffs that restrict or otherwise distort trade flows.[23]

Understood this broadly, customs-related non-tariff barriers may even arise by virtue, for example, of foreign policy such as the EU's Common Foreign and Security Policy.[24] Foreign policy not infrequently calls for the imposition of

[21] Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1.

[22] See generally Ray (1987), p. 285.

[23] OECD (2005), p. 11.

[24] As to which see, in particular, the Consolidated version of the Treaty on European Union, [2012] OJ C 326/13, Article 11.

sanctions, including restrictions on the import and export of goods. The sanctions are frequently imposed in response to resolutions of the UN Security Council. In recent times resolutions have demanded prohibitions, for example, on the direct or indirect export of charcoal from Somalia,[25] round logs and timber products from Liberia,[26] and jewellery and transportation items, among other things, from the People's Republic of Korea.[27] These bans will frequently be enforced by customs administrations. Disproportionate action in relation to them could give rise to non-tariff barriers. Yet they will often, but not always, be of interest to relatively limited groups of traders. Of more general relevance are matters such as customs fees and charges on imports. The whole of Chapter 4 of the OECD study is devoted to this topic.[28]

Given a broad understanding of customs-related non-tariff barriers, one could say that every element of customs law and administration which introduces inefficiencies into the international trading system is a non-tariff barrier. On this approach, many of the matters dealt with in the WTO's Trade Facilitation Agreement could be categorised as non-tariff barriers. That may be a reasonable approach if one categorises such barriers by reference to economic effect. Nevertheless, to equate "non-tariff barrier" with inefficiency of administration, for example, runs some risk of emptying the term of any utility. It is suggested that the term "non-tariff barrier" should be reserved for those activities which, however efficiently carried out, are in principle barriers to trade such as the imposition of certain customs fees and charges.

The imposition of customs fees and charges on imports is of particular importance at a time when governments are under more pressure than ever before to treat their activities as services and those with whom they deal as paying customers. Furthermore, many functions formerly carried out by governments may now be carried out by private sector operators who must charge for their services. Private sector involvement in customs matters is not, however, new. One case over charges imposed for compulsory testing, in a private laboratory, of certain food products for the carcinogen aflatoxin was considered in the EU as long ago as 1983.[29]

In addition to the OECD study, there is the World Trade Report 2012 to be taken into account.[30] This identified other matters closely related to customs law and administration including customs procedures, customs valuation,[31] rules of

[25] United Nations Security Council Resolution 2036, S/RES/2036 (2012), para. 22.

[26] United Nations Security Council Resolution 1478, S/RES/1478 (2003), para. 17(a); United Nations Security Council Resolution 1521 S/RES/1521 (2003), para. 10.

[27] United Nations Security Council Resolution 2094, S/RES/2094 (2013), para. 23, affirming sanctions on items and luxury goods imposed in 2006 and the list of additional items and luxury goods of 17 September 2013, section B) 1 and 2.

[28] Engman (2005), pp. 135–176.

[29] ECJ, C-158/82, *Commission v Denmark*, [1983] ECR 3573.

[30] WTO (2012).

[31] See also WTO, Committee on Customs Valuation, Report (2013) of the Committee for Customs Valuation to the Council for Trade in Goods, G/L/1043 (4 October 2013).

origin,[32] pre-shipment inspection and anti-dumping and countervailing duties. This list comes close, perhaps, to extending too far the concept of non-tariff barrier. Nevertheless, two things are apparent from it. First of all, there are some non-tariff barriers that are created by customs law and administration itself. Many of these, like complex rules of origin, frequently appear in bilateral trade treaties. Such barriers are likely to increase with the growth in bilateral treaties. Second, there are other non-tariff barriers which, although not created by customs law and administration, are overseen by customs administrations, such as anti-dumping duty regimes. The two types of barrier may be combined when, for example, anti-dumping duty utilises complex rules of origin. These types of barrier do not disappear if efficiency of process is introduced or improved.

It is important also to appreciate that customs non-tariff barriers can always result from an inadequate or divergent application of customs law, for example, in the field of classification pursuant to the application of the tariff established under the Harmonized System created pursuant to the International Convention on the Harmonized Commodity Description and Coding System of 1983. Any practitioner in the field of customs can supply examples of different classifications under the internationally applicable harmonised system of identical products by different national administrations.

Divergent applications of law are often particularly difficult to avoid in a customs union, particularly one with many partners who are not necessarily geographically close to each other. Any divergence is not necessarily a lack of efficiency. Members of the union may genuinely hold differing views on a variety of customs matters. The EU institutions have always been concerned to ensure the uniform application of EU law generally and in the specific context of customs. An example of the EU institutions at work appears in the Special Report of the Court of Auditors of December 1999. The Court noted that the EU customs union was suffering a serious distortion in relation to the provision of guarantees and securities.[33] In relation to the temporary importation procedure, one trader had 470 temporary importation declarations uncleared after 2 years. The maximum period for

[32] See also WTO, Report (2013) of the Committee on Rules of Origin to the Council for Trade in Goods, G/L/47 (10 October 2013). It states that 41 members have indicated that they apply some form of non-preferential rules of origin, 44 members have indicated that they do not apply non-preferential rules and 46 members have given no indication of their practice. This state of affairs renders harmonisation difficult. "Given this difference in Members' views, it is difficult for the chairman to draw a future roadmap." See para. 7.

[33] Special Report of the Court of Auditors 8/99 on securities and guarantees provided for in the Community Customs Code to protect the collection of traditional own resources together with the Commission's replies, [2000] OJ C 70/1.

which goods may be left in the procedure is 2 years.[34] Furthermore, one authority was taking 10 % of the customs duty as security instead of the 100 % required.[35]

The Court of Auditors recommended that Member States should comply with the 24-month limit and put in place appropriate monitoring procedures.[36] The Commission said it would examine the examples cited and would take any corrective action that was necessary. It noted that "it is for the Member States to ensure correct application of Community legislation and to assume the responsibility resulting from any shortcomings on their part in doing so".[37] On the one hand, the reaction of the authorities to the matters they discovered is encouraging. On the other hand, the example shows that individual customs administrations were, indeed, a source of non-tariff barriers. With the enlargement of the EU into a union of 28 Member States, the possibility that non-tariff barriers will arise from the proper or improper conduct of different national administrations has increased.

As is well known, the existence of non-tariff barriers in the EU customs union arising from differences in the application of customs law was a matter of some concern to the USA. The issue was ventilated before the WTO, in 2006, in proceedings entitled "European Communities — Selected Customs Matters".[38] The Appellate Body found there to be a lack of uniform administration in relation to the tariff classification of liquid crystal display monitors with digital video interface, but much of the substance of the case brought by the USA was unsuccessful. It should be noted that the Appellate Body upheld the conclusions of the Panel in holding that substantive differences in penalty laws and audit procedures among the Member States of the European Communities do not of themselves constitute a violation of GATT 1994, Article X:3(a). They may, however, contravene Article X.3(a) if there is evidence to show that the differences constitute non-uniform administration. There was no such evidence.[39] Now, however, the EU is seeking to harmonise penalties.[40]

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[34] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, [1992] OJ L 302/1, Art. 140.2.

[35] See Special Report of the Court of Auditors 8/99 on securities and guarantees provided for in the Community Customs Code to protect the collection of traditional own resources together with the Commission's replies, [2000] OJ C 70/1 (70/5, para. 15). For the requirements as to the level of security required, see Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, [1992] OJ L 302/1, Art. 192.

[36] See Special Report of the Court of Auditors 8/99 on securities and guarantees provided for in the Community Customs Code to protect the collection of traditional own resources together with the Commission's replies, [2000] OJ C 70/1 (70/5, para. 16).

[37] See Special Report of the Court of Auditors 8/99 on securities and guarantees provided for in the Community Customs Code to protect the collection of traditional own resources together with the Commission's replies, [2000] OJ C 70/1 (70/13 and 14, para. 16).

[38] WTO dispute, *European Communities – Selected Customs Matters*, WT/DS315.

[39] General Agreement on Tariffs and Trade 1994 (GATT 1994), 1867 U.N.T.S. 187, Article VIII:3, also limits what customs penalties may be imposed, stating, for example, that substantial penalties shall not be imposed for minor breaches of customs regulations.

[40] See European Commission, Proposal for a Directive of the European Parliament and of the Council on the Union legal framework for customs infringements and sanctions, COM(2013)884 final.

Other cases before the WTO have also dealt with matters of customs law and administration. For example, the customs valuation practices of the Thai customs administration and the general administration of the customs system were held to be incompatible with the Customs Valuation Agreement and with GATT, Articles III, X:3(b) and XX(d).[41]

Who Creates Customs-Related Non-tariff Barriers?

The answer to this question may seem obvious in relation to a national customs system. It is not so clear in relation to a customs union. In relation to the EU, it is the EU institutions that provide the broad legislative framework for the customs union. The Commission clearly has special responsibilities in relation to the customs union.[42] It has to engage in various ways with Member States and with traders. But the EU customs union, like many customs unions, has an additional potential source of non-tariff barriers because, as the first sentence of the first article of the Community Customs Code ("CCC") makes clear:

> Customs rules shall consist of this Code and the provisions adopted at Community level or nationally to implement them.[43]

The Union Code, which will in due course replace the CCC, defines "customs legislation" as a body of legislation which includes:

> the Code and the provisions supplementing or implementing it adopted at Union or national level.[44]

Customs administration as well as customs law has a strong national element. "Customs authorities" are defined in the CCC as "the authorities responsible *inter alia* for applying customs rules".[45] The Union Code defines "customs authorities" as:

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[41] WTO dispute, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371. See also, for example, WTO disputes, *Thailand – Customs Valuation of Certain Products from the European Communities*, WT/DS370 and *Colombia – Customs Measures on Importation of Certain Goods from Panama*, WT/DS348.

[42] See, for example, Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, [1987] OJ L 256/1.

[43] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, [1992] OJ L 302/1, Art 1.

[44] See Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1, Art. 5(2)(a).

[45] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, [1992] OJ L 302/1, Art. 4(3).

> . . .the customs authorities of the Member States responsible for applying the customs legislation and any other authorities empowered under national law to apply certain customs legislation;. . ..[46]

Both definitions acknowledge that the authorities which implement the rules of the customs union need not be customs authorities.

To a certain extent it may be said that, administratively at least, a certain lack of uniformity is allowed for in the operation of the EU customs union. For specified purposes, national authorities may "carry out all the controls they deem necessary".[47] The Union Customs Code preserves this discretion, saying that "The customs authorities may carry out any customs controls they deem necessary".[48] It is, therefore, good to see that the Union Customs Code specifically requires uniformity and states:

> Without prejudice to international law and conventions and Union legislation in other fields, the Code shall apply uniformly throughout the customs territory of the Union.[49]

In the light of this provision, the discretion of national administrations would appear more limited than it may at first appear. Nevertheless, it appears from what we have said above that customs-related non-tariff barriers may be created by national authorities, in the EU's customs union in particular, and that the national authorities in question need not be customs authorities.

Customs-Related Non-tariff Barriers: International Methods of Control

Now that we have looked briefly at non-tariff barriers arising in the field of customs law and administration, it will be clear that they can be controlled in a variety of ways. International law may control them. So too may the law of the customs territory in question.

The international law that may control customs-related non-tariff barriers need not be international trade or customs law. International human rights instruments may, for example, be of considerable significance. So far as concerns the EU, one

[46] Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1, Art 5(1).

[47] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, [1992] OJ L 302/1, Art 13.1.

[48] Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1, Art. 46.1.

[49] Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1, Art. 46.1, Article 1, second para. For an example of a case on customs valuation in which the Court of Justice of the EU referred to the requirement of the uniform application of EU law, see CJEU, C-116/12, *Christodolou*, 12 December 2013, para. 34.

must have regard to the Treaty on European Union, Article 6, which places human rights at the heart of the Union and, therefore, of the customs union. Indeed, that treaty provides that the Union itself shall accede to the European Convention on Human Rights.[50]

The courts in Luxembourg have had to consider the impact of human rights on the law affecting importers, for example, in relation to the system of distribution of import licences for bananas,[51] in relation to a trader's rights to state his case[52] and post-clearance recovery actions generally.[53] Elsewhere, both the European Court of Human Rights and the UK Supreme Court have had to consider the UK authorities' powers of detention.[54] The detention powers of customs authorities in Poitiers surely engaged the human rights of the owners of the goods.

Nevertheless, international trade law is important in controlling the erection of customs non-tariff barriers. Cases involving Thailand and Colombian customs authorities were referred to in the previous section.[55] They brought into play GATT 94, Article III (national treatment) as well as Article X:3, which requires uniform, impartial and reasonable administration of laws and regulations, as well as arbitral tribunals.

So far as concerns the imposition of customs charges and fees, what is now GATT 94 Article II:1(b), which provides for the schedules of tariff concessions and requires that goods shall not be subject to "ordinary customs duties", is significant.

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[50] See Treaty on European Union, Article 6.2. On 18 December 2014 the CJEU delivered Opinion of the Court 2/13 in which it found incompatible with the Treaty on European Union the proposed agreement for the accession of the EU to the European Convention on the Protection Human Rights and Fundamental Freedoms.

[51] See, e.g., ECJ, T-19/01, *Chiquita Brands and Ors v Commission*, [1991] ECR II-321. The Court dismissed the claim, which is discussed at paras. 216–223.

[52] In repayment and remission claims, Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code [1993] OJ L 253/1 provided for contact between a trader and a national administration and a national administration and the Commission. No right to be heard by the Commission was given to a trader. Following ECJ, T-346/94, *France-aviation v Commission*, [1995] ECR II-2841, the relevant legislation was amended so that a statement from the trader was sent by the national administration to the Commission. This was held inadequate in ECJ, T-42/96, *Eyckeler & Malt* [1998] ECR II-401, and ECJ, T-50/96, *Primex Produkte Import-export GmbH &Co. KG,* [1998] ECR II-3773. A right to state a point of view to the Commission was given by Commission Regulation (EC) No 1677/98 of 29 July 1998 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, [1998] OJ L 212/18, Article 1, para. 9, which inserted Article 906a into the Commission Regulation of 1993 referred to above.

[53] See, for example, ECJ, C-349/07, *Sopropé,* [2008] ECR I-10369, para 36, and, more recently, CJEU, Joined Cases C-29/13 and C-30/13, *Global Trans Lodzhistik OOD*, para. 57.

[54] See ECHR, *Air Canada v UK*, 9/1994/456/537, and UK Supreme Court, *R (on the application of Eastenders Cash and Carry plc and ors) v The Commissioners for HMRC*, [2014] UKSC 34, paras. 24(3) and (4).

[55] WTO dispute, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371; see also, for example, WTO disputes, *Thailand – Customs Valuation of Certain Products from the European Communities*, WT/DS370 and *Colombia – Customs Measures on Importation of Certain Goods from Panama*, WT/DS348.

The products in question are to be "exempt from all other duties or charges of any kind imposed on or in connection with the importation" with certain qualifications. Nevertheless, fees and charges may be imposed so long as they are limited in amount to the approximate cost of services rendered and do not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes (see GATT 94, Article VIII:1(a)). Article VIII:4 sets out specific charges which are included within the scope of the article and mentions those related to consular transactions, quantitative restrictions, licensing, exchange control, statistical services, documents, documentation and certification, analysis and inspection, and quarantine, sanitation and fumigation. Article VIII:4 has been considered in detail in a number of disputes.[56]

One should also have regard to provisions in GATT 94[57] which particularly refer to what may be thought of as matters under customs supervision, such as Article V on freedom of transit, Article VI on anti-dumping and countervailing duties and Article VII on valuation for customs purposes. There are, of course, specific agreements to be taken into account such as the Agreement on the Implementation of Article VII and the Agreement on the Implementation of Article VI (the anti-dumping agreement) and the Agreement on Rules of Origin.

GATT 94, therefore has plenty to say on customs-related non-tariff barriers and there is more to be considered. Generally, there are the agreements, already referred to resulting from the Uruguay Round. Mention should be made of the Technical Barriers to Trade Agreement, the Agreement on the Application of Sanitary and Photosanitary Measures, the Agreement on Import Licensing Procedures, the Agreements on Preshipment Inspection and the Agreement on Subsidies and Countervailing Measures.

Quite apart from WTO agreements and the provisions of any WTO Trade Facilitation Agreement that may be established,[58] there are other international agreements to be taken into account. There is, for example, the Revised Kyoto Convention.[59] It has ten chapters in its General Annex dealing with provisions

[56] See, e.g., GATT, report of the Panel, *United States – Customs User Fee*, L/6264, BISD 35S/245; WTO, report of the Appellate Body, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, WT/DS56/AB/R.

[57] The EU approved the Uruguay Round agreements by Council Decision (EC) 800/94 of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986–1994), [1994] OJ L 336/1.

[58] See, e.g., Art 6.2.1.i of the WTO's Trade Facilitation Agreement which requires fees and charges for customs processing to be limited to "the approximate cost of the services rendered on or in connection with the specific import or export operation in question".

[59] The International Convention on the Simplification and Harmonisation of Customs Procedures (Revised Kyoto Convention) entered into force on 3 February 2006. See Council Decision of 17 March 2003 concerning the accession of the European Community to the Protocol of Amendment to the International Convention on the simplification and harmonisation of customs procedures (Kyoto Convention), 2003/231/EC, [2003] OJ L86/21 amended by Council Decision of 26 April 2004, 2004/485/EC, [2004] OJ L162/113.

affecting all customs procedures and then ten Specific Annexes dealing with individual customs procedures. Standards and recommendations are set out in each. There are many other international agreements that could be mentioned, such as the Customs Convention on the International Transport of Goods (TIR Convention) which is regularly updated and now has 68 parties, including the European Union.[60]

This brief review identifies just some of the obligations that can limit customs-related non-tariff barriers. As in relation to non-tariff barriers generally, there is no comprehensive inventory of barriers. The creation of an inventory was suggested in the Uruguay Round but was not pursued.[61] Such an inventory may seem appropriate, especially to those familiar with customs law and its dependence on detailed analysis of goods and their classification. But one of the problems that customs law faces is adapting its classification of goods to a fast-changing world in which innovative products are under constant development. Similarly, too detailed an approach to the identification of non-tariff barriers could limit the authorities' ability to control them as much as enhance it.

To the extent that the treaties referred to above lay down constraints within which customs authorities must operate, they may be seen as curtailing the scope for the creation of non-tariff barriers that may otherwise be erected by official activity. One disadvantage of this international law, though, is that its effectiveness depends, in practice, on the extent to which traders may rely upon it in the jurisdiction in which they operate. In some countries, such as Brazil, it will be possible to rely directly on the WTO agreements in domestic courts.[62] In many other countries that will not be possible. In the EU, for example, the General Court has said:

> . . .the Agreement establishing the WTO and the agreements and understandings annexed to it are not in principle among the rules in the light of which the Courts of the European Union are to review the legality of measures adopted by the Community institutions. . .[63]

The court went on to say that the position is different where those institutions adopted legislation in order to satisfy their international obligations, as was the case in relation to the Agreement on the Implementation of Article VI. Nevertheless, if customs-related non-tariff barriers are to be successfully challenged, there must be grounds for doing so in domestic as well as international law.

In addition to international law, mention should also be made of international institutional cooperation. This has been particularly significant in the attempt to

[60] See http://www.unece.org/tir/welcome.html.

[61] See further and more generally Santana and Jackson (2012), p. 462 (466). Reference should be made to the entirety of issue 3 of volume 11, which is a special issue on Standards and Non-Tariff Barriers in Trade, Heckelei/Swinnen (Guest Editors).

[62] As was indicated by Judge Luis Olavo Baptista on 1 October 2013 in *Tax Protectionism and Tax Discrimination: Relevance of Multilateral and Bilateral Trade and Investment Agreements*, São Paulo, conference of IFA, IBDT, EMAG and FAUDASP.

[63] CJEU, T-512/09, *Rusal Armenal* ZAO, 5 November 2013, para. 36.

deal with the problems caused by the rules of origin. The World Customs Organization and the World Trade Organization are cooperating in a programme of work that the Agreement on the Rules of Origin required.[64] The work programme, however, does not appear yet to have concluded although the Uruguay Round ended 20 years ago. The EU has also been engaged in work on rules of origin, which is mentioned below. International institutional cooperation may make slow progress but it is likely to be important if non-tariff barriers of all kinds are to be effectively addressed.

To conclude this section, it may be said that there are international methods for the control of customs non-tariff barriers. They may extend to the use of general international agreements as well as specific agreements. The utility of international action is limited, however, by a number of factors, particularly the extent to which traders may rely on the agreements and by the extent to which institutional action can be successfully coordinated.

Customs-Related Non-tariff Barriers: EU Methods of Control

In this section we look, first and briefly, at the way in which customs non-tariff barriers arise internally within the EU's customs territory then, secondly, at those that affect goods coming from or going to "third countries". General principles of EU law, such as proportionality, are, of course, powerful tools that may prevent customs administrations creating non-tariff barriers in whatever context, as we noted in *The changing mission of EU customs authorities*. Also capable of countering customs-related non-tariff barriers are duties such as the duty of good administration, which is applicable to EU institutions and which is significant in customs duty matters.[65] More specific legal principles are also relevant, and these are considered next.

EU Customs-Related Non-tariff Barriers: Internal

The law governing free movement of goods and the law of the internal market play an important role in combatting non-tariff barriers. The internal market is, of course, "…an area without internal frontiers in which the free movement of

[64] See further Foltea (2012), p. 815.

[65] For an example of a case in which the duty of good administration was relevant, see e.g. ECJ, Joined Cases T-186/97, T-187/97 and ors, *Kaufring & Ors v Commission*, [2001] ECR II-1337, paras. 257–275. See also the Charter of Fundamental Rights of the EU, [2012] OJ C 326/391, Article 41 (right to good administration).

goods, persons services and capital is ensured…".[66] Just how significant that was had to be emphasised by the EU institutions. The European Commission made the implications of the internal market clear when it said:

> If the Community is to become a genuine internal market and if this market is to operate under the same conditions as a national market, physical frontiers must be abolished. This means the abolition of all controls, formalities, procedures, checks, examinations, inspections, etc. … at internal frontiers, just as there are no border controls between regions in national markets.[67]

In a genuine internal market, barriers to free movement, including non-tariff barriers arising from customs law and administration, should not exist. The Court of First Instance affirmed that state of affairs in a case brought by the customs agent Édouard Dubois et Fils. It sought damages from the Council for "the almost total and definitive cessation of its activities as a customs agent".[68] As may be expected, it failed. The Court made clear that the internal market entailed "the abolition of frontiers for tax purposes and customs controls within the Community".[69] The action of Édouard Dubois et Fils can be seen as an attempt to be compensated for its inability to profit from the imposition of non-tariff barriers. It is not surprising it failed.

Even before the creation of the internal market, the law of free movement of goods was having a profound effect in requiring the removal of internal non-tariff barriers. The EEC Treaty famously prohibited "quantitative restrictions" on the movement of goods and all measures having equivalent effect. The Court of Justice made clear that

> all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an equivalent effect to quantitative restrictions.[70]

The fact that this was established a long time ago does not mean that it can be forgotten. The battle for free movement of goods is continuous. In 2014, the Court had to refer to the *Dassonville* formulation again in ruling that it was inconsistent with the free movement of goods to require articles of gold to be stamped with a hallmark in Lithuania, the State of destination, when they had already been stamped

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[66] Consolidated version of the Treaty on the Functioning of the European Union (TFEU), [2012] OJ C 326/47, Art 26.2 (see Article 8a of the EEC Treaty, Article 13 of the Single Act and Article 7a of the EC Treaty).

[67] In Annex I to Commission Communication to the Council and to Parliament "Abolition of Border Controls", SEC(92)877 final, para. 3.

[68] ECJ, T-113/96, *Édouard Dubois et Fils SA* v *Council & Commission*, [1998] ECR II-125, para. 14.

[69] ECJ, T-113/96, *Édouard Dubois et Fils SA* v *Council & Commission*, [1998] ECR II-125, para. 2.

[70] ECJ, 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, [1974] ECR 837, para. 5. See also ECJ, 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649 ("Cassis de Dijon"), which found an indistinct requirement relating to alcohol content of all alcoholic drinks inconsistent with free movement rules.

with a hallmark in Poland, the State of origin.[71] Free movement of goods also provides a "general principle of freedom of transit of goods" within the EU.[72] The free movement and the free transit of goods are principles that can be highly effective in countering non-tariff barriers related to customs as to other matters.

Non-tariff barriers in the customs field may also be countered, in certain circumstances, by TFEU Article 110 concerning internal taxation, by state aid law or by other internal market rules.[73] Customs law may also be relied upon. Article 28 of the TFEU and its predecessors provide that the customs union involves the prohibition, between Member States, of duties on imports and exports "and of all charges having equivalent effect". Article 30 of the TFEU repeats the prohibition stating:

> Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.

What Advocate General Jacobs has called "a core definition" of a charge having an equivalent effect states that it is

> any pecuniary charge, however small and whatever its designation and mode of application, which is imposed unilaterally on domestic or foreign goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense,. . .even if it is not imposed for the benefit of the State, is not discriminatory or protective in effect and if the product on which the charge is imposed is not in competition with any domestic product.[74]

The definition continues by excluding, from the concept of a charge having equivalent effect, internal taxation imposed in the same way on similar or comparable domestic products or, in the absence of such products, within the framework of general internal taxation.

The prohibition on charges having equivalent effect has ensured the prohibition of dock dues payable on entry into a French overseas department;[75] a levy on the

[71] CJEU, C-481/12, *UAB 'Juvelta' v VĮ 'Lietuvos prabavimo rūmai'*, 16 January 2014, para. 16. The current prohibition on the imposition of quantitative restrictions and all measures having equivalent effect is found in TFEU, Articles 34 and 35; see also CJEU, C-443/10, *Philippe Bonnarde v Agence de Services et de Paiement*, [2011] ECR I-09327, especially paras. 26 and 27.

[72] See, eg, ECJ, 266/81, *SIOT v Ministre delle Finance*, [1983] ECR 731 (777, para. 16) and ECJ, C-320/03, *Commission v Austria*, [2005] ECR I-9871, para. 65. "Transit" is, of course, specifically mentioned in TFEU, Art 36.

[73] See, e.g., ECJ, C-206/06, *Essent Netwerk Noord BV*, [2008] ECR 5498; and CJEU, C-677/11, *Doux Élevage SNC and Coopérative agricole*, Opinion of Advocate-General Wathalet, paras. 100–105.

[74] See the Opinion of Advocate-General Jacobs in ECJ, C-90/94, *Haahr Petroleum Ltd v Åbenrå Havn and ors*, [1997] ECR I-4085, para 41. The definition was established in ECJ, 24/68 *Commission* v *Italy*, [1969] ECR 193, paras. 9 and 11; ECJ, Joined Cases 2/69 and 3/69, *Diamantarbeiders* v *Brachfeld*, [1969] ECR 211, paras. 18 and 20.

[75] ECJ, C-163/90, *Administration des Douanes et droits Indirects v Leopold Legros*, [1992] ECR I-4625. See also ECJ, Joined Cases C-363/93, *René Lancry SA v Direction Générale des Souanes and Société Dindar Confort and others* [1994] ECR I-3957, and ECJ, Joined Cases C-485/93 and C-486/93, *Simitzi v Municipality of Kos*, [1995] ECR I-2655.

transportation of shrimp used to finance the purchase, installation and maintenance of shrimp sieves and peelers;[76] and charges paid by an importer to a private laboratory to test groundnuts and groundnut products for a carcinogen—aflatoxin.[77] The last case referred to shows that prohibited charges having equivalent effect may be charges for services. As we have seen, this is an area to which the OECD study on non-tariff barriers paid particular attention. Where charges are paid to customs administrations, often for services rendered, they may be included within the category of non-tariff barrier known as "para tariff barriers".[78] Not every charge for every service, however, falls to be considered as a prohibited charge having equivalent effect to a customs duty.

In order to avoid being a charge having equivalent effect, a charge by EU customs administrations for services rendered must satisfy three conditions. First, the activity paid for must be consistent with the internal market.[79] Second, the activity charged for must be a service to the payee and not to the general public.[80] Third, the amount of the charge must be permitted under EU law. The fee must be related to the length of time taken to carry it out, the number of persons involved, the costs of materials used, the overheads incurred and so on.[81] Costs imposed by reference to weight or value are impermissible,[82] as are costs that merely put the customs service in a position to carry out a service (although the position in relation to costs incurred in relation to goods coming from third countries is not always entirely the same as in relation to those moving within the EU).[83]

[76] ECJ, C-517/04, *Visserijbedrijf D. J. Koornstra & Zn. vof v Productschap Vis*, [2006] ECR I-5015.

[77] ECJ, C-158/82, *Commission v Denmark*, [1983] ECR 3573.

[78] See OECD (2005), p. 136.

[79] This limitation is obviously not found in GATT 1994. For an example of a case in which a charge was accepted as a charge for services but the services were inconsistent with the internal market, see ECJ, C-272/95, *Bundesanstalt für Landwirtschaft und Ernährung v Deutsches Milch-Kontor GmbH*, [1997] ECR I-1905. The service in question was the inspection of samples of skimmed milk powder to determine whether the product qualified for aid under a particular regulation.

[80] In ECJ, 63/74, *Cadsky v Instituto Nazionale per il Commercio Estero* [1975] ECR 281, charges for quality control of salad vegetables were not a service to the exporter.

[81] See, e.g., ECJ, C-389/00, *Commission v Germany*, [2003] ECR I-2001, para. 40; see also ECJ, Noted Case 209/89, *Commission v Italy*, [1991] ECR I-1575, para. 10, and ECJ, 111/89, *Netherlands v P Bakker Hillegom BV,* [1990] ECR I-1735, para. 12.

[82] ECJ, 170/88, *Ford España SA v Estado Español*, [1989] ECR 2305.

[83] ECJ, 1/83, *IFG v Freistaat Bayern*, [1984] ECR 349, paras. 13 and 17. For more details generally in relation to charges having equivalent effect, see Lyons (2008), pp. 72–83.

EU Customs-Related Non-tariff Barriers: External

The work of the EU in relation to non-tariff barriers has been undertaken in the context of its commercial policy as well in the context of its internal affairs.[84] Charges having an equivalent effect to tariffs are not prohibited in relation to third countries by the TFEU. They are prohibited, however, by treaties with third countries entered into pursuant to the EU's commercial policy. As an example from a considerable time ago, one may take the Euro-Mediterranean Agreement between Morocco, the EC and the Member States of 26 February 1996.[85] Title II is concerned with the free movement of goods. It prohibits charges having equivalent effect to customs duties in a number of articles.[86] It also prohibits quantitative restrictions and provisions having equivalent effect.[87] This approach is common but is not adopted in every case. The Agreement between the EU and South Korea, for example, does not adopt it.[88]

The general approach of the Court of Justice to the interpretation of the concept of charges having equivalent effect in bilateral treaties is that there is

> [n]o reason to interpret the prohibition of charges having an equivalent effect to customs duties differently depending on whether the trade concerned is conducted within the Community or with non-member countries under the abovementioned agreements or regulations governing particular sectors.[89]

Consequently, where the phrase is used in the EU's bilateral agreements, the prohibition of external non-tariff barriers by virtue of the prohibition of charges having equivalent effect to customs duties is the same externally as internally. The prohibition is contained in a good number of bilateral agreements.[90]

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[84] See TFEU, Article 207.

[85] See Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, [2000] OJ L 70/2.

[86] See, e.g., Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, [2000] OJ L 70/2, Articles 8, 9, and 11.

[87] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, [2000] OJ L 70/2, Article 19.

[88] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/1, Article 2.3, contains a definition of customs duty, but Article 6.9 deals with fees and charges for services rendered, as mentioned below. Some comparison between EU international agreements and those of the USA was made by Neufeld (2014), p. 13.

[89] ECJ, C-125/94, *Aprile Srl, in liquidation v Amministrazione delle Finanze dello Stato*, [1995] ECR I-2919, para. 39, which concerned trade between EEC Member States and EFTA countries. As was noted earlier, there may be some differences of approach where a charge seeks to put an authority in the position in which it may provide a service.

[90] See also ECJ, 87/75, *Conceria Daniele Bresciani v Amministrazione Italian delle Finanze*, [1976] ECR 129, in relation to the first Yaoundé Convention and ECJ, T-115/94, *Opel Austria GmbH v Council*, [1997] ECR II-39 in relation to the EEA Agreement.

Commercial agreements with third countries, however, go much further than the prohibition of charges having equivalent effect to customs duties in prohibiting non-tariff barriers, as shown particularly by the recent free trade agreement between the EU and South Korea.[91]

Chapter 6 of the agreement deals with customs and trade facilitation matters. It provides that import, export and transit requirements are to be efficient and proportionate[92] and based on international standards and instruments that the parties have accepted.[93] There are provisions on release of goods,[94] simplified import and export procedures,[95] risk management and transparency.

Of particular importance is the provision in Article 6.9 which provides that fees and charges shall be imposed only for services provided in connection with the importation or exportation in question or for any formality required for undertaking it, that the fees and charges shall not exceed the approximate cost of the service provided, shall not be calculated on an *ad valorem* basis and shall not be imposed with respect to consular services.[96] In addition to these provisions on customs there is the Protocol on Mutual Administrative Assistance in Customs Matters, which deals with the relationship between the respective customs authorities, and the Protocol on the definition of "originating products" and methods of administrative cooperation.

The EU has been taking action against customs-related non-tariff barriers by means of internal legislation as well as bilateral agreements. It has, for example,

[91] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L 127/1, for example, Article 2.14 provides for the elimination of sectoral non-tariff measures as set out in Annexes 2B to 2E; Article 4.1 makes the WTO Agreement on Technical Barriers to Trade a part of the free trade agreement, and Chapter 5 deals with sanitary and phytosanitary measures. See also Article 13.6 in which the parties commit themselves to advancing trade in environmental goods and service "including through addressing related non-tariff barriers".

[92] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, [2011] OJ L 127/1, Article 6.1 (a).

[93] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, [2011] OJ L 127/1, Article 6.1 (b).

[94] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, [2011] OJ L 127/1, Article 6.2.

[95] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, [2011] OJ L 127/1, Article 6.3.

[96] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, [2011] OJ L 127/1, Article 6.9 (a)–(d) inclusive.

simplified the rules of origin applicable to the Generalised System of Preferences,[97] which seeks to deal with origin sector by sector rather than product by product.

The EU has also taken steps to deal with the complexities associated with customs procedures. For example, under the Community Customs Code there are eight procedures.[98] Under the Union Customs Code the number is reduced to three: release for free circulation, special procedures and export.[99] There will then be four special procedures: transit covering internal and external transit; storage covering temporary storage, customs warehousing and free zones; specific use covering temporary admission and end use and finally, processing covering inward and outward processing.[100]

Bilateral agreements, internal legislation and, of course, multilateral agreements to which we referred earlier are all used by the EU and other jurisdictions to counter customs-related non-tariff barriers. Bilateral agreements and internal legislation may not be expressly described as countering non-tariff barriers, but they are no less effective for that.

Conclusion

Customs law and administration are worthy of particular attention in the debate over non-tariff barriers. The scope for them to give rise to barriers is growing due to the development of customs authorities' mission. The use of value chains means that the damage caused by them is spread widely. Nevertheless, there is nothing new about customs-related non-tariff barriers as the Poitiers incident shows.

The removal of barriers caused by customs law and administration is particularly important for the EU because the customs union is central to its more general union and because any barriers that arise as a result of a lack of uniformity damage not merely the EU's customs union but the EU itself. The tools available to fight customs-related non-tariff barriers are very varied. They range from instruments on international human rights to multilateral international agreements, bilateral agreements and internal EU law. Pascal Lamy has said that what is needed is "regulatory convergence".[101] In the field of customs there is a considerable body of converging law, not least in the Revised Kyoto Agreement, in WTO agreements

[97] See Commission Regulation (EU) No 1063/2010 of 18 November 2010 amending Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, [2010] OJ L307/1.

[98] See Community Customs Code, Art 4(16).

[99] See Art 5(16) of the Union Customs Code, Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1.

[100] See Title VII of Regulation (EU) 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), [2013] OJ L269/1.

[101] See Lamy (2012), p. 8.

such as those on customs valuation, and the regime governing, for example, the imposition of anti-dumping duty. Further work is being carried out in some areas, for example, rules of origin, as noted above. Nevertheless, convergent rules are not enough. The uniform application of convergent rules is what is needed.

Within the EU, some lack of uniformity has been identified and the USA has complained of divergent application of EU customs law within the WTO dispute settlement procedure. Nevertheless, there is clearly uniformity in the EU's directly applicable customs regulations. The EU also has highly developed institutional and legal apparatus to ensure uniform application of its law and, in particular, the unicity of the customs union.

The international community cannot be expected to have tools to ensure uniform application of rules similar to those available in the EU. Furthermore, non-tariff barriers frequently concern highly sensitive matters such as security, health and safety and environmental protection. Customs-related non-tariff barriers are even more sensitive because they often directly affect many financial interests. Such barriers can, therefore, be some of the most difficult to remove. A new multilateral instrument may prove very useful.[102] Cost-effective, speedy and uniform application of international rules is, however, essential.

It has been said in relation to the WTO that "winning a case, especially against a major trading nation, does not guarantee compliance with the ruling will follow".[103] If compliance is required, then domestically enforceable provisions in regional and bilateral agreements[104] are likely to be at least as useful as multilateral activity in the task of removing customs-related non-tariff barriers.[105]

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[102] See further Santana and Jackson (2012), p. 462.

[103] See Walters (2011), p. 169 (178).

[104] Provisions related to customs matters in the bilateral trade agreements of the EU may, in the appropriate circumstances, be relied on by individual traders. An example from many years ago is in ECJ, C-432/92, *The Queen v Min. of Agriculture, Fisheries and Food, ex. p. Anastasiou (Pissouri) Ltd*, [1994] ECR I-3087.

[105] See Kolben (2010), p. 461, who notes at p. 491 that bilateral and regional activity may achieve more in the field of labour standards than "focusing on an institution that is perhaps symbolically potent, but practically limited". Perhaps a new WTO agreement on trade facilitation will disprove this assessment but enforceability is still likely to remain an important consideration.

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Non-tariff Barriers to Trade: Quality and Quantity from an Economic Perspective

Nikita Lomagin

WTO Director-General Roberto Azevêdo, presenting his first global trade-monitoring report to WTO members, said that though trade growth projections for 2014 are "much improved, hovering somewhere between 4.0% and 4.5%, ... 407 new restrictive measures were reported during the review period. Compared to 308 in the same period a year earlier", affecting 1.3 % of world merchandise imports—valued at $240 billion.[1] Indeed, according to Simon Evenett, the founder of Global Trade Alert network, a group of economists who monitor actions that block free trade, protectionism is on the rise despite pledges by the leading industrial and developing countries in the Group of 20 to avoid it. Evenett estimated that 452 protectionist measures have been imposed in the last 12 months. State bailouts of companies, outright export subsidies, and tax rebates for exporters all distort trade.[2] These measures add to the existing stock of restrictions and other impediments to the flow of international trade.

The most recent report on G-20 economies[3] was issued on November 5, 2014.[4] It says that of the 1,244 restrictive measures recorded since the onset of the crisis in 2008, only 282 have been removed. Over the past year, the number of restrictive measures in place has increased by 12 %. Thus, the total number of those restrictive measures still in place now stands at 962—up by 12 % from the end of the reporting

[1] WTO News (2014a).

[2] Bloomberg Businessweek, 4–10 November 2013, p. 22.

[3] In total, 12 reports have been prepared in response to the request by G-20 leaders to the WTO, together with the OECD and UNCTAD, to monitor and report publicly on G-20 adherence to their undertakings on resisting trade and investment protectionism.

[4] WTO News (2014b).

N. Lomagin (✉)
Department of Economics, St. Petersburg State University, 7-9, Universitetskaya nab. St. Petersburg, Russia 199034
e-mail: lomagin@eu.spb.ru

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period on November 2013. The combination of the continuing addition of new restrictive measures and a relatively low removal rate runs counter to the G-20 pledge to roll back any new protectionist measures that may have arisen.

Substantial work has already been done to assess the impact of NTMs on trade. Despite their widespread use, NTBs' effect on international trade is still quite understudied because of the complexities and variations of such policy instruments and the fact that NTMs often have diverse effects on international trade that cannot be easily generalised. Unlike tariffs, NTM data are not merely numbers and their effect on international trade is often subtle, indirect, and often very case specific.[5]

However, there is a need to sum up findings by various international economic organisations and prominent scholars related to the impact of various restrictive measures on trade. This paper aims at summarising economic findings regarding qualitative and quantitative evaluation of non-tariff barriers in trade literature, as well as the most recent exposure of trade barriers in the form of embargo as a result of a conflict over Ukraine in 2014, where import bans for a wide range of goods were introduced by Russia.

The paper will foremost address the notion of NTMs–NTBs and its classification. Then we will provide a trade literature review related to quantification of NTBs, and finally the paper will focus on new developments of using NTBs.

NTBs: Notion, Taxonomy, and Study Methods

While some NTMs may serve legitimate purposes, others may just be barriers that reduce market access. The terms NTMs and NTBs are often used interchangeably, and "non-tariff barrier" (NTB) is more commonly used in the academic literature, while international organisations tend to use the term "non-tariff measures" (NTM).[6]

Since the 1970s, non-tariff barriers have emerged as one of the primary impediments to international trade. As tariffs were negotiated away over successive rounds of the GATT, previous NTBs were exposed and NTBs were created to insulate uncompetitive industries from the consequences of liberalisation. Given the decline in tariff rates, the relative contribution of NTBs to overall trade restrictiveness is likely to have increased, making them even more important than tariffs in most countries. As a result, trade literature regards NTBs as a major challenge for the multilateral trading system both because they are difficult to negotiate and because they threaten to undermine the tariff commitments already made. The complicating factor has always been the informational burden of

[5] UNCTAD (2013), p. vii.

[6] Some experts disagree with this approach, noting that NTMs comprise a wider set of measures than NTBs, which are generally intended only as discriminatory non-tariff measures imposed by governments to favour domestic over foreign suppliers.

identifying NTBs and quantifying them in a common and economically meaningful way.

Non-tariff barriers refer to restrictions that result from prohibitions, conditions, or specific market requirements that make importation or exportation of products difficult and/or costly. NTBs also include the unjustified and/or improper application of non-tariff measures such as sanitary and phytosanitary (SPS) measures and other technical barriers to trade (TBT).

Considerable progress has been made by UNCTAD, which has catalogued various NTBs by type, country, and product since the 1960s. During the 2000s, UNCTAD expert meetings on NTBs provided a forum for researchers and policymakers to clarify methodological, classification, and technical issues related to NTB quantification, to better understand the impacts of NTBs—especially for LDCs.[7]

Non-tariff measures are generally defined as policy measures other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded or prices or both (UNCTAD/DITC/TAB/2009/3). Since this definition is broad, a detailed classification is of critical importance so as to better identify and distinguish among the various forms of non-tariff measures.

The classification of non-tariff measures is a taxonomy of all those measures considered relevant in today's situation in international trade. It was extensively discussed and agreed upon by several international organisations forming what was called the MAST group (Multi-Agency Support Team) to support the Group of Eminent Persons on non-tariff barriers established by the Secretary General of UNCTAD in 2006. Its work ranged from 2007 to 2012, during which time the classification was tested in the field for data collection.[8]

This classification comprises technical measures, such as sanitary or environmental protection measures, as well as others traditionally used as instruments of commercial policy, e.g., quotas, price control, export restrictions, contingent trade protective measures, and also other behind-the-border measures, such as competition, trade-related investment measures, government procurement, or distribution restrictions.

NTBs arise from different measures taken by governments and authorities in the form of government laws, regulations, policies, conditions, restrictions or specific requirements, private sector business practices, or prohibitions that protect the domestic industries from foreign competition. Doha draft procedures for dispute resolution, for example, require a country to identify the specific NTB under dispute and provide detailed information on that NTB's impact on trade. To accomplish this, negotiators would need information on the price impacts and/or trade-reducing effects of specific NTBs imposed on specific products by individual partner countries.[9]

[7] See UNCTAD, Report on the Experts Meeting on Methodologies, Classification, Quantification, and Development Impacts of Non-Tariff Barriers.

[8] UNCTAD (2013).

[9] See Dean et al. (2008), p. 1.

Measuring NTBs and their effects is a challenge because of the heterogeneity of policy instruments and lack of systematic data. A unified approach to measuring NTBs does not exist. Most measurement methods start from a simple partial equilibrium approach looking at a single commodity and attempt to develop a producer, consumer, or trade tax equivalent to the NTBs that explains by how much supply and/or demand or trade are affected by the policy intervention. Most NTB analyses implicitly rely on a framework that accounts for three economic effects: the regulatory protection effect providing rents to the domestic sector; the "supply shift" effect, which reflects the increased costs of enforcing compliance of the NTBs on foreign and sometime domestic suppliers; and the "demand-shift" effect, which takes into account the fact that a regulation may enhance demand with new information or by reducing an externality.[10]

The literature on measuring core NTBs (i.e., import quotas, prohibitions, import licenses, and export restraints)[11] features two main methodological approaches.[12] In order to facilitate a comparison between the trade effects of these different NTBs, studies by Anderson and Neary analyse their impact on international trade by estimating the so-called ad valorem tariff equivalent (AVE), i.e., the level of an ad valorem tariff that would have an equally trade restricting effect as the non-tariff barrier in question.[13] This enables a comparison to be made with tariffs and is important for any analysis of the welfare implications of various trade policy measures. In the trade literature, the AVE of different NTBs is computed using one of two approaches—the price gap or the econometric-based model.

The basic strategy of the price gap method involves a comparison of prices before and after the NTB's markup, where this difference is expressed as a tariff equivalent. Attempts to assess the trade impacts of NTMs have led to the development of the "price gap" or "tariff equivalent" method, which seeks to estimate the level of ad valorem tariff that would have an equally trade-restricting effect on the NTM in question. If country A is imposing an NTM and its import price is higher than the "world price", this can be taken as evidence that the NTM is trade restrictive. This approach aims at assessing the presence of implicit NTBs from anomalies in the market data, such as price gaps (i.e., differences between domestic and foreign prices) or smaller-than-predicted trade flows.[14]

The second method is to calculate econometrically the effects of NTBs on markets using available information about their incidence. The econometric-based method focuses on estimating the "quantity impact" by using econometric models. This method is useful because data on trade flows is more easily available

[10] Kee et al. (2006).

[11] See WTO (2001).

[12] For a detailed survey of both methods, see Deardorff and Stern (1999); Ferrantino (2006).

[13] See on the Trade Restrictiveness Index Anderson and Neary (1994), p. 151; Anderson and Neary (1996), p. 107.

[14] See Baldwin (1975); Bhagwati and Srinivasan (1975); Bradford (2003), p. 24; Bradford (2005), p. 435; Saxonhouse and Stern (1989), p. 293; McCallum (1995), p. 615.

at disaggregated level. Also, if the NTM is absolutely prohibitive, no prices are observed, or when the product is highly differentiated, prices are not very informative.[15] The so-called gravity equation models predict that the value of trade between any two countries will be positively related to the size of their economies and universally related to the distance (and other measures of trade costs) between them. In order to estimate the effect of policies such as tariffs and NTMs on trade, gravity equations include measures that capture these policy factors as explanatory variables.

The gravity model of trade enables an estimation of the predicted value of trade between a country pair with and without the NTMs. The effect of NTMs on trade is estimated as the difference between the two values. A similar calculation can be made for the effect of a tariff compared with no tariff. The AVE of the NTMs can then be derived by comparing these two predicted differences. In short, the AVE of the NTM is a tariff that has the same effect on the value of trade.

Both methods are perfectly valid approaches, but they address different issues. The first addresses the problem about isolating the effects of known policies while relying on other sources of information to identify the policies themselves. The second helps to identify barriers that may otherwise be hidden. As experts observe, this too is important. However, unless these hidden barriers can be linked to specific policies, it is unclear how a policymaker would tackle them.

Also, as Ferrantino found, different NTBs occur at different points in the supply chain. This means that the price impact of a particular NTB can only be identified by comparing two prices at the relevant stages in the production and distribution process. For instance, customs procedures affect the difference between the "cost-insurance-freight" (c.i.f.) price and the landed duty-paid price. Given sufficient data on export and import prices, tariffs, and transport margins, it is possible to do a reasonably good job of estimating the price gap.[16] In short, it is possible but not straightforward to measure and compare the restrictiveness of different types of NTBs.

Several NTBs based on a price intervention (export subsidies, countervailing duties) are a tax instrument. More complex NTBs (for instance, domestic content requirement) can be assessed as a set of taxes and hence analysed accordingly as taxes. To develop a tax equivalent, a basis of equivalence has to be chosen.[17] The tax equivalent has to lead to an equivalent protection level (same profit under the tax equivalent or the NTB), a price increase equivalence (a price wedge), or a consumption, production, or trade equivalent.

This choice of basis depends on the intended policy analysis. However, many NTBs do not easily translate into a tax-equivalent instrument. They require more sophisticated and indirect approaches to be measured and to quantify their effects on import volume, price, and welfare. Round-about approaches are also used

[15] Ferrantino (2012).

[16] Ferrantino (2012).

[17] See Vousden (1990).

because of lack of data on the direct implications of an NTB on the cost of production and consumer decisions.[18]

Some of the most widely used indicators to measure the effect of NTBs on trade are those developed by Kee et al. (2006) and implemented by the World Bank in its global monitoring reports.[19] The indicators referred to are the overall trade restrictiveness index (OTRI)[20] and market access OTRI (MA-OTRI). These indicators provide the overall level of restrictiveness of the trade policies imposed (OTRI) or faced (MA-OTRI) by a country and are based on the estimation of ad valorem equivalents of NTMs.

The TRI focuses on the trade distortions imposed by each country's trade policies on itself. It uses welfare as the relevant metric. It answers the following question: what is the uniform tariff that if applied to imports would leave home welfare unchanged? The OTRI focuses on the distortions imposed by each country's trade policies on its import bundle. It uses the aggregate import value as the relevant metric. It answers the following question: what is the uniform tariff that if imposed to home imports would leave aggregate imports unchanged?

The MA-OTRI is the mirror image of the OTRI. It focuses on the distortions that the rest of the world imposes on each country's export bundle. It uses export value as the relevant metric. It answers the following question: what is the uniform tariff that if imposed by all trading partners on exports of country C would leave exports of country C unchanged?[21]

Quantification of NTBs

Adopting the framework of Anderson and Neary, Kee, Nicita, and Olarreaga[22] computed a 9 % tariff equivalent of NTBs, including price and quantity controls, finance measures, and TBT on average for all goods. The average tariff equivalent is about 40 % for the goods affected by these NTBs.[23] The main findings by Kee, Nicita, and Olarreaga about NTBs' impact on trade are threefold.

Firstly, NTBs have a significant contribution to the level of trade restrictiveness. Indeed, NTBs add on average an additional 70 % to the level of trade restrictiveness

[18] Beghin and Bureau (2001), p. 107.

[19] In their work, Kee et al. use two broad types of NTBs—the so-called core NTBs (price and quantity control measures, technical regulations, as well as monopolistic measures, such as single channel for imports) and agricultural domestic support.

[20] See on the Trade Restrictiveness Index Anderson and Neary (1994), p. 151; Anderson and Neary (1996), p. 107.

[21] Kee et al. (2006).

[22] Kee et al. (2006).

[23] Kee et al. (2006), p. 4.

imposed by tariffs. In 21 countries (out of 91), the contribution of NTBs to the overall level of restrictiveness was higher than the contribution of tariffs.[24]

Secondly, the TRI that uses welfare as a reference is always higher than the OTRI. On average, the TRI is around 70 % higher than the OTRI (regardless of whether we include NTBs or not). The largest differences between OTRIs and TRIs are to be found in countries where the tariff variance is the highest. High-income countries tend to be predominantly among those with a much higher TRI (and therefore a higher tariff variance). All high-income countries are in the top 20 when ranked according to these criteria.

Thirdly, agriculture protection is larger than manufacturing protection. It is on average twice as high. In only one country in the sample was the OTRI for agriculture lower than for manufacturing (Egypt). The MA-OTRI in agriculture is on average almost four times higher than the MA-OTRI for manufacturing. This means that countries that have an export bundle concentrated in agriculture products are likely to face much more important market access problems than countries specialising in manufacturing products.

The simple average ad valorem equivalent in the sample for core NTBs is 9.2 %; it is 7.8 % when import weighted. If averages are calculated only over tariff lines affected by core NTBs, the numbers are much higher: 39.8 and 22.7 %, respectively.

Empirical results suggest that the importance of NTBs as a protectionist tool is substantial, especially considering that in 57 % of tariff lines subject to core NTBs in the Kee et al. sample, the AVE of core NTB is higher than the tariff. Regarding products subject to agricultural domestic support, in 30 % of these tariff lines the AVE of agricultural domestic support is higher than the tariff. Since the use of NTBs has increased in the last 10 years, these indicators probably underrepresent the actual impact of NTBs on trade. On the other hand, in the statistics presented by UNCTAD, tariff data are updated to 2010 using the UNCTAD TRAINS database (see Fig. 1).

According to this indicator, NTBs substantially contribute to restricting international trade. Their contribution to overall trade restrictiveness is generally much higher than that of tariffs. In the case of high-income countries, NTBs add about 4 % points to the average tariff of about 2 %.[25] In general, NTBs are relatively more restrictive in high- and middle-income countries than in low-income countries. This is partly due to the fact that trade policies of low-income countries still largely rely on tariff restrictions, as NTB administration is more costly and complex.

There is a big gap in the restrictiveness of NTBs between agricultural and manufacturing products, with NTBs substantially adding to the level of restrictiveness of the agricultural sector, especially in high- and middle-income countries. For these countries, the effect of trade policies on the agricultural sector is estimated to represent on average almost 30 % of the value, with about 20 % points due to NTBs.

[24] Kee et al. (2006), pp. 20–21.

[25] UNCTAD (2013), p. 14.

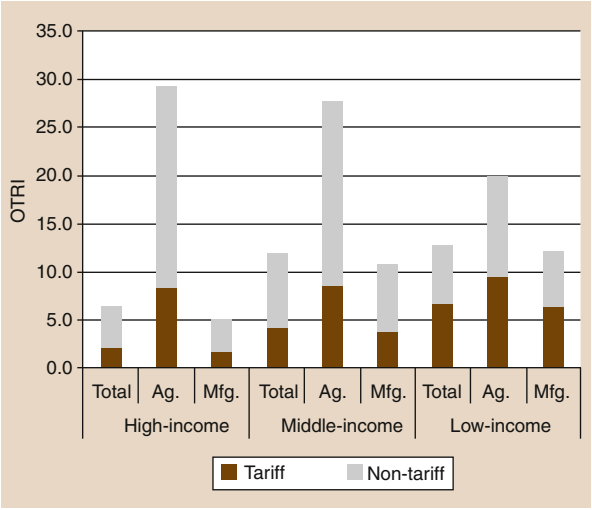

Fig. 1 OTRI for high-, middle- and low-income countries (UNCTAD 2013, p. 14)

As for manufacturing, the impact of NTBs is not as large, especially in restricting access to high-income markets. It appears to be that NTBs are more important in limiting manufacturing imports that enter middle- and low-income markets.[26]

With regard to market access, the restrictiveness of trade policies varies across trading partners. This variance is due both to the discriminatory use of trade policies (e.g., trade preferences) and to the composition of trade (e.g., countries whose main exports are agricultural products face more restrictive market conditions than countries exporting mainly manufactured goods because agricultural market access is generally more restrictive). Figure 2 reports on the level of restrictiveness faced by exports. Countries are set in groups on the basis of their income.

Similar to the case of imports, the overall level of restrictiveness faced by exports is largely influenced by NTBs. On average, the contribution of NTBs to restricting access to markets is more than twice as much than tariffs. In some cases, NTBs are overwhelmingly more important than tariffs in restricting access to markets. For instance, while the agricultural exports of low-income countries face an average tariff of about 5 %, largely because of various preferential schemes, once the effect of NTMs is taken into account the overall level of restrictiveness is much higher at about 27 %.

By and large, non-tariff barriers account for a much bigger contraction in trade than traditional forms of trade policies such as tariffs. They are especially restrictive for the market access of low-income developing countries-exporters of agricultural products, which are relatively much more affected by NTBs than other products.[27]

Aforementioned findings by UNCTAD correspond to a number of studies from the early 1990s that attempt to quantify the effect on non-tariff measures on

[26] UNCTAD (2013), p. 14.

[27] UNCTAD (2013), p. 15.

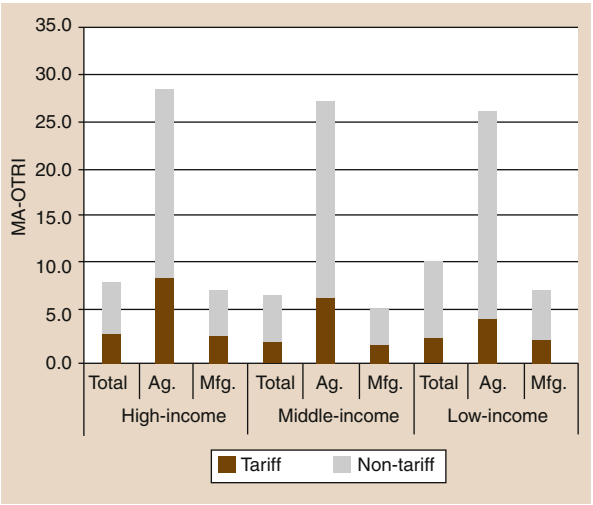

Fig. 2 Overall level of restrictiveness faced by exports (MA-OTRI) (UNCTAD 2013, p. 15)

international trade. Averaging across countries, they find that NTBs are almost twice as trade restrictive as tariffs. They also find that in several countries, NTBs contribute much more than tariffs to the overall level of trade restrictiveness. These results, however, are based on NTBs' data that have not been updated for about a decade.[28]

Studies by Trefler (1993)[29] and Lee and Swagel (1997) argue that NTBs are less likely to be imposed on export-oriented industries, at least in part because of fear of foreign retaliation. Each study finds a strong negative relation between an industry's ratio of exports to total output (or consumption) and the likelihood of an NTB. Thus, a country is less likely to impose an NTB on a product the more that product is exported rather than consumed at home. Both studies also argue that import penetration is likely to be positively related to the willingness of legislators to impose NTBs but that import penetration is clearly affected by comparative advantage (both studies) and by distance. Also, Lee and Swagel argue that an NTB may be a complement to or substitute for a tariff.[30] Hence, the tariff itself is an important determinant of the likelihood of an NTB. Their evidence strongly supports the idea

[28] It was recognised by the 11th UNCTAD Conference at São Paulo (2004) that in spite of their importance in regulating trade, there is little understanding of the exact implications of NTMs on trade flows, export-led growth and social welfare in general. This lack of understanding was in large part due to the fact that, with the exception of the UNCTAD-TRAINS database, there is no global mechanism to obtain comprehensive and continuously updated information on NTMs. The UNCTAD TRAINS database has not been updated regularly since 2001, and the data was based on an obsolete classification that does not adequately and accurately reflect new forms of non-tariff measures.

[29] Trefler (1993), p. 138.

[30] Lee and Swagel (1997), p. 372.

that tariffs and NTB are two sides of the same coin. Their main goal is to enhance the protection granted to an import-competing sector.

The foundational study by Deardorff and Stern (1999) gives a detailed exposition of the calculation of the tariff equivalent of NTBs using data on individual product prices and allows for different types of NTBs, market competition, and product substitutability.[31] Ferrantino (2006) notes that "This method requires a good deal of fairly precise information on prices, transport and distribution costs, tariffs, taxes, and/or subsidies at the product-specific level, and in some cases information on quality differences between products. Unfortunately, this amount of cross-product, cross-country data is not usually available."[32]

Mansfield and Busch in their pioneering work on cross-national patterns of non-tariff barriers found that NTBs are most pervasive when deteriorating macroeconomic conditions prompt industries to make new demands for protection, when countries are sufficiently large to give policymakers incentives to impose protection, and when domestic institutions permit groups to influence policymakers. In short, NTBs tend to be most pervasive in cases where the incentives of pressure groups and policymakers converge.[33]

By virtue of their size, large states are likely to be vested with disproportionate market power. They can exploit their monopoly power through the use of tariffs, as well as quotas and other NTBs that duplicate tariff effect. Large states retain an incentive to target small states since the latter have no incentives to retaliate. In contrast, small states are unlikely to possess the market power necessary to benefit from optimal protection and face the prospect of retaliation by trade partners should they impose NTBs. Hence, on average, larger states display a greater preference for NTBs than their smaller counterparts.[34]

Also, one of the key factors for the use of NTBs is the level of pre-existing tariff levels. As Mansfield and Busch showed, "groups already well protected by tariffs may bring less pressure for new NTBs and face more governmental resistance to their demands than less well protected groups. This suggests that tariffs and NTBs are substitutes, which is consistent with the view that NTBs are often used to protect industries that have lost tariff protection due to successive rounds of the GATT."[35] In other words, NTBs as the "new" protection may be newer in form than in cause: it appears to be the product of many of the same factors that explain the "old" protection (i.e., tariffs). This finding is consistent with the law of constant protection.[36]

Final finding of Mansfield and Busch is that the provision of NTBs is at least partially governed by economic size, domestic institutions, and the interaction

[31] Deardorff and Stern (1999).

[32] Ferrantino (2006), p. 6.

[33] Mansfield and Busch (2000), p. 353.

[34] Mansfield and Busch (2000), p. 353 (356).

[35] Mansfield and Busch (2000), p. 353 (358).

[36] Mansfield and Busch (2000), p. 353 (365).

between these factors. NTBs are highest in large states that are characterised by high levels of institutional insulation and autonomy. Thus, states are most likely to impose NTBs when economic incentives to do so exist and when strong domestic institutions insulate policymakers from interest-group pressures. NTBs are greatest when the interests of state and societal actors converge.

A large and growing body of literature centers on the macroeconomic determinants of protection such as unemployment and the real exchange rate. Most of this research supports the view that macroeconomic fluctuations strongly influence pressures for protection. High levels of unemployment and appreciated currency, by increasing the price of domestically produced goods, contribute to demands for protection.

The UNCTAD study supports the aforementioned findings. As of 2005, the un-weighted average tariff was roughly 3 % in high-income countries and 11 % in developing countries according to the World Bank, from respective levels at least three times as high in 1980. Export subsidies have almost disappeared except in a few agricultural food markets. Quotas have become less important, as they have been converted into two-tier tariff schemes, the so-called tariff-trade quotas.[37] As tariffs have been lowered, demands for protectionism have induced new NTBs, such as TBT interventions. UNCTAD estimated that the use of NTBs based on quantity and price controls and finance measures has decreased dramatically, from a little less than 45 % of tariff lines faced by NTBs in 1994 to 15 % in 2004, reflecting commitments made during the Uruguay Round.[38] However, the use of NTBs other than quantity and price controls and finance measures increased from 55 % of all NTB measures in 1994 to 85 % in 2004. The use of TBT almost doubled, from 32 to 59 % of affected tariff lines during the same period. The use of quantity control measures associated with TBT showed a small increase, from 21 to 24 % of affected tariff lines, suggesting that trade impediments within TBT are rising.[39]

By the end of 2014, the WTO reported that the import-restrictive measures introduced since October 2008 that remain in place are estimated to cover around 4.1 % of world merchandise imports and around 5.3 % of G-20 imports. G-20 economies have applied 93 new trade-restrictive measures since June 2014, compared with 112 during the previous 6 months (see Table 1). As in previous periods, trade remedy measures account for more than 50 % of these measures, followed by other restrictive import measures and restrictive measures affecting exports. In terms of trade coverage, the trade remedy actions and other restrictive import measures applied by G-20 economies during the period under review constitute 0.8 % of the value of G-20 merchandise imports and 0.6 % of the value of world merchandise imports. This amounts to around US$118 billion. Further, the import-restrictive measures recorded since October 2008 that remain in place cover around 4.1 % of the value of world merchandise imports and around 5.3 % of the value of G-20

[37] UNCTAD (2005), p. 3.
[38] UNCTAD (2005), p. 6.
[39] UNCTAD (2005), p. 6.

Table 1 Trade-restrictive measures (WTO 2014, p. 17)

Type of measure	Mid-October 10 to April 11 (6 months)	May to mid-October 11 (6 months)	Mid-October 11 to mid-May 12 (7 months)	Mid-May to mid-October 12 (5 months)	Mid-October 12 to mid-May 13 (6 months)	May to mid-October 11 (6 months)	Mid-November 13 to Mid-May 14 (6 months)	Mid-May 14 to mid-October 14 (5 months)
Trade remedy	53	44	66	46	67	70	66	54
Import	52	36	39	20	29	36	25	25
Export	11	19	11	4	7	8	17	9
Other measures	6	9	8	1	6	2	4	5
Total	122	108	124	71	109	116	112	93
Average per month	20.3	18.0	17.7	14.2	15.6	19.3	18.7	18.6

imports. This amounts to US$757.0 billion.[40] The overall impact of NTBs is perhaps much higher but cannot be evaluated since "adequate information on behind-the-border measures, including regulatory measures and subsidies, is still lacking".[41]

The number of WTO members that responded to the request for information on their new trade measures still remains small. In fact, it even slightly declined from 38 % of the membership in 2012 to 35 % in 2013.[42] The paper by Henn and McDonald (2014) finds "strong evidence that new trade restrictions are significantly decreasing trade in affected products. Estimates of impacts on affected trade flows associated with border measures are about 5–8 %".[43]

To some extent, this gap was filled by Hufbauer et al. (2013). By using a combination of statistical analysis and case studies, they show that local content requirements (LCRs) have become increasingly popular. Case studies featured the healthcare sector in Brazil, wind turbines in Canada, the automobile industry in China, solar cells and modules in India, oil and gas in Nigeria, and "Buy American" restrictions on government procurement. As the analysis shows, of 117 cases only 47 were systematically quantifiable. Taken together, they affected more than $373 billion in goods and service trade flows, about 2 % of global trade in 2010. The remaining 70 cases were not quantifiable "because of their opaque nature, vague wording, or nontransparent application". By making various assumptions, the analysis concludes that non-quantifiable cases affected another $555 billion of trade or about 3 % of global trade in goods and services. In total, LCRs affected about $928 billion in trade in 2010 or 5 % in global trade. Assuming that this is tariff equivalent to 10 % ad valorem, the reduction of trade as a result of LCRS in 2010 has been about $93 billion.[44]

Recently, the OECD has developed a sophisticated model to measure LCRs by incorporating two features that are unique for CGE models. First, it integrates information from the OECD–WTO Trade in Value Added database (TiVA), which more fully develops the structure of trade by differentiating markets. The second tenet of this method is the incorporation of a quantity-based policy instrument for the analysis of LCRs. As the OECD states, these features permit a more nuanced analysis of the impact of a subset of recent LCR measures. The analysis focuses on those measures that are currently in place, are binding, and target industrial inputs. The main findings show great impact of the LCRs on trade. They substantially reduce trade, decreasing import and export flows even in those

[40] WTO (2014), p. 20.

[41] The Report says that information on measures included in this summary has been collated from inputs submitted by G-20 members and from other official and public sources. Initial inputs in response to the Director-General's request were received from all G-20 delegations with the exception of Turkey. This data, plus information collected from other public sources, were sent back for verification to the G-20 member concerned. Most delegations actively participated in the process, although in some cases the Secretariat received only partial responses, particularly with respect to general economic support measures.

[42] WTO News (2014a).

[43] Henn and McDonald (2014), p. 77 (115).

[44] Hufbauer et al. (2013), p. 37; on LCRs see also Ezel et al. (2013).

economies not engaging in such actions, potentially reversing the trend of greater economic integration and dampening global growth. The forthcoming OECD paper concludes that "[t]otal imports fall by US$ 12 billion and exports decline by nearly US$ 11 billion from the application of just 11 LCRs that were measured. [. . .] LCRs introduce production and trade distortions that aggravate rather than address the underlying problems they may have been designed to solve. LCRs distort input markets and potentially inhibit innovation by removing access to technologically-advanced inputs. Imports of intermediate goods account for almost all of the total import declines (US$ 10 billion), and 80 % of the drop in exports (US$ 8.6 billion)."[45]

One of the most radical forms of NTBs is an import ban. Recently, Russia imposed an embargo on agro-food products from the European Union[46] as a response to sanctions imposed against Russia in the context of the situation in Ukraine. The 1-year ban covers almost all meat products (beef, pigmeat, poultry, and certain sausages), milk and dairy products, fruits and vegetables, as well as fish and crustaceans. The EU has conducted a comprehensive analysis related to this ban and economic impact on member states. The EU confirmed that restrictions put a serious pressure on the agriculture and food sector for two reasons. First, Russia is the second-biggest commercial market (the banned products on the Russian market constitute 4.2 % of all EU agri-food exports), representing in total a value of about € 11.8 billion in 2013, i.e. 10 % of all EU agri-food exports. The agri-food products covered by the Russian ban represent a value of € 5.1 billion in 2013 exports, i.e., 43 % of EU agri-food exports to Russia.

Some sectors and EU member states (in particular the Netherlands, Poland, Spain, Finland) are more heavily affected—i.e., 29 % of EU fruits and vegetables exports, 33 % of cheese, 28 % butter. Second, there is possible cascade effects leading to oversupply on the internal market given the volumes involved and the quantity of perishable products banned in full during harvesting season.

The EU admitted that though alternative market opportunities will exist for some of these EU products, rerouting will take time. The overall temporary restrictions applied by Russia potentially put at risk € 5 billion worth of trade and affect the income of 9.5 million people.

In a global perspective, the ban affects 4.2 % of total EU agri-food exports, but, depending on the sector, this share can represent a considerable part of EU exports in the sectors concerned (see Table 2).

The ban has already had an immediate negative impact on prices in some sectors. Oversupply situations and the so-called psychological effects of the announcement of the ban put pressure on local distributors. The analysis by the EU experts shows that "not only countries which were traditionally exporting substantial quantities to

[45] WTO (2014), p. 21.

[46] European Commission (Agriculture and Rural Development), Information Note On the Russian on Agro-Food Products from the EU, available at http://ec.europa.eu/agriculture/russian-import-ban/pdf/info-note-03-09_en.pdf.

Table 2 EU exports to Russia as share of production, 2013

Products	EU production used domestically (%)	Ban-affected exports to Russia in EU production (%)	Banned exports to Russia in total EU exports (%)
Fruits and vegetables (in value)	90	3.0	29
Cheese	92	2.7	33
Butter	95	1.7	28
Pigmeat	90	2.0	20
Beef	96	0.5	25
Poultry meat	90	0.7	6

Russia are affected, but that oversupply may also spread into the internal market as a result of producers and operators' efforts to find alternative markets in the EU and because of the time necessary to find new markets outside the EU".

The Russian ban on fruits and vegetables was the most severe. This effect was immediate, as for many products the harvest was ongoing or about to start in the EU and Russia is traditionally an important destination for EU fruit and vegetables. As Table 2 shows, the country represented almost 30 % of the EU's fruit and vegetable exports in 2013. The main products concerned are apples, tomatoes, peaches, nectarines, pears, and also mushrooms, cucumbers, sweet peppers, and cabbage, among others. Russia was also a growing market for fresh apples, pears, and tomatoes, for which sales increased during the last decade.

In 2012–2013, the EU supplied 25 % of Russian fruit imports and 34 % of vegetable imports. The main EU suppliers for fruits were Poland (7 %), Spain (6 %), Greece (4 %), Italy (3 %), and Belgium (2 %) and for vegetables the Netherlands (10 %), Poland (9 %), Spain (8 %), and Belgium (2 %).[47] Russia has sourced vegetables and fruits in particular from Turkey, Serbia, Azerbaijan, and Uzbekistan. To the EU's surprise, candidate and third countries did not refrain from measures that are aimed at exploiting new trading opportunities arising from the introduction of the ban.

The most affected dairy products are cheese (257,000 tonnes or 33 % of total EU cheese exports) and butter (37,000 tonnes or 28 % of total EU butter exports). The banned dairy products amount to some 1.5 % of total EU milk production in milk equivalent, which is a significant share of the total 9 % of EU milk production that is exported.

For the dairy sector, cheese is the product most affected by the ban. Russia is an exclusive trading partner for cheese for Finland and the Baltic countries (about or over 90 % of these countries' cheese exports), which also represents for each of

[47] European Commission (Agriculture and Rural Development), Information Note On the Russian on Agro-Food Products from the EU, available at http://ec.europa.eu/agriculture/russian-import-ban/pdf/info-note-03-09_en.pdf.

these EU member states around or above 20 % of national cheese production (e.g., around 35,000 tonnes for both Finland and Lithuania). Cheese exports to Russia also represent a high share of certain EU member states' cheese exports: 42 % for the Netherlands (corresponding to 8 % of national production), 38 % for Germany (corresponding to about 2 % of national production), and 43 % for Poland (corresponding to less than 4 % of national production). Close to half of the butter exported to Russia comes from Finland (17,000 tonnes covering 95 % of Finland's butter exports). In total, producers of dairy food staff in Finland have reported losses at $200 million.[48]

The EU meat sector has been confronted with SPS-related trade restrictions from Russia even before the imposition of the recent ban. Relatively high producer prices for all meats, moderate feed costs, and—until now—good export demand from other markets than Russia limit the immediate impact of the current ban. However, the Commission remains vigilant as regards the medium- and long-term effects the ban might have on these sectors. For pigmeat, EU exports to Russia have been banned since February 2014 (SPS—African Swine fever). The EU Commission started a WTO procedure against this measure.[49]

Russia is the first destination of EU exports for beef meat, rising to 25 % of all EU beef meat exports. The EU's most relevant beef products for the Russian market are breeding animals and low-value products (trimmings, offal, and fats). The ban affects the export of fresh, chilled, and frozen beef but not the exports of live animals, offal, or fats. The products affected directly by the ban represent less than 1 % of EU production. On June 2014, Russia had already issued a sanitary ban on beef offal and trimmings (due to the detection of pigmeat in a consignment). Poultry meat is the least affected of the meats sector, as exports to Russia amount to 0.7 % of EU production (or about 6.5 % of EU's total poultry exports). Thus, the impact of the Russian ban on EU farmers was significant. It is worth noting that Russian consumers suffered as well. First, it took retailers some time to substitute EU agro-products, and second, due to the same "psychological effect" nominal prices have increased by 20–35 %. The Ministry of Finance of Russia directly tied this phenomenon with the import ban.[50]

In conclusion, one can agree with the WTO Director-General who believes that though a health check on global trade revealed "the diagnosis is cautiously positive", there are still reasons to be concerned about trade restrictive measures that have a tendency to grow, including G-20 countries with worth almost $ 1 trillion. Existing empirical evidence shows that NTBs can significantly restrict trade.

As trade literature shows, there are sufficient instruments to quantify various NTBs that represent a serious hurdle to further development of trade and the global economy as a whole. More attention should be given to the further measurement of

[48] See http://lenta.ru/news/2014/11/10/finban/.

[49] See the Russian Federation's measures on EU exports of live pigs and pork products due to African Swine Fever (raised by the European Union, March 2014 (STC 369)).

[50] See http://www.gazeta.ru/business/news/2014/10/02/n_6527109.shtml.

global supply chains because AVEs do not adequately reflect the trade-restrictive impact of certain NTBs when the production process is fragmented across countries. Also, studies of differences in use of NTBs across sectors and countries are still lacking, as well as research on specific NTBs especially in emerging economies. There is no literature on NTBs in post-Soviet states, though market access is one of the key instruments of dominant economies over there.

Further progress in trade liberalisation will largely depend on the transparency of trade and trade-related measures, which is a key factor affecting all aspects of global trade and the WTO as such. The sharing of information among WTO members is essential not only for the WTO's surveillance activities through the Trade Policy Review Mechanism and the trade monitoring exercise. It is also essential for the sufficient implementation of WTO agreements, avoiding unnecessary trade disputes, and, last but not least, completing successful negotiations.[51]

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[51] See http://www.gazeta.ru/business/news/2014/10/02/n_6527109.shtml.

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The Horizontal Mechanism Initiative in the WTO: The Proceduralist Turn and Its Discontents

Akbar Rasulov

Introduction

It has long been the received wisdom among international lawyers that the natural course of historical progression for the international legal system entails a process of steady but ever-deepening judicialisation of international dispute settlement (IDS). The more developed and more sophisticated the international legal system became, the more ubiquitous would become the use of international judicial mechanisms, the more decisively the centre of gravity in IDS would move away from what in other legal systems would be considered alternative dispute resolution structures towards some form of litigative or quasi-litigative procedure.

Whether this theory was ever justified as a matter of factual historical record remains, of course, in considerable doubt. Latterly, however, it seems, in addition to everything else, it has come on hard times also *as a matter of international policy vision*—nowhere more so vividly, perhaps, than in the field of international economic law. The remarkable decision by the German government in March 2014 to push for the exclusion of any form of investor-State IDS mechanism from the Transatlantic Trade and Investment Partnership agreement provides only the most recent illustration of what seems to be a gradually spreading trend.[1]

This emergent pattern of deep-seated ambivalence concerning the use of judicial IDS mechanisms has not, of course, remained the sole provenance of international investment law policymakers. Over the last few years, indeed, it seems to have become a rather familiar theme in various international trade law (ITL) circles as well. The ongoing attempt since the middle of the last decade to reform the standard

[1] For background, see Donnan and Wagstyl (2014).

A. Rasulov (✉)
School of Law, University of Glasgow, Stair Building 5-9, Glasgow G12 8QQ, UK
e-mail: Akbar.Rasulov@glasgow.ac.uk

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procedures for the "facilitation of solutions to non-tariff barriers" in the context of the World Trade Organization (WTO)—the so-called horizontal mechanism (HM) initiative—offers a brilliant case in point.

In this essay, I propose to address some of the issues raised by the emergence of the HM initiative and the respective transformations in the ITL consciousness that it seems to reflect. More specifically, I am going to describe a number of fundamental challenges that the rise of the HM initiative seems to have uncovered within the broader structure of the ITL *project*, challenges that I am going to argue are not, in fact, at all exclusive to the ITL field as such but are, indeed, characteristic of the entire *enterprise of contemporary international law* as a whole.[2]

A large part of the argument I am going to sketch out in these pages is fairly unoriginal. What it lacks in terms of originality, however, it tries to make up for in terms of its theoretical urgency. It seems to me truly extraordinary how little attention has been paid in the broader doctrinal and policymaking debates that have sprung around the question of the HM initiative in recent years—and more generally in contemporary ITL as a whole—to the kind of issues and insights that the sort of analysis outlined here helps identify and articulate. Given how relevant these insights are for *other areas of international economic governance* too, this pattern of omission seems both baffling and suggestive of a rather worrying trend.

Since the theoretical intervention that I would like to make in this essay is not intended to double as a literature review, I have refrained from discussing in these pages every single piece of writing that seeks to make a contribution to the HM "debate". For the purposes of the argument that I wanted to make here, it was sufficient to focus only on the most characteristic representative of the genre.[3] This I found in a recent article written by Veronique Fraser.[4] This choice, inevitably, is not immune to challenges. But then neither is any other interpretative decision, and this one at least has the merit of being transparent.[5]

A Brief Genealogy of the HM Initiative

The basic timeline behind the HM initiative looks as follows.

Building on the various successes of the previous decades, in 2001, WTO members embarked on a new round of multilateral trade negotiation (the so-called Doha Round). One of the central concerns placed on the negotiators' agenda was the spread of the so-called non-tariff barriers (NTBs) in international

[2] On the concept of international law as a "project" or "enterprise", see further Koskenniemi (2007), p. 1; Kennedy (1994), p. 329.

[3] In making this choice, I was influenced by the methodological discussion in Ginzburg (2012), pp. 193–213.

[4] Fraser (2012), p. 1033.

[5] Further on the subject of interpretation being a fundamentally decisionistic process, see, e.g., Eco (1979).

trade. Though a clearly defined substantive conception of NTBs had proved traditionally impossible to work out—even today the standard definition vacillates between the decidedly elastic "any policy measures other than tariffs that can impact trade flows"[6] and the somewhat more functional but still very broad "all non-tax measures imposed by governments to favour domestic over foreign suppliers"[7]—the commitment to address the mischief caused by these trade-restrictive mechanisms remained firm.

The common assumption established at the time held that for decades NTBs had not played a significant role in international trade. The reason this stopped being the case was the continuing success of the GATT/WTO enterprise. The progressive development of the GATT disciplines relating to tariffs over the previous decades had steadily increased the relative attractiveness of other instruments of protectionism. Because, unlike tariffs, NTBs historically have tended to be fundamentally non-transparent in their purpose and effects, and because in many cases their application could be easily justified on grounds that formally had nothing to do with trade, their trade-distortive potential was quickly realised both by governments and the various special interests clamouring trade protection.[8] The use of NTBs increased. What is more, it also became progressively more sophisticated: if prior to the Uruguay Round NTBs most commonly took the form of import quotas, voluntary export restraint agreements, and non-automatic import licenses, the post-Uruguay trend has seen the use of these trade control devices significantly diminished in favour of other, less easily quantifiable and analysable mechanisms.[9]

Even though the empirical evidence in its support was not unequivocal, the common impression by the start of the new century thus became that the centre of gravity in NTB practices had increasingly shifted away from the relatively easy to trace measures, such as quotas and non-automatic licenses—what one might call old-style NTBs—towards the fundamentally more difficult to "expose" instruments, such as technical standards, customs procedures, and SPS measures[10]—the new-style NTBs—devices that, because of their mixed legitimation dynamics, were furthermore even more difficult to measure for their trade-distortive effects in practice.[11]

In response to such developments, an entirely new policy initiative framework, it was decided, had to be put in place. As part of this framework and in furtherance of the Doha Round's more comprehensive vision for trade liberalisation, a special

[6] Staiger (2012), p. 2.

[7] See Terhechte (2013), para. 1.

[8] For a standard rehearsal of this argument, see Ray (1987), p. 285 (302–308).

[9] See OECD (2005), p. 12.

[10] Thus, the authors of a 2005 OECD study on the subject observe: "Today, exporters around the world are preoccupied less by traditional border measures, such as import or export licensing, quotas and prohibitions than by difficulties arising from product standards, conformity assessments and other behind-the-border policies in importing countries." OECD (2005), p. 12.

[11] OECD (2005), p. 13.

Negotiating Group on Market Access for Non-agricultural Products (NAMA) was established in early 2002. Designed to serve, among other things, as the WTO's primary institutional locus for all work aimed at the reduction or elimination of NTBs in the WTO context, NAMA's efforts in the area to date have proceeded along two main avenues: the identification, categorisation, and examination of the different types of NTBs used in current global practice and the development of corresponding solutions and approaches to NTB negotiations.[12]

In the course of its work, the group has prepared a number of comprehensive negotiation proposals—the so-called NAMA modalities—the most recent of which was issued on 6 December 2008. The aim of such proposals is to set out a draft roadmap for the subsequent negotiations on market access that would be followed by the WTO members. An important source of inspiration in determining the content of these draft roadmaps has been the individual proposals and initiatives submitted by various participating member States or groups of member States.

The HM initiative, originally proposed by the so-called NAMA-11 group and the European Communities, was first entered into this process of policy collation in May 2006.[13] After undergoing a series of variously significant amendments, it found its most commonly recognisable shape in a reformulated proposal sponsored by some 88 WTO member States that was tabled on 3 February 2010.[14] It is this version of the HM "vision" that remains today at the focus of the respective doctrinal debates.

The Internal Structure of the HM Discourse

Most discussions of the HM initiative follow the same script: they adopt a conspicuously technocratic tone, they present arguments light on history and hard data, and they build their narrative structures around three principal themes.

The first theme addresses the question of the *overall purpose behind the HM initiative*. According to the standard account, the principal objective of introducing the new mechanism is to "assist in the resolution of NTB disputes", and the general

[12] Terhechte (2013), para. 19.

[13] See WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Resolution of NTBs through a Facilitative Mechanism, Submission by NAMA 11 Group Of Developing Countries, TN/MA/W/68/Add.1 (5 May 2006); see also WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Negotiating Proposal on WTO Means to Reduce the Risk of Future NTBs and to Facilitate their Resolution, Communication from the European Communities, TN/MA/W/11/Add.8 (1 May 2006).

[14] See WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Ministerial Decision on Procedures for the Facilitation of Solutions to Non-Tariff Barriers, Communication from the African Group, Canada, European Union, LDC Group, NAMA-11, Group of Developing Countries, New Zealand, Norway, Pakistan and Switzerland, TN/MA/W/106/Rev.1 (3 February 2010).

presumption behind this is that this aim can be best attained by inserting the new IDS mechanism within the already existing procedural setup rather than by establishing some new procedural channel.[15] The basic conception thus outlined projects an impression of a policy programme geared towards evolution, organic growth, and modest piecemeal reform but never radical reconstruction: "[t]he topic seems to be too complex for a 'big solution'", runs the common refrain.[16] The spirit of radicalism and sweeping utopian visions have no place in the NTB landscape. A pragmatic approach grounded in a realistic set of ambitions is the order of the day.

The second theme concerns the question of what sort of *immediate institutional arrangements* would best serve to realise this conception in practice. Two main points are commonly stressed in these discussions: (1) the new mechanism should work exclusively on the basis of the principle of consent, and the search for mutually acceptable solutions should remain the key priority at all stages, and (2) to assist the parties in developing such solutions, it would be a good idea, after an initial stage of bilateral consultations, to introduce into the picture some kind of independent facilitator.

The basic setup that is reflected in the 2010 version of the HM proposal[17] offers a perfect illustration of this vision: at the first stage of the proceedings, the parties would be given the chance to resolve the matter between themselves bilaterally. The requesting member would have to submit in writing a request for information concerning a specific NTB to the responding member: the request should detail the immediate measure in question and also explain the grounds for the requesting member's concerns (§6). The responding member would then have up to 20 days to prove a written response (§7), a copy of which, together with the copy of the request, would be passed on to the respective WTO Committee to be circulated to the WTO membership (§8). If at that point the requesting State's concerns still remain unresolved, and if both the requesting State and the responding State so agree, the proceedings would progress to the second stage (§9) and an independent facilitator would be appointed (§12). The parties can request the chairperson of the relevant Committee or one of the vice chairpersons to serve as the facilitator or agree on an entirely external candidature who would serve in the capacity of "a friend of the chair" (§12). If the parties cannot agree on who should serve as the facilitator, the chairperson of the relevant Committee may, upon request by one of the parties, appoint the facilitator himself or herself (§12). Obviously, if the other party would not be content with the choice, it could always request that the proceedings be terminated altogether (§11bis). The facilitator's principal functions would include organising the meetings between the parties, consulting on their

[15] Fraser (2012), p. 1033 (1040).

[16] Terhechte (2013), para. 18.

[17] See WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Ministerial Decision on Procedures for the Facilitation of Solutions to Non-Tariff Barriers, Communication from the African Group, Canada, European Union, LDC Group, NAMA-11, Group of Developing Countries, New Zealand, Norway, Pakistan and Switzerland, TN/MA/W/106/Rev.1 (3 February 2010).

behalf with the relevant WTO structures, offering advice, and proposing possible solutions (§15). In fulfilling these functions, the facilitator would be entitled to receive any information from either of the parties as well as from the relevant WTO structures, experts, and stakeholders whom he or she would be entitled to consult, subject to the parties' agreement (§15). All meetings and information acquired in this process would be treated as confidential and would not be subject to prejudicial use in any future WTO judicial proceedings (§17). All in all, the second stage would last up to 60 days from the date of the appointment of the facilitator (§16). Whether or not in the end a satisfactory resolution would be achieved, the facilitator would prepare an independent factual report, outlining the issues raised during the discussions and the solutions proposed thereto. The report, with the accompanying comments from the parties, would then be passed on to the relevant WTO Committee and added to the record (§18). At no point would this report be treated as providing a commentary on the parties' legal position or an interpretation of the WTO Agreement (§18).

It is unclear to what extent the authors of the 2010 proposal consciously took into account what one might call the traditional dogmas of IDS theory. However, it seems quite remarkable how closely the proposed setup reflects the conventional accounts of mediation and conciliation adopted in the classical IDS doctrine. Consider, for instance, what the latter typically has to say on the subject of mediation:

> By accepting mediation, a government acknowledges that its dispute is a legitimate matter of international concern. If, therefore, a question of international accountability lies at the heart of the controversy, ... mediation will be out of the question. Moreover, a mediated settlement is always likely to be a compromise of some kind. [Thus, m]ediation is likely to be particularly relevant when a dispute has progressed to a stage which compels the parties to rethink their policies. A stalemate is clearly one such situation; another is when the parties come to recognise that the risks of continuing a dispute outweigh the costs of trying to end it. ... The value of mediation as a source of information should not be overstated. ... There is ... no guarantee that the information brought by a mediator [e.g., in the form of a final report] will always be believed; nevertheless, its presence will certainly tend to discourage wishful thinking, while sometimes providing critics of official policy (whose pressures may be important in encouraging a settlement) with a source of valuable intelligence.[18]

The parallels with the 2010 proposal are numerous and very easy to spot. The consistent foregrounding of compromise, resistance towards any prospects of allowing the question of accountability and thus of legal status to be raised at any point during the proceedings,[19] the introduction of a two-stage process to prepare the ground for the "rethinking of the policies", the insistence on the publication of the mediator's report and the treatment of (partial) transparency as a good in

[18] Merrills (2011), pp. 29–34.

[19] Fraser even goes so far as to propose an additional provision to the HM procedure enjoining the facilitator from using any kind of writing style that may be interpreted as "presenting a legal evaluation of the parties' case", Fraser (2012), p. 1033 (1051).

itself—one almost gets the sense that the authors of the 2010 proposal made a conscious effort to make it look like it had been "written by the book".

Nor is that all. Consider now how the IDS doctrine typically conceptualises conciliation:

> One view is that it is to be regarded as a kind of institutionalised negotiation. The task of the [conciliator] is to encourage and structure the parties' dialogue, while providing them with whatever assistance may be necessary to bring it to a successful conclusion. This approach, which proceeds from the premise that the resolution of disputes depends on securing the parties' agreement, finds an affinity between conciliation and mediation ... A [conciliator] has a duty to examine the nature and background of a dispute and so is usually equipped with wide powers of investigation. Unlike an inquiry, however, whose whole *raison d'être* is to illuminate the dispute, a [conciliator] has as [his] objective the parties' conciliation. [His] investigative powers are thus simply a means to an end. As a result, if it becomes apparent that the exposure of some matter might make conciliation more difficult, that line of investigation is unlikely to be pursued. ... [O]ne of the distinctive features of conciliation is that [the final] report takes the form of a set of proposals, not a decision. Thus, even in cases where law has been a major consideration, the report is quite different from an arbitral award and not binding on the parties. This feature of conciliations [presents] something of a dilemma. On the one hand, [the conciliators] wish to make their proposals as persuasive as possible by supporting them with reasons; on the other hand, they are unwilling to provide the parties with legal arguments or findings of facts that may be cited in subsequent litigation. [Nevertheless, it has to be noted that, as a mechanism of IDS, c]onciliation has so far proved most useful for disputes where the main issues are legal, but the parties desire an equitable compromise. [B]ecause of the way conciliation is conducted – through a dialogue with and between the parties – there is no danger of it producing a result that takes the parties completely by surprise, as sometimes happens in legal proceedings. Secondly a [conciliator's] proposals ... are not binding and, if unacceptable, can be rejected.[20]

The parallels, once more, are rather difficult to overlook: an *equitable* resolution for issues that are *legal* in character, a final report that is all about *outlining proposals* and *not preparing the ground for subsequent litigation*, proposals that are all about *persuasion* but are *not binding*, considerable *independent investigative powers* subject to the understanding that if the parties are not happy about a certain line of investigation (e.g., the use of a certain group of independent experts), it should be *immediately abandoned*.

Now, this is not at all a certain fact—and it most definitely is not the *only thing* that is probably happening beneath the surface of the HM initiative—but it seems to me that one very possible scenario that needs to be considered at this point, in trying to explain this turn to "writing by the book", is that the more successfully the authors of the 2010 proposal have managed to express the idea that the HM proposal they were sponsoring had been modelled on the traditional concepts of mediation and conciliation, the more successfully they would thereby have also conveyed the message that it was not at the same time intended to be considered under the rubric of the judicial IDS.

[20] Merrills (2011), pp. 65–81.

In a sense, this is all just basic Saussurean semiotics in action: since all meaning is relational, i.e. derived from the logic of differences and oppositions ("A" is that which is both not "-A" and not "non A"),[21] the easiest way to ensure that one's audience does not get the impression that one is talking of a certain phenomenon would be to use persistently those vocabularies that in the mind of this audience are associated with the exactly opposite phenomena.

In the internal conceptual taxonomy adopted by the traditional IDS theory, both mediation and conciliation operate as categories whose basic identity is defined to a very large extent through their distance from, and dissimilarity to, arbitration and judicial settlement, i.e., the judicial IDS mechanisms. Looking at the standard patterns of the HM discourse from this angle, the consistent deployment of the classical tropes of mediation-ism and conciliation-ism suddenly seems not at all unrelated to the regular invocation in the same context of the idea that "whatever the outcome, the HM procedure will neither address nor alter the legal positions of the parties". For, indeed, even the briefest scrutiny of the broader HM discourse suggests that this motif is not of episodic importance.

The third theme around which most of the discussions in the contemporary HM debate revolve has for its focus the question of the general strategy of institution building, that is to say, the overall plan on the basis of which all those practical details outlined above have been developed.

This plan, in a nutshell, seems to consist of two chief elements, each of which is defined in terms of a fundamental end goal to be achieved through the institution of the new mechanism.

The first goal is the improvement of the existing institutional potential of the respective WTO Committees. The strategic plan envisages that the new procedures would be carried out strictly within the limits of the established WTO Committee

[21] For a quick introduction to Saussurean semiotics, see Chandler (2007). In a nutshell, Saussurean semiotics (there exist also other varieties) is distinguished by its presumption that the production of meaning cannot be understood in terms of some essential or intrinsic facts (content), which the words (signs) we use to describe these facts (content) are meant to represent. The reason for this is that "signs refer primarily to each other": "no sign makes sense on its own, but only in relation to other signs." "This notion can be hard to understand since we may feel than an individual word such as 'tree' does have some meaning for us, but Saussure's argument is that its meaning depends on its relation to other words within the system (such as 'bush')", ibid., p. 19; "Saussure's relational conception of meaning was specifically *differential*: he emphasized the differences between signs. Language for him was a system of functional differences and oppositions. [. . .] Saussure emphasized in particular negative, oppositional differences between signs. He argued that 'concepts [. . .] are defined not positively, in terms of their content, but negatively by contrast with other items in the same system. What characterizes each most exactly is being whatever the others are not.' This notion may initially seem mystifying if not perverse, but the concept of negative differentiation becomes clearer if we consider how we might teach someone who did not share our language what we mean by the term 'red'. We would be unlikely to make our point by simply showing that person a range of different objects which all happened to be red – we would probably do better to single out a red object from a set of objects which were identical in all respects except colour", ibid., p. 21.

framework and would apply "to any non-tariff measure that is within the remit of a covered WTO Committee", which is defined as the Committee charged with "overseeing the operation of the WTO agreement most closely related to the measure at issue"; if no such Committee exists for the particular class of measures, the coordinating structure will be the Council for Trade Goods.[22]

The second goal set out in the strategic plan is the facilitation of the emergence of a more efficient *multilateral* process of information gathering, discussion, and negotiations that will not lead to any kind of "*legalistic evaluation*" of the member States' rights and obligations under the respective parts of the WTO agreement.

Note the double emphasis: the 2009 briefing paper[23] prepared on behalf of the then coalition of sponsors (its composition has since changed) puts a very clear premium on the idea that the resolution of any given NTB dispute is not, ultimately, an issue in which only the two immediately involved States alone have a valid stake. To resolve the problem of NTBs effectively requires the achievement of the "highest possible transparency of procedure" and the balancing of "the interests of the [immediate] parties to come to a mutually agreed solution" with the legitimate "interests of other WTO members".[24] Although the drafters of the paper do not immediately clarify what those legitimate interests might include, from the overall context of the discussion it seems clear that the main concern here is to enable the creation of an effective regime for the accumulation of information that could be used in the future by any member State or the interested WTO structure.[25] (Note again the continuous pre-occupation with the concept of information gathering; I will return to this point shortly.)

The language of "legalistic evaluation" comes from the same briefing paper. The wording may seem a little unusual—the term "legalistic" clearly has pejorative connotations and would normally be associated with the writings of Hans Morgenthau, not WTO policy discourse—but it is certainly not without wider significance. A close reading of the accompanying discussions suggests that the invocation of this phrase is designed to perform two slightly different functions in the present context: in the first place, it fixes what seems to be the most important element in an otherwise fundamentally vague explanation (see the point about semiotics above: the best way

[22] Fraser (2012), p. 1033 (1042).

[23] See WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Answers by the co-sponsors to Questions raised during Chair's NTB session of 19.03.2009 regarding the proposed "Ministerial Decision on procedures for the facilitation of solutions to non-tariff barriers"', TN/MA/W/110 (16 April 2009).

[24] WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Answers by the co-sponsors to Questions raised during Chair's NTB session of 19.03.2009 regarding the proposed "Ministerial Decision on procedures for the facilitation of solutions to non-tariff barriers"', TN/MA/W/110 (16 April 2009), para. VII.1.

[25] See, in particular, WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Answers by the co-sponsors to Questions raised during Chair's NTB session of 19.03.2009 regarding the proposed "Ministerial Decision on procedures for the facilitation of solutions to non-tariff barriers", TN/MA/W/110 (16 April 2009), paras. I.1 and VII.3.

to explain what something is is to indicate what it is not); in the second place, it very efficiently conveys the HM sponsors' general theory about NTB disputes.

What are the main defining elements of this theory? The answer can be gleaned in part from an earlier passage in Fraser's essay:

> NTBs are trade barriers that have the effect of restricting imports [but] NTBs can [also] serve legitimate objectives and important purposes pursued by Member States. They are expressly permitted under the WTO agreements when they are deemed to protect human, animal or plant life or health, or the environment. [...] Due to their antagonistic nature, which on one hand serves legitimate purposes of governments, and on the other hand, restricts trade, NTBs can be the object of many disputes between Member States.[26]

Most of these disputes, continues the argument, are unlikely, however, to be brought forward through the standard WTO legal channels—and precisely for the same set of reasons already mentioned: many measures that result in the creation of NTBs are adopted for the protection of fundamentally important social values the advancement of which is expressly permitted under the WTO law. Any attempt to challenge their legitimacy, follows the conclusion, is bound to result in such tremendous political acrimony that any potential gains will not be worth the costs. As another commentator puts it, "in the area of NTBs national interests play [such] a pivotal role [that they] often cause States to refrain from formal disputes".[27] Lest these latent disputes be allowed to simmer indefinitely, a more informal IDS mechanism has to be provided.

Or, at least, that is the basic understanding that the standard account seeks to promote. Recall the general sequence implied by Fraser's argument: (1) there seems to be something very distinctive about NTB disputes *themselves* as a result of which they tend to become extremely resistant to "legalistic" resolution; (2) this something can be best explained in terms of the fact that NTB disputes are characterised by a deeper than usual level of complexity in their legitimacy dimension, that is to say, the role of policy considerations in their case seems to be far higher than in the case of most other WTO disputes; (3) "legalistic" institutional frameworks are not the best forum for the resolution of policy conflicts; (4) hence, the conclusion that a new, more "flexible and expeditious procedure [...] of a conciliatory and non-adjudicatory nature" is needed.[28]

Now, compare this implied sequence to the actual argument Fraser makes. Consider, in particular, the loose combination of two sweeping generalisations and a logical leap that are quietly imported into the argument structure to enable its smooth progression: surely, it would be inaccurate to suggest that *all* NTB disputes are characterised by the same degree of policy indeterminacy, right? Indeed, Fraser's *second* comment in the passage quoted above seems to recognise exactly that fact since she writes: "NTBs *can* [also] serve legitimate objectives and important purposes." The choice of the verb is not insignificant: not all measures

[26] Fraser (2012), p. 1033 (1036).
[27] Terhechte (2013), para. 34.
[28] Fraser (2012), p. 1033 (1040).

that can do. In her *first* comment, just before that, Fraser states that all NTB measures have the effect of restricting trade. In formal-logical terms, this statement follows the standard formula of a universal proposition: *all A are B*. What Fraser says in her second comment, by contrast, does not have the same intonation: all NTB measures can serve legitimate social purposes, which means that in practice only some of them do and others do not. The logical formula that is deployed here is that of a particular proposition: *some A are also C*. So far, so clear, but notice now how Fraser then goes on to rearrange these two statements at the start of her third comment, just before she explains the reasons for why legalistic IDSs are not going to be a good forum for NTB disputes: because NTB measures serve legitimate objectives and at the same time result in trade restrictions, NTB disputes are likely to give rise to particularly acrimonious disputes. Notice the sudden shift from "all A are B, and some A are also C" to "all A are B and all A are also C". What is going on here?

For starters, it is a basic rule of formal logic that a combination of a universal proposition about NTBs and a particular proposition about NTBs cannot yield a logically valid universal conclusion about NTBs. If Fraser had not rephrased the basic statement at the heart of her second comment when she repeated it at the start of her third comment, she would not have been able to produce a convincing argument about the irresolvable contradiction whence the suggestion about particularly awful acrimony would arise.

Furthermore, the proposition that some measures that lead to the creation of NTBs may also, under certain circumstances, be used to protect fundamentally legitimate social values is valid, strictly speaking, only for a very limited class of such measures. Given the established doctrinal consensus, it would be hard to imagine that an old-style NTB, such as an import quota or a voluntary export restraint, could ever be recognised as serving a fundamentally legitimate (from an ITL point of view) social purpose in the normal course of international trade. If there is one thing on which all NTB commentators today seem to agree, it is that from the "good policy" point of view, outside situations of extreme economic emergency, such devices will have no redeeming features. By the same token, it is equally unclear how one could ever make in the same context a convincing argument that the meaning of "fundamentally legitimate social values" could be extended in such a way as to cover, for example, a situation where the importing State changes its customs certification procedure from a model that mandates the importer to complete ten separate forms to one that mandates the completion of 14 forms.

None of this is to suggest, of course, that in its general contours Fraser's proposed explanation and the argument constructed in its support do not work. They most certainly do—and that is the whole point: like so much else about the NTB discourse, they work but only *in their general contours*, at the most abstract level, that is to say, so long as one does not inspect them very closely, trace their logical formulas too diligently, or ask for too many practical illustrations and specific examples. An argument that cannot withstand close inspection, an explanation that relies on hidden logical slippages for its ability to hold together, a

discourse that operates smoothly only when it deals in abstract generalities—in the critical study tradition, such an arrangement of intellectual conditions is typically taken to be a sign that one is getting dragged into the middle of a heavily *ideological* exercise—in the most vulgar sense of the word possible.

The External Structure of the HM Discourse

When it comes to the question of addressing any given set of challenges to the enterprise of trade liberalisation, the contemporary ITL doctrine recognises three main possibilities.

The first possibility involves the delegation of the respective issue to the respective WTO Committees and other similarly placed executive and deliberative structures. This is the rubric under which the HM initiative belongs. The popular view holds that this approach offers the greatest amount of flexibility but that it works best when the stakes involved are either relatively low (so as not to excite any digging-in of the heels on the part of the involved players) or relatively high (so that diplomacy by definition becomes the only realistic option). When it comes to situations involving stakes of medium-range proportions, the procedure often falters. With regard to the NTB problem, for example, the common impression is often that the absence of a stricter operative code in such institutional settings means that "the discussions over a NTB concern [will typically] occur in an unstructured manner and without any timeframe, [which] restrains its potential of being resolved".[29] The statement may seem observationally correct. And yet it is, in fact, deeply illogical. It is precisely because these settings offer the possibility to the parties concerned to engage in an unstructured discussion without any rigid time frames that these procedures exist at all. To complain about the fact that they have these characteristics is, effectively, akin to feeling scandalised that there are no goalkeepers in chess or that a violin does not work very well as a hammer. Far more importantly, however, one should ask also: what is the evidence on the basis of which the claim that the "procedure often falters" is made? What is the benchmark, in other words, against which the judgement call that the potential of successful resolution has been "restrained" by the excessive flexibility of the Committee mechanism is made? The more closely one looks at it, the less convincing the argument seems to become—and not simply because such evidence, even if it were provided, would be very difficult to assess since it would be at best of anecdotal character. The real question is: what probative value would we have to assign to all those cases where no such evidence has been detected? Can the absence of a certain pattern of evidence—e.g., a bout of toothache suffered when eating apples or an international dispute escalating when dealt with through a flexible committee procedure—itself be treated an evidence of something else—viz., that eating apples

[29] Fraser (2012), p. 1033 (1040).

does not cause toothache and the use of flexible committee procedures does not escalate international disputes? The analytical dilemma this points to will be familiar to the students of public international law: it was exactly this conundrum that formed the central point of contention in the famous exchange between Thomas Franck and Louis Henkin in the early 1970s about the alleged effectiveness of Article 2(4) of the United Nations Charter.[30] Should Article 2(4) be considered dead letter because in the years since its adoption so many States have gone to war so often?[31] Or should it rather be considered a perfectly successful legal regime because so many other States that could have gone to war during the same period did not and of those that did most have sought to limit the scale of their military operations?[32] Deterrence, like deliberate omission, is notoriously difficult to measure and to prove. Both interpretations seem, in principle, valid; that is, there is really no way of knowing which is the "better" one. Choosing either over the other can hardly be justified in objective terms and is, thus, liable to give rise to charges of ideological bias.

The second standard solution involves the deployment of the WTO dispute settlement system (DSS). The background cultural reflex here is essentially that of a common lawyer crossing over into technocratic governance: the best way to resolve any given set of social problems is to leave everything to the wisdom of the case-law

[30] See Franck (1970), p. 809; Henkin (1971), p. 544.

[31] Franck (1970), p. 809 (810–811): "In the twenty-five years since the San Francisco Conference, there have been some one hundred separate outbreaks of hostility between states. The fact that on only one of these occasions has the United Nations been able to mount a collective enforcement action – and that more by a fluke than by dint of organisational responsiveness – indicates why, for security, nations have increasingly fallen back on their own resources and on military and regional alliances. [T]he failure of UN enforcement machinery has not been occasional but endemic, and so, concomitantly, has the resort to 'self-defense'. [S]ince there is usually no way for the international system to establish conclusively which state is the aggressor and which the aggrieved, wars continue to occur, as they have since time immemorial, between parties both of which are using force allegedly in 'self-defense'."

[32] Henkin (1971), p. 544: "The purpose of Article 2(4) was to establish a norm of national behavior and to help deter violation of it. Despite common misimpressions, Article 2(4) has indeed been a norm of behavior and has deterred violations. In inter-state as in individual penology, deterrence often cannot be measured or even proved, but students of politics agree that traditional war between nations has become less frequent and less likely. The sense that war is not done has taken hold, and nations more readily find that their interests do not in fact require the use of force at all. Expectations of international violence no longer underlie every political calculation of every nation, and war plans lie buried in national files. Even where force is used, the fact that it is unlawful cannot be left out of account and limits the scope, the weapons, the duration, the purposes for which force is used. Of the 'some one hundred separate outbreaks of hostilities' to which Dr. Franck refers, less than fingers-full became 'war' or successful conquest, and hundreds of other instances of conflict of interest and tensions have not produced even an international shot: cold war has remained cold, threats to the peace have remained threats, issues have remained only issues.' See also ibid., p. 547: "[T]he temptation to military intervention in internal affairs is largely the affliction of the few big Powers and even for them military intervention to promote or maintain internal wars is not always and everywhere possible."

process. Eschew top-down legislative scenarios the same way a free marketeer would eschew economic planning, trust the decentralised logic of individual complaints to throw up all the relevant issues, look to the collective genius of the judicial profession to separate the gold from the dross, assemble the individual nuggets as they come—and then maybe, some years down the line, see if they could not perhaps be arranged together and fused into some kind of codifying document or a restatement.

For all its intuitive familiarity to the international legal mind, in the current ITL environment this approach seems the least popular. The conventional wisdom rather appears to suggest that at least in the case of NTBs the weaknesses of the WTO DSS consistently outweigh its strengths. Of course, the argument states, it is most definitely true that most policy solutions worked out in the context of a judicial process will normally have a far more rigorously constructed reasoning basis than those that have been developed in the context of diplomatic negotiations. And, of course, it is also true that such solutions will frequently further benefit from the higher transparency and predictability of the judicial process. However, the inductivist philosophy at the heart of the leave-it-to-the-courts approach unavoidably makes it a very slow-moving process, especially when it comes to major policy issues—it may take well upwards of a decade before enough starting material is accumulated for any kind of restatement project to become possible—and time in the present context is absolutely of the essence:

> Exporters facing NTBs need real time solutions. A solution that comes 2 years after the identification of the problem does very little to assist exporters in clearing their goods at the port of entry and only adds to costs and leads to a loss of market opportunity. The lengthy dispute settlement mechanism can [. . .] create considerable instability especially for a new enterprise in the exporting country.[33]

What is more, even at the micro-level the judicial process can hardly be said to work well. It is a well-known fact that the use of the WTO DSS is a very resource-intensive undertaking, both in terms of the amount of time it takes before an average dispute reaches resolution and in terms of the sheer scale of financial and legal-labour resources that the involved parties would have to expend to get there. No less importantly, continues the argument, routing the dispute resolution process through a litigative channel by definition will typically encourage the participating players to assume a fundamentally adversarial attitude vis-à-vis one another, which, of course, is not at all conducive to the achievement of swift pragmatic resolutions and, indeed, under some circumstances can lead to an even greater resource wastage pattern (digging of the heels scenario).[34]

Note the hidden pop psychology turn (another classical trait of ideological discourses): the claim about the counterproductive effects of the litigative experience, though it is couched in decidedly empirical terms, is backed up neither by any

[33] See WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Resolution of NTBs through a Facilitative Mechanism, Submission by NAMA 11 Group Of Developing Countries, TN/MA/W/68/Add.1 (5 May 2006), para. 5.

[34] See Fraser (2012), p. 1033 (1041).

quotable empirical evidence nor by data derived from any kind of practical trials or experiments. The idea is simply parachuted into the argument in the form of a bold deductive assertion, having been borrowed, one suspects, from an apparently similar domestic-law context in which the matter at hand was the study of the psychological impact of litigative experiences on human individuals and business enterprises—if it holds true for those kinds of litigants, why should it not also hold true for States?—the promiscuity of unreflective domestic analogism at its best.[35]

Note also the lack of any recognition when it comes to providing account of any potential cultural differences between the different categories of WTO members: going by this theory, the litigative experience appears to have the exact same effects on German trade officials as it would on their Chinese or Qatari counterparts.

The secret of the ideological discourse is that it always seems to work unless one knows what to look for to see if it doesn't. If one does not know what is missing from its construction—the empirical evidence, the justification for the domestic analogy, the recognition of cultural differences—the anti-DSS argument offered by the HM discourse reads actually quite elegantly:

> While it should be recognized that the WTO's [DSS] is a distinct improvement over the erstwhile GATT procedures due to its predictability and enforceability, as well as being one of the most efficient mechanisms available under international legal regimes, the [DSS], which works on the principles of an adversarial process, is expensive, and the time of up to 2 years taken for an enforceable decision, often frustrates the exporter's need for a timely solution.[36]

So far, so good, except: is it not true that a significant part of the DSS procedure does not, in fact, rely on any kind of adversarial dynamics? Neither the initial consultation stage nor the "good offices, conciliation and mediation" stage—nothing, in fact, that is covered by Articles 4 and 5 of the WTO Dispute Settlement Understanding—is premised on any form of litigative confrontationism. What should one make of *that* fact?

The answer might have been far from obvious under some other circumstances but not so in the world of pop psychology. The thing is, explain the authors of the 2009 briefing note, although the consultations procedure may not look the same as a normal litigative procedure, in reality it is precisely that: "the formal step of submitting a request for consultations" already "frame[s] the discussion in a legal and adversarial direction".[37] The damaging effect, in other words, is produced

[35] For an overview of the bleak history of unscrupulous use of domestic analogism in international law, see Carty (1986); see, in particular, ibid., pp. 67–80 and 87–92; see also for a related comment Rasulov (2014), p. 74.

[36] See WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Resolution of NTBs through a Facilitative Mechanism, Submission by NAMA 11 Group Of Developing Countries, TN/MA/W/68/Add.1 (5 May 2006), para. 4.

[37] See WTO, Negotiating Group on Market Access, Market Access for Non-Agricultural Products, Answers by the co-sponsors to Questions raised during Chair's NTB session of 19.03.2009 regarding the proposed "Ministerial Decision on procedures for the facilitation of solutions to non-tariff barriers", TN/MA/W/110 (16 April 2009), para. II.2.

already at the moment the earliest stage of the DSS process is initiated; there is no need to wait until the Panel is established or the Appellate Body is engaged.

Note again the lack of any quotable empirical evidence and the avoidance of the cultural variety question: once more it does not seem to matter which member States may be involved in the consultations procedure; the phenomenological effects in question—the arousal of an adversarial sensibility—will always be the same.

Note also the latent circularity at the heart of the proposed explanation: what the 2009 sponsors are essentially saying is that the act of starting a process that the involved parties perceive as a litigative process triggers in their minds an experience of this process as a litigative process. But, of course: the act of starting something that I know is a form of dancing is going to lead me—because I already know that I am dancing—to realise that I am dancing.

Note, finally, the curious attempt to equate in the latter part of the formulation "legal" with "adversarial". A stickler for detail might note that while the latter concept usually describes a certain way of arranging the mechanics of judicial procedure, the former tends to cover a much broader field of phenomena, but this would be precisely to miss the whole point of what seems to be the implied argument: the damaging effects that were mentioned earlier are really a product not of the DSS itself but of the *idea of law*. It is not so much, in other words, the immediate organisation of the DSS procedure that is supposed to cause the member States to develop a deep-seated predilection for belligerence and an uncontrollable urge to dig their heels in. It is the introduction of the concept of law into their heads and the notion that their dispute should be resolved according to their legal rights.

Thus put, the animating argument behind this part of the HM discourse may seem truly absurd, but, of course, that is precisely what (almost) all ideologies have in common: a certain fondness for fundamental absurdity and deep-seated theoretical bankruptcy. The only thing that separates the more successful ideologies from the less successful ones in this context is how effectively this combination of absurdity and theoretical bankruptcy has been covered up by the use of clever discursive devices.

The third archetypal scenario recognised in the eyes of the contemporary ITL doctrine is the harmonisation of the corresponding member States' internal regulatory regimes. An ounce of prophylactic is worth a gallon of medicine. The WTO Committees and the DSS may help resolve individual NTB disputes after they break out, but "[t]he harmonization of the Members' [domestic regulatory regimes] has the effect of limiting and preventing disputes on specific NTB measures" before they even become possible.[38]

How does this process work? The argument, in a nutshell, seems to go more or less as follows: every NTB dispute is ultimately a symptom of an underlying discrepancy in the respective regulatory regimes. The more similar the regulatory regimes adopted by the different member States are, the less likely their application

[38] Fraser (2012), p. 1033 (1036).

in practice is going to produce a disproportionate effect on cross-border trade, the less likely, accordingly, their execution is going to raise a protectionist NTB. If the ultimate aim of the ITL enterprise is to reduce and eliminate the harmful effects of NTBs on international trade, the most effective strategy the ITL enterprise can adopt in the long run, it follows, must be the promotion of an ever-deepening process of regulatory harmonisation.

Note the implied assumption behind this argument: what gives NTBs their trade-destructive power, on this vision, comes down essentially to a loose combination of *informational asymmetries* and *a collective action problem*, both of which are species of what in modern economics is loosely described by the broad label *transaction costs*. The informational asymmetries hypothesis proceeds from the fairly commonsensical observation that it would be considerably more difficult for Ruritanian toy manufacturers to find out about Arcadian toy safety standards and certification procedures than it would be for Arcadian toy manufacturers. The collective action hypothesis, in turn, revolves around the idea that even though it may be ultimately in the interests of the Ruritanian toy industry as a whole to institute a regime of information gathering and dissemination about the Arcadian toy safety standards and to establish on its basis some kind of pre-certification procedure modelled on the applicable Arcadian regulations that could be used by the Ruritanian exporters whenever they need it, only very few Ruritanian toy manufacturers will find it both feasible and economically sensible to invest in either of these undertakings; the rest will either take a leap of faith and try to export their products to the Arcadian market without the assurance of having gone through such a procedure or avoid exporting into that market altogether. Either scenario, obviously, is going to result in sub-optimal trade patterns, hence the need for a global-level public institution-style solution, such as the establishment of a comprehensive notification mechanism under the respective WTO Committees or the promotion of an equally comprehensive programme of transnational harmonisation of standards.

Why is it important to take notice of this imaginational pattern beyond the fact that it confirms the presence of a strongly ideologised climate within the ITL discursive space? The answer, in a sense, is as old as the critical tradition itself: to a man with a hammer, every problem that does not look like a nail is fated to remain either incomprehensible or invisible.

If the general theory against the background of which the contemporary NTB debate unfolds is premised on the notion that to solve the problem of the NTBs one must only manage the question of transaction costs, then a large part of what might be called openly strategic and heavily politicised behaviour will simply not register within that debate's horizon of internal visibility or will be received into it in a fundamentally misrecognised form. Indeed, the only variety of open politicisation scenario that the currently dominant theory of trade policy decision-making appears to be able to recognise is the classical capture-by-special-interests scenario. And the first thing, of course, that needs to be noted about this kind of scenario is that it is essentially premised on two fairly far-fetched assumptions: (1) that national governments typically have no capacity and no real inclination to determine the course of their political action in the global trade policy-setting arena independently of the respective domestic interests under whose pressure they act and (2) that the single

dominant rationality at the heart of all global trade policy processes is the rationality of managerialism and economic calculation—as opposed to, say, OPEC-style or Russian-style geopolitical games as seen, for example, in the 1970s oil crisis or in the recent cases of Moldovan and Georgian wine embargoes. A theoretical apparatus that is grounded in such a remarkably impoverished model of political behaviour (and social life more broadly) and so fundamentally predisposed towards ignoring the role of non-economic factors and considerations in the development of global trade policy can, of course, still equip its users to form relatively well-informed judgements about the operative logic of the international trade regime—but only up to a certain point. Beyond that, it is bound inevitably to turn into a fundamental epistemological obstacle and thus become a source of serious practical impediment and danger both to these users themselves and to those wider publics whose lives may be affected by their choices and decisions.

A somewhat different way to make the same point would be to say that the exact same imaginational pattern that can be seen in the present context can also be detected on a slightly larger scale in the case of the so-called Liberal Theory of International Relations—as expounded by the likes of Anne-Marie Slaughter and Andrew Moravcsik[39]—and Harold Koh's transnational legal process school.[40] Everything that has been said about the miscellaneous dark sides, blind spots, and pop-science dilettantism tendencies of these schools,[41] it follows, can be extended logically to this aspect of the NTB debate as well—and, by extension, to the corresponding region of the contemporary ITL consciousness too, out of which the HM initiative has arisen and by the internal contradictions of which its discourse is structured and over-determined.

The Proceduralist Turn and Its Discontents

What is the importance of all these observations? One way of answering this would be to say that what the discussion above shows is essentially that the emergence of the HM enterprise in modern ITL is an event that cannot really be understood on its own terms. It is, in other words, something other than what it makes itself out to be. The argument made on behalf of the new HM procedure by its sponsors seems fundamentally unconvincing if it is taken at its face value—both as a policy proposal and as a hypothesis about NTB disputes and, quite possibly, the ITL IDS logic more generally. What the new mechanism is supposed to contribute to

[39] See, e.g., Moravcsik (1997), p. 513; Slaughter (2004).

[40] See, e.g., Koh (1998), p. 623.

[41] A good place to start reconstructing such a critique would be Mouffe (2000). For a slightly different starting point, see Kelman (1983), p. 274. Otherwise, see Koskenniemi (2007), p. 1 (on the new managerial ethos in international studies). See also Kennedy (1999), p. 9, and Kennedy (2001), p. 463 (on the politics of not-seeing-politics and dark sides more generally).

the WTO IDS system is, in fact, neither so novel nor so radically different as its sponsors seek to present it: the WTO procedural framework already has all of those elements that the HM initiative aims to introduce within it; what is more, it is neither so inefficient nor so disorganised as it commonly tends to be portrayed.

If it cannot be understood on its own terms, however, the question then arises: how *should* it be understood? How should we read the appearance—the coming-into-existence—of the HM policy exercise? My sense, dictated no doubt as much by my scholarly habits as by anything else, is that the most convincing answer to this would be that we should read this kind of "events" *symptomatically*, that is to say, as reflections, traces, and expressions of some broader underlying process—and not necessarily one of a ruptural nature (i.e. a "revolution" or a "paradigm shift"). What could this process be in the present case? The answer, I think, has to be sought for the most part outside the immediate horizon of the present-day ITL enterprise.

If we look closely at the operative dynamics animating the HM discourse, its basic *self-image* essentially seems to be that of a fundamentally *technocratic* enterprise preoccupied with the question of *process-building*. The main debate at its heart is presented as an entirely apolitical debate about process and procedure. All the various issues, dilemmas, and aporias that it throws up are similarly formulated as entirely apolitical issues, dilemmas, and aporias of process and procedure. Even the ultimate foundational challenge towards which everything is orientated is consistently articulated in the fundamentally apolitical form of: "What is the best way to organise the processes and procedures of ITL IDS?" The whole enterprise of the HM initiative, it seems, is, in effect, constructed as just another phase in the grand technocratic exercise dedicated to the improvement and optimisation of the ITL process.

And yet all these presentations, formulations, and articulations, it seems to me, are ultimately just that: interpretative spin, flimsy appearances, carefully constructed façades—nothing more. The reality behind them is entirely different, a lot more complex, and a lot more ambivalent too. To see what that reality is, one needs first to take the proverbial few steps back and try to insert the HM discourse into the framework of a somewhat broader discursive formation than the one in whose context it has heretofore been considered: that of the contemporary public international law (PIL) system as a whole rather than just the present-day ITL enterprise—for it is, indeed, that formation whose operative conditions actually determine the productive logic of the ITL IDS debate and define the general thrust behind the HM enterprise. Such is the task, and there exists probably no better platform from which to begin addressing it than David Kennedy's *International Legal Structures*.[42]

Kennedy's starting thesis is very simple: proceeding on the assumption that the contemporary PIL discourse does, in fact, constitute—as most of its participants appear to believe—an internally coherent system, it seems it would be useful to try

[42] See Kennedy (1987).

to comprehend the achievement of this coherence as a function of its underlying structure. The most intuitively obvious way to determine the essential contours of this structure would be to trace the various internal divisions of PIL's doctrinal field as reflected in the second-order discourse produced by PIL commentators.

Having set out with this general aim, Kennedy's next step was to identify which of these internally recognisable divisions could shed the most light on the productive logic of the PIL discourse. After entertaining several different possibilities,[43] he eventually decided to focus on the tripartite split between "three broad categories which I termed sources, process and substance".[44] The logic of giving them these names did not, of course, come from a simple division of functions between the three doctrinal blocks:

> I did not decide to work with these categories because I thought they addressed different problems, or had developed in response to different historical or functional demands, or because they seemed to apply in different contexts. Indeed, commentators seem[] to treat them as the product of similar forces, and doctrines from each category often seem[] equally applicable to a wide range of factual situations. It was precisely this generalizability which suggested that they all formed part of the contemporary discourse of public international law.[45]

What makes the three blocks into a single whole, in other words, is not so much the fact that there exists, at some abstract level, a formal division of labour between the respective doctrinal sub-systems. Quite on the contrary: at any given point any given factual issue that is submitted to a PIL analysis can lend itself to being treated through the prism of any one of these sub-systems simultaneously. What to one PIL practitioner, thus, may look like a question of substance, to another may well seem a question of process or a question of sources. The interchangeability of the framing perspectives in this sense constituted a key defining characteristic of the PIL system for Kennedy:

> Each of these doctrinal groups, however, seemed to be characterised by a distinctive rhetorical style and self-image. Each seemed eager to differentiate itself from the others. Usually commentators and treatise writers complied by treating them distinctly in the order in which I consider[] them here. I decided to do likewise, partly because I was interested in examining just such rhetorical self-images or purports. After looking at these materials in this way, it has become possible to think about the overall coherence of public international law as a set of relationships among these discursive fields. Indeed, it is striking how effectively these distinctive fields, each with its own characteristic doctrinal structure and argumentative style, *work with and against one another* to generate and sustain an international legal system.[46]

To understand how this regime of "working with and against one another" is actually organised in practice, it is essential to take account of another very important feature of the PIL discursive tradition: the objective organisation of the

[43] See, e.g., Kennedy (1980), p. 353.

[44] See Kennedy (1987), p. 289.

[45] Kennedy (1987), p. 289.

[46] Kennedy (1987), p. 289.

PIL discursive structure does not for the most part match the projected imagery of that structure that animates its practical deployment. That is to say, while in the former context all three sub-systems operate as "equal partners", in the latter context the relationship between them is governed by a certain sense of hierarchy. Process and sources

> present themselves as servants of a substantive order which will be achieved and protected [with their help]. We expect little of process – and even less of sources – because we expect so much of substance. In substantive legal doctrine we hope to find a social fabric of resolution and peace – the wise constraints which keep us free. Substance should reflect and create a social order which can be elaborated by sources and served through process. In this sense, the discourses of process and sources call for and project a substantive normative order.[47]

The discourse of process, in particular, seems to be dominated by this spirit of instrumentalism and subservience to substance. Its basic organisation, remarks Kennedy, is fundamentally defined by its implicit aspiration "to be both outcome determinative . . . and to remain open and responsive to those who participate in it – to remain neutral with respect to substantive outcomes", to refrain from prejudging substance's work.[48] Drawing its legitimacy from the idea that it strives to create a system that is simultaneously open and closed,[49] the process discourse thus finds itself constantly attracted towards the ethos and the aesthetics of technocracy. It buttresses itself by regularly referencing, on the one hand, the incontrovertible authority of State consent from which it arises and which it seeks to harness and channel into a practical institutional reality and by constantly invoking, on the other hand, the breathtaking promises of the substantive regime to come—a system of clear definite answers to every substantive question about the international legal right(s) and wrong(s)—the crystallisation of which it is meant to facilitate. The reality that is concealed by these twin manoeuvres, argues Kennedy, however, is that all this, in a sense, is a con job: the ideology of process is a regime of false consciousness, distortion, and manipulation.

The discourse of substance never delivers on its grand promise. At any given point in time it offers to its participants the possibility of supporting several equally valid answers to any given question without indicating which of them should be privileged over the others. Is Mexico's low minimum wage scheme an unfair "subsidy" and part of a strategy that enables "dumping" on the part of the Mexican manufacturers when they export to US markets? Or is it rather the case that the US insistence on the observance of higher labour standards is a form of NTB? Both interpretations are possible; how one goes about adjudicating between them depends in large measure on one's ideological preferences and unstated background assumptions about what is "good" and "normal".[50]

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[47] Kennedy (1987), p. 195.

[48] Kennedy (1987), p. 188.

[49] Kennedy (1987), p. 290.

[50] See Kennedy (2006), p. 95 (140).

The only way in which the PIL tradition knows how to escape this kind of antinomian vortex without stepping "outside law" is by reframing the respective questions of substance as questions of process and sources. The implicit assumption there seems to be that whenever one runs into a logically irresolvable indeterminacy one should opt for that solution which either (a) is supported by a better/longer/more "hard-legal"/more fundamental-principles-reinforcing/more authoritatively verifiable sources pedigree; and/or (b) originates in a better/more inclusive/more transparent/more rigidly structured/more flexible process. What rules of international law are part of *jus cogens*? Whatever the international community of States as a whole decides to accept and recognise as such. What does the concept of a threat to international peace and security mean in practice? Whatever the UN Security Council, while acting according to the procedure determined by Chapters V, VI, and VII of the Charter, decides it means. How should one understand the non-attribution requirement in the WTO law of safeguards? The official definition—that the alleged "serious injury" in question should be attributable directly to the alleged "increase in imports" and not some other factor—is so abstract and impractical (try applying this test literally amidst an ongoing economic crisis) it seems virtually useless. How can this problem be resolved? Again, the solution proposed by the ITL practice could not be clearer: the principle of non-attribution in the law of safeguards has effectively been converted into a series of procedural requirements (rituals of process) that have to be complied with by the respective investigating authority before it can safely apply the desired measures.

The problem with such an escape strategy, points out Kennedy, however, is that, in the first place, it threatens to bring about the disappearance of substance: "[o]nce substantive issues are presented in this way, substance discourse loses its [distinctive identity]. Any such resolution projects the conflict into sources or process by harnessing the substantive doctrinal scheme of categories to modes of authority."[51] In the second place, and far more importantly, to the extent to which this strategy can work at all, it can only work temporarily, i.e., until the point when someone starts to recognise—as Martti Koskenniemi explains, they inevitably will[52]—that the indeterminacy challenge is no less pressing on the other side of the fence. The only thing that changes when the relegated question of substance arrives in the domains of process and sources is the list of immediate options in terms of which the "new" indeterminacy challenge is going to be structured. The antinomian pressure underpinning it remains exactly the same. Depending on the quality of the legal talent involved and the reactionary pressures exerted by the vested interests, the coming-to-consciousness of this process may take some time. Sooner or later, however, the realisation inevitably surfaces that, just like the discourse of substance, so too the discourses of process and sources enable their practitioners at any given point in time to produce several mutually contradictory and—from the strictly legal point of view—equally valid solutions to any given question posed

[51] See Kennedy (1987), p. 198.

[52] See Koskenniemi (2006).

before them. The only meaningful way the PIL tradition enables them to escape such aporias is by relegating the respective controversies into the neighbouring domain.

And thus, explains Kennedy, the vicious circle at the root of the PIL discursive system gradually becomes revealed: "we find ourselves continually referred back [from substance] to process and sources while they refer us forward to substance."[53] The politics this creates has a highly distinct ideological signature: so long as the awareness of the vicious circle remains limited to a relatively narrow community of the disciplinary insiders

> the rhetorical system as a whole is able to assert itself quite firmly [...] while sustaining a very humble and deferential tone. [It creates the impression of] a quite well articulate and complete legal order even though it is difficult to locate the authoritative origin or substantive voice of the system in any particular area. [...] Sources refers us to the states constituted by process and grounded in the violence defined and limited by substance. Process refers us to its origin in sources and its determination in substance. Substance refers us to the boundaries of process, its origins in sources and its resolution in an institutional system of application and interpretation. Thus, the variety of references among these discursive areas always shrewdly located the moment of authority and the application in practice elsewhere.[54]

What is more, even though at the most abstract level the basic distinction between the three sub-systems may often be experienced by the respective discursive agents as something quite tangible and definite, the actual sets of rhetorical strategies that are encountered in each case seem to be exactly the same.[55] *There is, in short, not much that really separates the rhetoric of process from the rhetoric of substance and the rhetoric of sources*.[56]

For Kennedy, the main lesson that could eventually be extracted from this discovery was the promise of a new disciplinary imaginary: "If, as it seems, a rather small set of argumentative maneuvers and doctrinal distinctions repeat themselves in a wide variety of different contexts throughout public international law, it might be possible to unite the field around these patterns rather than to be forced to think of them each time anew in response to different situations or in different doctrinal areas."[57] For us, in our present context, however, it seems to be something else.

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[53] Kennedy (1987), p. 196.

[54] Kennedy (1987), p. 293.

[55] Kennedy (1987), p. 291: "[T]o a surprising extent, the rhetorical patterns characteristic of each discourse – indeed, which seem[] to characterize that discourse – seem[] to repeat themes and references familiar from other areas. This [is] most apparent in the return of the law of force to doctrines about sources. Although these two fields seem[] very distinct – sources a very doctrinal, logical field, the law of force a very substantively engaged field – both seem[] to be concerned with invoking and the muffling the sovereign authority behind its most basic principles."

[56] For the same argument, see also generally Koskenniemi (2006).

[57] Kennedy (1987), p. 291.

Conclusion

It should not be too difficult to guess where this argument goes next. The self-image projected by the HM discourse is grounded in a very important but entirely unacknowledged assumption that has come to take root in recent years across the whole field of the contemporary ITL enterprise. The triggering event that led to this development was the long-term failure of, to use Kennedy's vocabulary, the "substance discourse" project in modern ITL. In a recent book, Andrew Lang masterfully documents the various instances of this failure and how it has come to be realised by the actors concerned across the different areas of the GATT/WTO regime, from the TBT Agreement to the Article XX GATT jurisprudence.[58] The combined effect of these developments, argues Lang, has been the emergence of what he describes as the "proceduralist turn" in modern ITL:[59] the half-unconscious decision by the ITL community to deploy the discourse of process as a functional replacement for the discourse of substance, to try to tackle, in other words, the apparently unsolvable questions of substance, such as what types of non-tariff measures should be allowed and encouraged and under what circumstances, by reformulating them as questions of process.

Looking from this angle, the underlying sensibility by which the proceduralist turn has been inspired appears to be grounded in a deep practical contradiction. On the one hand, it seems extremely naïve in its theoretical self-image: the latent message against the background of which it unfolds seems to be that we are only having this conversation about the NTB IDS process because we have not (as yet) been able to work out the correct substantive answer to the question of what kind of domestic regulations are legitimate and what kind are not. On the other hand, it also seems to be deeply strategic, not to say cynical, in its broader political gamble: so long as the ITL community continues to act as though a *legal* answer to the question of NTBs can be worked out, the *political* challenges raised for the ITL enterprise—by everything from its determining that this might be a "question" at all to endorsing the use of such a suspiciously elastic category as "NTBs" as a legal standard—can be deferred virtually indefinitely. What happens in the meantime under the cover of this endless deferral—what sort of distributive outcomes become possible, entrenched, and gradually normalised, and who gets to benefit from that—is, of course, an entirely separate matter.

The current debate about the HM initiative presents itself—and is most probably completely sincerely experienced by its participants—as an essentially technocratic debate about process and procedure. In reality, as Kennedy's analysis of the PIL discursive system suggests, it functions as a discursive prism that refracts a regime of policy contestation far more extensive in its scope and far more complex in its real-world effects.

[58] See Lang (2011).

[59] See in particular the discussion in Lang (2011), pp. 313–353.

On its surface, it presents itself as a debate that operates on the explicit premise that the challenges placed at its heart can be eventually resolved and thus the debate itself be brought to an end. The reality, however, seems to be that this is not at all the case: and not just because that regime of policy contestation for which it acts as the refracting discursive prism is far too complex and multi-layered but also because neither the challenges themselves nor the debate that has developed around them are actually capable of reaching any logical, objective, and impartial resolution. Any termination that can be brought to them, thus, is liable to remain effective only so long as the underlying convergence of political interests is stable and functional. In the present day and age, the possibility of such a convergence achieving any degree of longevity, while at the same time retaining its practical functionality at a sufficiently high level to enable the freezing of such kind of policy contestational environments, seems fundamentally unlikely. The good news is that this means the services of ITL professionals are certain to remain in high demand. What happens under the cover of this good news, though, is again an entirely separate matter.

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NTBs and the WTO Agreement on Technical Barriers to Trade: The Case of PPM-Based Measures Following *US – Tuna II* and *EC – Seal Products*

Gracia Marín Durán

Introduction

In our societies, products are often subject to requirements relating to their (intrinsic and extrinsic) characteristics and/or the manner in which they are produced—i.e., processes and production methods (PPMs). Quite often too, these product requirements serve policy objectives that are generally accepted as being legitimate, such as the protection of consumers, public health, or the environment. Yet at times, product regulations can be used as a pretext for disguised protectionism in order to shield domestic producers from foreign competition. But even when genuinely prompted by legitimate policy considerations and applied in a non-discriminatory manner, product regulations and associated conformity assessment procedures can constitute considerable barriers to trade—e.g., by being unnecessarily trade restrictive to achieve the desired objective. Moreover, significant divergence in product requirements across countries may *per se* act as a barrier to international trade because it can be financially and technically difficult for producers in one country to adjust their production methods in order to be able to export their products to another country. This is particularly (though not exclusively) a hurdle for producers/exporters in developing and least developed countries, which may simply not have the capacity to meet the different regulatory requirements imposed in their various trading partners.

G.M. Durán (✉)
School of Law, University of Edinburgh, Old College South Bridge, Edinburgh EH8 9YL, UK
e-mail: Gracia.Marin-Duran@ed.ac.uk

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As one type of non-tariff barrier (NTB) to trade, product requirements have long presented the multilateral trading system[1] with a formidable twofold challenge: first, how can one distinguish between essentially protectionist NTBs from those that pursue other 'legitimate' regulatory goals and, second, how can one uphold the inherent right of members of the World Trade Organization (WTO) to regulate in the pursuit of certain legitimate policy goals while avoiding the creation of 'unnecessary' barriers to the trade with other members. In other words, what is the appropriate balance between domestic regulatory autonomy and international trade liberalisation in the area of product regulation? The WTO Agreement on Technical Barriers to Trade (TBT)[2] is part of a broader category of WTO agreements[3] seeking to strike such a balance with regard to technical regulations, standards, and associated conformity assessment procedures. While already a concern at the time of the 1947 General Agreement on Tariffs and Trade (GATT),[4] these non-tariff measures have drastically grown in number and complexity partly as tariffs and other traditional barriers to trade have been progressively reduced or eliminated, but also in response to changing consumer concerns and societal interests: notably, as of April 2015, 19,477 (regular) TBT measures have been notified to the WTO.[5]

As aptly proposed by Howse, "in thinking about the TBT Agreement, a logical point of departure is to consider whether and how it represents a different approach to the GATT in managing the interface between liberalised trade and domestic regulation".[6] In this regard, the Appellate Body held in *EC – Asbestos (2001)* that "[. . .] although the TBT Agreement is intended to 'further the objectives of the GATT 1994', it does so through a specialised legal regime that applies solely to a *limited class of measures*. For these measures, the TBT Agreement imposes obligations on Members that seem to be *different from*, and *additional to*, the obligations imposed on Members under the GATT 1994."[7] The aim of this article is to explore the significance and implications of this statement with a specific focus on product regulations based on PPMs and in particular on so-called non-product-related PPMs (i.e., those that do not affect the physical characteristics of the final

[1] See, e.g., GATT Committee on Industrial Products, Report to the Council, L/3298, dated 22 December 1969, section I 'Non-tariff Barriers'; and more generally, WTO Secretariat (2012), pp. 39–43.

[2] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120, replacing the plurilateral 1979 Tokyo Round Agreement on Technical Barriers.

[3] Also important is the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), 1867 U.N.T.S. 493, which deals with a specific category of product-related regulatory measures aimed at the protection of human, animal, or plant life or health from food-borne risks and risks from pests and diseases.

[4] GATT 1947, 55 U.N.T.S. 194, incorporated by reference into the GATT 1994, 1867 U.N.T.S. 187.

[5] TBT Information Management System: http://tbtims.wto.org/.

[6] Howse (2013), p. 1 (1).

[7] WTO, report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R para. 80 (emphasis added).

product). The appropriateness of imposing trade measures contingent upon PPMs has long been contentious in international trade relations and arguably one of the most knotty issues in the negotiations of the TBT Agreement. The recent WTO rulings in the *US – Tuna II (2012)*[8] and *EC – Seal Products (2014)*[9] offer important insights regarding the applicability of the TBT Agreement to PPM-based measures,[10] but doctrinal ambiguity and diverging views remain in academic and other circles.

On this background, this article proceeds in three main sections. The first section introduces the product-related/non-product-related PPM distinction and outlines the main arguments for and against the validity of such a distinction. While not purporting to take sides in this broader debate, it will be questioned whether concerns surrounding non-product-related PPMs are sensibly addressed through limiting their coverage by the TBT Agreement. The second section then turns to elucidate on the extent to which PPM-based product regulations are part of the 'limited class of measures' to which the TBT Agreement applies, on the basis of an in-depth examination of the relevant provisions (Annex 1) and case law. It will be argued that the interpretative approach adopted by the WTO dispute settlement organs, which seemingly differentiates between labelling requirements and other regulatory measures in relation to non-product-related PPMs, is not supported, and is indeed rather counter-intuitive, in light of the object and purpose of the TBT Agreement. Instead, it is suggested that a contextual and teleological interpretation[11] is warranted for delineating the scope of application of the TBT Agreement to non-product-related PPMs, which considers the purpose of this agreement and the nature of the disciplines prescribed therein, as well as its relation with the GATT. On this basis, the third section analyses the extent to which the TBT Agreement imposes obligations that are 'different from' and 'additional to' those found in the GATT and discusses the implications for regulatory measures specifying non-product-related PPMs. Ultimately, this chapter concludes that the applicability of the TBT Agreement to PPM-based measures ought not to be dictated by

[8] WTO, reports of the Panel and Apppellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R and WT/DS381/AB/R.

[9] WTO, reports of the Panel and the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/R and WT/DS400/DS401/AB/R.

[10] An extensive analysis of this issue was undertaken by Conrad (2014) but this predates the *EC – Seal Products (2014)* decision.

[11] This follows the general rules of treaty interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties (VCLT), 1155 U.N.T.S. 331, whereby, in addition to the 'ordinary meaning' of the terms in the treaty provision itself (i.e., so-called textualist interpretation), treaty interpreters are required to take account of the 'context' (i.e., known as contextual or systemic interpretation and here including not only the TBT Agreement as a whole but also the GATT as a 'related agreement') as well as of the 'object and purpose' of the relevant treaty (i.e., known as teleological or purposive interpretation).

a rigid product-related/non-product-related distinction but should depend on what is meant by 'technical' content.

NTBs Based on Processes and Production Methods: Why Is the Related/Unrelated Distinction Contested?

As already noted, governments rely on non-tariff measures to intervene in the processes of production, marketing, and consumption of goods and services[12] in order to achieve a number of public policy goals, including the protection of public health and the environment, safeguarding rights of employees and consumers, prevention of deceptive practices, and national security interests. As such, product regulations are frequent among WTO members, and the fact that international trade is affected is a normal and often legitimate consequence of such regulation.[13] In doing so, governments use a variety of measures ranging from top-down 'command-and-control' regulation that is overtly trade restrictive (e.g., a product ban) to market-based mechanisms that are less trade restrictive, such as price-based measures (e.g., internal taxes) and labelling schemes. Labelling provisions are often seen as a more accommodating policy option in balancing domestic regulatory space with international trade obligations by offering a middle way between outright trade prohibitions and no domestic regulation at all. In effect, the intent of a labelling scheme is to enable consumers to decide whether and to what extent they value a particular policy goal while allowing market access to products adhering to the specified requirements rather than prohibiting their importation altogether.[14] However, as rightly argued by Howse and Regan, labelling schemes will not always achieve the same results in terms of the regulatory objective pursued, but this will depend on the nature of consumers' preferences and concerns.[15]

In terms of content, product regulations may specify mere product characteristics (e.g., texture, colour, or size) or processes and production methods. For reasons that will be discussed below, a distinction is conventionally made in the literature within the PPM category between[16]

[12] Note that the TBT Agreement only applies to agricultural and industrial products (Article 1.3), and thus services are not covered here.

[13] World Trade Organisation (2014), p. 11.

[14] See, e.g., Ankersmit and Lawrence (2012), p. 127 (128–129 and 133–134). Note, however, that labelling schemes are often aimed at *influencing* consumer behaviour and patterns of consumption and in this sense can also be trade restrictive; see, e.g., Voon et al. (2013), p. 454.

[15] Howse and Regan (2000), p. 249 (273–274), taking turtle-friendly shrimp as an example and arguing that a labelling scheme would only be equally effective if all the consumer cares about is that her/his own purchase of shrimp does not encourage the killing of turtles (and not collective behaviour) and if the extra cost of buying turtle-friendly shrimp is no serious object.

[16] See, e.g., Lowe (2014), p. 593, and other sources below.

- *product-related* processes and production methods (pr-PPMs), to refer to measures prescribing PPMs that affect the physical characteristics of the final product and thus are detectable or tangible in the product placed on the market (e.g., a prohibition on the use of hormones for cattle in the production of meat, a maximum level of lead paint in children's toys, or a minimum level of recycled content in newsprint); and
- *non-product-related* processes and production methods (npr-PPMs), to refer to measures prescribing PPMs that do *not* (or only in a negligible manner) affect the physical characteristics of the final product and thus are not readily detectable or tangible in the product placed on the market. Environmental and climate change policies are a prime example of employing measures based on npr-PPMs (e.g., a requirement that tuna fishing vessels use dolphin-friendly nets or that firms reduce greenhouse gas (GHG) emissions to a given target level),[17] but such measures are also becoming increasingly popular to address other policy concerns, such as animal welfare (e.g., a labelling scheme concerning 'free range' chicken or a requirement that eggs must be produced in conditions where battery cages hold no more than 8 laying hens per m^2) or working/social conditions (e.g., a prohibition on the sale of products made by child labour or a 'fair trade' labelling scheme for coffee).[18]

This related/unrelated distinction is popular among scholars and practitioners for its (apparent) simplicity, but it is flawed for the same reason. To begin with, as rightly pointed out by Charnovitz, the assertion that a PPM is 'unrelated' to a product is too strong and misleading, as "no PPM is employed without reference to some product".[19] Next, the related/unrelated distinction rests on separating the rationales for regulatory intervention. That is, pr-PPM-based measures are used to assure the functionality or quality of the product and thereby safeguard the consumers from any risks associated with the ingredients or other physical properties of the product.[20] Conversely, npr-PPM-based measures seek to address environmental and social externalities of the production process that are not (or not fully) internalised by the market-based pricing mechanism, and hence governments intervene to correct such a market failure by prescribing or prohibiting certain processes and production methods.[21] However, this division evidently disregards PPM-based regulations adopted for multiple regulatory purposes, which can be

[17] See, e.g., Charnovitz (2002), p. 59; Low et al. (2012), p. 485.

[18] See van den Bossche et al. (2007), pp. 8–11.

[19] Charnovitz (2002), p. 59 (66).

[20] Charnovitz (2002), p. 59 (65).

[21] Potts (2008), p. 3.

considered as product related and non-product related—e.g., a ban on genetically modified food may be adopted to address the impact of ingestion on human health as well as environmental impacts on agriculture.[22] Moreover, it is not always plausible to establish the related/unrelated distinction in practice: take the example of organic production methods in agriculture, which are generally accepted as being more beneficial to the environment, but it is debated whether the physical or nutritional qualities of the actual products are affected[23]—on this account, would organic labelling schemes be a npr-PPM-based or a pr-PPM-based measure?

While the implementation of PPM-based measures within closed national boundaries is relatively uncontroversial, the challenge associated with implementing such measures in the context of integrated global markets has become increasingly evident and contentious over the past decades. On the one hand, as competition deepens across borders, the imposition of PPM-based regulations only on domestic producers risks creating a competitive advantage for foreign producers, even though their PPMs may cause the same environmental or social externality that the regulating State is seeking to address. This provides a fundamental stimulus to use PPM-based measures as a means to 'level the playing field' between compliant and non-compliant production practices.[24] On the other hand, these measures have spurred strenuous opposition, particularly from developing countries, for several reasons.

Foremost, an argument often levelled against PPM-based measures is that, by trying to export national policy objectives and influence production/processing behaviour in a foreign country, they are inherently in conflict with the sovereign right of each State to determine its own policy priorities and level of protection and thus are objectionably extraterritorial and coercive. From this perspective, the pr-PPM/npr-PPM distinction is justified as providing a clear and appropriate dividing line between domains of sovereign authority of trading partners based on the understanding that different cultural, geographic, and economic conditions warrant specific PPMs that should not be subject to foreign influence *unless* they directly affect the products sold in, and under the jurisdiction of, the importing country (as is the case of pr-PPMs).[25] This way, a certain territorial vision of the regulatory autonomy of both the importing and the exporting States would be maintained[26]—i.e., the former should only regulate PPMs that have consequences at the consumption stage and thus for its own citizens.

However, others contend that the related/unrelated approach is based on a rather narrow conception of consumer preferences and the consequences of consumption. Indeed, the presupposition that consumers are (or should be) only concerned about the physical characteristics of products seems neither true nor desirable, given the

[22] Charnovitz (2002), p. 59 (66).

[23] Morgera et al. (2012), pp. 6–12.

[24] Howse and Regan (2000), p. 249 (280–281).

[25] Potts (2008), p. 3.

[26] Marceau and Trachtman (2014), p. 351 (411).

recognised need to promote sustainable consumption patterns.[27] Furthermore, the consumption of a product is not limited to its physical properties but, in the normal course of economic activity, has also consequences for the nature of future production—e.g., the purchase of a can of dolphin-safe tuna tends to encourage the subsequent production of dolphin-safe tuna, while the purchase of a can of dolphin-unsafe tuna would have the opposite effect, and this can be a licit cause for regulatory action even though the tuna itself is indistinguishable.[28] Even though the product characteristics are unaffected, there are several ways in which processing/production behaviour occurring outside the importing State may nonetheless have adverse effects within its territory (e.g., by causing air or water pollution) or on global commons (e.g., threat to endangered migratory species or depletion of ozone layer). But even if the damaging effects of a PPM occur entirely in the producing country, some scholars still question whether national sovereignty can provide a foundation for arguing against regulatory action by other countries: in their view, the importing country is still entitled to restrict access to its *own* (domestic) market so as to ensure that its *own* (domestic) consumption is not used to encourage npr-PPMs that it regards as harmful or immoral, whereas it remains within the authority of the foreign jurisdiction to decide whether or not to access that market.[29]

Apart from national sovereignty and extraterritoriality claims, another common objection against PPM-based measures is that these may be used for protectionist purposes or, even when pursuing legitimate policy objectives, may be disproportionate to their achievement. In addition, it is argued that PPM-based regulations hinder market access particularly for small producers in developing countries in several ways, notably, lack of information about, and complexity of, the criteria to be fulfilled; financial costs and technical difficulties in adapting processes and production methods to the standards applied by the importing country; and divergent PPM requirements in different export markets acting as a barrier to access.[30] Whereas some of these issues are also raised in relation to pr-PPM-based measures, the debate is far more heated with regard to npr-PPMs. And yet these genuine concerns are not unique to npr-PPM-based measures but can equally arise with domestic regulations specifying pr-PPMs, or indeed mere product characteristics. For instance, as Potts rightly notes, any formal distinction between products, whatever the basis is, can be designed to serve protectionist interests if so desired by the regulating State.[31] On this account, it is certainly appropriate and necessary

[27] See, e.g., Rio Declaration on Environment and Development, A/CONF.151/26, Principle 8: "to achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies."

[28] On this point, see Howse and Regan (2000), p. 249 (272–273).

[29] See, e.g., Howse and Regan (2000), p. 249 (274–279); Potts (2008), pp. 5–6; Ankersmit et al. (2012), p. 14 (24–27). For a different view, see notably Bartels (2002), p. 353 (377 et seq.)

[30] Norpoth (2013), p. 575 (578).

[31] Potts (2008), p. 5.

for WTO dispute settlement organs to enquire on a case-by-case basis into whether a given product regulation is a tool of disguised protectionism, but there is no ground for a categorical presumption against npr-PPM-based measures.[32]

Therefore, what is being questioned here is *not* the importance of the challenges posed by the implementation of PPM-based measures in the international trade context. Rather, it is whether such challenges are sensibly addressed by the conventional pr-PPM/npr-PPM distinction, which, as will be examined next, may lead to a partial exclusion of npr-PPM-based measures from the scope of application of the TBT Agreement. To put it differently, latent anxieties about npr-PPM-based regulation should not detract our attention from the principal question of how its use is most appropriately disciplined under WTO law.

NTBs and the TBT Agreement: To What Extent Does It Apply to PPM-Based Measures?

Defining Technical Barriers to Trade: Annex 1 TBT Agreement and Interpretative Choices[33]

The 'limited class' of non-tariff measures to which the TBT Agreement applies are technical regulations and standards, as well as associated conformity assessment procedures to determine whether the relevant requirements in technical regulations or standards are fulfilled.[34] Annex 1.1 of the TBT Agreement defines a *technical regulation* as a

> Document which lays down *product characteristics* ***or their related*** *processes and production methods*, including the applicable administrative provisions, with which compliance is *mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to *a product, process or production method* (emphasis added).

Annex 1.2 TBT Agreement in turn defines a *standard* as a

[32] Howse and Regan (2000), p. 249 (280).

[33] Note that, in addition to the scope of application *ratione materiae*, the scope of application *ratione personae* of the TBT Agreement is also debated particularly with regard to private sector standards; see, *inter alia*, Arcuri (2013), p. 485.

[34] Conformity assessment procedures are defined in Annex 1.3 TBT Agreement and could include, for instance, sampling, testing, inspection, and certification procedures used to ensure that product requirements (both product characteristics and PPMs) are met. Disciplines specifically applicable to these procedures are set out in Articles 5–9 TBT Agreement, but a detailed examination is not included here. The focus is rather on the threshold question of whether npr-PPM-based measures fall within the scope of application of the TBT Agreement as technical regulations or standards in the first place.

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or *characteristics for products* ***or related*** *processes and production methods*, with which compliance is *not mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to *a product, process or production method* (emphasis added).

From the structure and wording of these definitions, the key distinction between technical regulations (mandatory) and standards (not mandatory) pertains to their legal effect,[35] whereas both TBT measures may be *similar* in terms of the subject matter being addressed. In principle, both technical regulations and standards can set forth product characteristics or processes and production methods. Yet Annex 1 TBT Agreement offers only limited guidance as to the substantive content of a technical regulation or a standard, and thus it is not entirely clear how narrow is the special category of measures that are covered by the TBT Agreement. Ultimately, the precise contours of what may constitute a 'technical' barrier to trade depend on the interpretation given to the core terms of 'product characteristics' and (related) 'process and production methods'.

With regard to the former, it would seem fairly evident that 'product characteristics' include the physical properties or qualities of a product, but does it include anything else? For example, a few would question that a law requiring that seal oil pills must consist of at least 80 % seal oil or a law requiring that wine contain no more than 18 % alcohol would be both technical regulations within the meaning of the TBT Agreement. Yet what about a law requiring that wine be sold in green glass bottles, a law requiring that cigarette packets carry health warming marks, or a law requiring tuna products bear a label indicating dolphin-safe fishing methods were used? In other words, are packaging, marking, and labelling requirements themselves a 'product characteristic', irrespective of the kind of information provided? And what about a law prohibiting the use of pesticides in the production of fruits and vegetables, a law prohibiting the sale of *foie gras* from geese that were force fed, or a law regulating the GHG emissions of the factory producing the relevant products? In other words, to *which* 'processes and production methods' does the TBT Agreement apply?

[35] The distinction between a 'mandatory' technical regulation and a 'voluntary' standard is not always clear-cut and indeed was a controversial issue in the *US – Tuna II (2012)* dispute, as exemplified by the rare dissenting opinion on the matter and the critical reactions in the literature to the finding by the majority Panel and Appellate Body that the US dolphin-safe labelling scheme was a 'mandatory' technical regulation, even though there was no requirement to label tuna products as 'dolphin-safe' to access the US market (i.e., tuna products could be sold on the US market with or without the dolphin-safe label). See *inter alia*, Al-Nabhani (2012), p. 355; Davies (2014), p. 37; Silveira and Obersteiner (2013), p. 112. This issue is not, however, directly relevant to the question being addressed here, which turns on the content rather than the mandatory/non-mandatory effect of TBT measures.

It is largely undisputed that the TBT Agreement applies to measures based on PPMs affecting the physical characteristics of the final product (i.e., pr-PPMs), and this is also confirmed by the agreement's negotiating history.[36] However, it has been much debated among scholars and practitioners whether it also applies to measures based on npr-PPMs, with divergence of views centring on the differences in wording between the first and second sentences of the definitions in Annexes 1.1 and 1.2 TBT Agreement. A closer examination of these provisions reveals, indeed, that only the language of the second sentence is fully *identical* in both definitions,[37] and in both instances the adjective 'related' has been omitted in the reference to PPMs. Conversely, a subtle difference may be noticed between the first sentences of each definition with regard to PPMs: only in the case of technical regulations, does the term 'their' precede 'related' PPMs. Here again, the exact scope of application of the TBT Agreement to PPM-based measures will depend on interpretative choices: that is, how one reads 'related' and understands the relationship between the first and second sentences in each definition. What does, in fact, 'related' mean in the first sentence? And is it significant that such an adjective does not qualify the reference to PPMs in the second sentence?

Both proponents and opponents of the applicability of the TBT Agreement to npr-PPM-based measures have found arguments in the text of Annexes 1.1 and 1.2 TBT Agreement in their favour, often citing the negotiating history of the agreement as further evidence.[38] Those favouring a narrow scope of application of the TBT Agreement take the view that the expression 'related' PPMs in the first sentence refers to 'product characteristics', understood as meaning solely *physical* characteristics of products. In addition, they argue that the second sentence is subordinated to the first, in the sense that it only provides examples of the measures already covered by the first sentence. From this perspective, the TBT Agreement

[36] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), para. 3(c).

[37] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 187, noting that "[t]he second sentence of Annex 1.2, which sets out the definition of "standard" for purposes of the *TBT Agreement*, contains language identical to that found in the second sentence of Annex 1.1. With respect to the second sentence of these provisions, the subject matter of a particular measure is therefore not dispositive of whether a measure constitutes a technical regulation or a standard."

[38] On the negotiating history of the TBT Agreement, see further below in the section *A Contextual/Teleological Interpretation of Technical Barriers to Trade – Questioning the pr-PPM/npr-PPM distinction*.

would *not* apply to *any* measure regulating npr-PPMs (i.e., those that do not affect the physical characteristics of the final product).[39] A less restrictive stance is taken by those who read the second sentence as additional to and distinct from, rather than illustrative of, the first sentence. Advocates of this view argue that, while there is uncertainty about the meaning of the term 'related' PPMs in the first sentence, its omission from the second sentence implicates that *all* labelling requirements fall within the scope of the TBT Agreement, including those relating to npr-PPMs.[40] Other scholars call into question whether the word 'related' in the first sentence actually concerns the conventional pr-PPMs/npr-PPMs distinction and instead argue that the proper interpretation of 'related' is that the PPM requirement is connected to an identifiable traded product. This interpretative approach would support a broader applicability of the TBT Agreement to *any* PPM-based measure that specifies the market access conditions of a specific traded good, regardless of whether such a PPM affects or not the physical characteristics of the relevant product.[41] For its part, the WTO Appellate Body has thrown some light on the status of PPM-based measures as 'technical' barriers to trade, although doctrinal ambiguity and controversy remain, as will be seen next.

Interpreting Technical Barriers to Trade: The Appellate Body's Approach to PPM-Based Measures

Based on the definition in Annex 1.1 TBT Agreement,[42] the Appellate Body has developed a three-pronged test to establish whether a measure[43] qualifies as a technical regulation under the TBT Agreement:

[39] See, e.g., Du (2007), p. 269 (287). This seems to have been also the position of Mexico during the negotiations of the TBT Agreement: see WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by the Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), paras. 146–147.

[40] See, e.g., van den Bossche et al. (2007), pp. 145–146; Conrad (2014), pp. 386–388.

[41] See, e.g., Howse (2013), p. 1 (3–4).

[42] At the time of writing, Annex 1.2 TBT Agreement has not been thoroughly interpreted in WTO case law; albeit in light of similarities in structure and wording with Annex 1.1 TBT Agreement, it can be expected that a similar test would be applied.

[43] Note that Annexes 1.1 and 1.2 TBT Agreement both refer to 'document', which, given its ordinary meaning as 'something written', has been considered by the Appellate Body as covering a "broad range of instruments or apply to a variety of measures". WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 185.

- the measure must apply to an 'identifiable' group of products (even if this is not expressly identified in the document);[44]
- the measure must lay down (i.e., set forth, stipulate, or provide) 'product characteristics' or 'related processes and production methods' (in either a positive or negative form);[45] and
- compliance with such product characteristics or related PPMs must be 'mandatory'.[46]

In applying this test in *EC – Asbestos (2001)*, the Appellate Body further clarified the ordinary meaning of the term 'product characteristics' through reference to its synonyms and the second sentence of Annex 1.1 TBT Agreement:

> the "characteristics" of a product include, in our view, ***any objectively definable*** "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" – "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, ***not only features and qualities intrinsic to the product itself, but also related "characteristics"***, such as the means of identification, the presentation and the appearance of a product.[47]

On the basis of this statement, the Appellate Body appears to take the view that 'product characteristics' in Annex 1.1 TBT Agreement are *not* confined to the *physical* characteristics of products—i.e., only the first set of features and qualities above indicated (e.g., product's composition, size, shape, colour) can be said to be 'physical' *sensu stricto* (i.e., incorporated *in* the product itself). Yet the second set of '*related* characteristics' (i.e., means of identification, presentation, and appearance of a product) still refers to attributes or marks that are discernible *on* the product itself. Given that this second list is expressed in non-exhaustive terms ("such as"), how far may 'related' characteristics be stretched out, and in particular does it encompass elements beyond those enumerated in the second sentence of Annex 1.1 TBT Agreement (i.e., terminology, symbols, packaging, marking, or labelling requirements)? It does not appear from the available case law that this was

[44] WTO, report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 70.

[45] Note that, when this test was first established, the Appellate Body made no reference to 'related processes and production methods', possibly because it was not relevant in the factual context of the cases at hand.

[46] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 176.

[47] WTO, report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 67 (emphasis added).

the intention behind the Appellate Body's statement: out of the six disputes where the measure at issue was found to qualify as a technical regulation laying down 'product characteristics', two concerned physical characteristics of the relevant products[48] and four labelling requirements[49] or other means of identification[50] attached to the relevant products. Thus, while the Appellate Body has avoided restricting the meaning of 'product characteristics' to the physical properties of the product, it has not gone as far as accepting that *any* feature that could be 'objectively defined' as relating to a product is a 'product characteristic', irrespective of whether it is detectable *in* or *on* the product itself.[51] Indeed, this is further corroborated by the approach taken by the Appellate Body in the recent *EC – Seal Products (2014)* dispute, which deserves greater attention here as the first WTO case in which the challenged measure was found *not* to be a technical regulation because it did not lay down product characteristics.

The *EC – Seal Products (2014)* dispute concerned the Seal Regime of the European Union (EU), which regulates the placing on the EU market of seal products and is aimed at addressing EU public moral concerns on seal welfare.[52]

[48] WTO, report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 72: "It is important to note here that, although formulated *negatively* –products containing asbestos are prohibited– the measure, in this respect, effectively prescribes or imposes certain objective features, qualities or "characteristics" on *all* products. That is, in effect, the measure provides that *all* products must *not* contain asbestos fibres" (emphasis in original); WTO, report of the Panel, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, paras. 7.31–7.36.

[49] WTO, report of the Panel, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R, paras. 7.449–7.451; WTO, report of the Panel, *United States – Certain Country of Origin Labelling Requirements*, WT/DS384/DS386/R, paras. 7.211–7.214. While *US – Tuna II (2012)* also concerned a labelling requirement under the second sentence of Annex 1.1 TBT Agreement, the Panel explicitly declined to rule on the question of whether the US labelling scheme could also fall within the scope of the first sentence: WTO, report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, paras. 7.78–7.79.

[50] WTO, report of the Appellate Body, *European Commmunities – Trade Description of Sardines*, WT/DS231/AB/R, paras. 187–191.

[51] For a different view, see Crowley and Howse (2014), p. 321 (325–326), referring to 'dolphin friendliness' as the relevant product characteristic in *US – Tuna II (2012)*. However, neither the Panel nor the Appellate Body explicitly assessed the measure at issue in that case under the first sentence of Annex 1.1 TBT Agreement, but rather as a labelling requirement under the second sentence: WTO, report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, paras. 7.78–7.79; WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 186.

[52] Regulation (EC) No. 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products (Basic Regulation) [2009] OJ L286/36; Commission Regulation (EU) No. 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No. 1007/2009 of the European Parliament and of the Council on trade in seal products (Implementing Regulation) [2010] OJ L216/1, both treated as a single measure and referred to as 'EU Seal Regime'.

In essence, seal products can be placed on the EU market only where (1) such products result from seals hunted by Inuit or other indigenous communities and contribute to their subsistence (IC hunts exception), (2) such products are obtained from seals hunted for the sole purposes of marine resource management and are not placed on the market for commercial reasons (MRM hunts exception), and (3) such products are brought by travellers into the EU on an occasional basis and exclusively for their personal use (travellers exception).[53]

Referring to the Appellate Body's ruling in *EC – Asbestos (2001)*, the Panel had found that the criteria under the IC and MRM exceptions lay down 'product characteristics' on grounds that the identity of the hunter and the type or purpose of the hunt constitute "objectively definable features of the seal products that are allowed to be placed on the EU market".[54] The EU appealed this finding, arguing that "under the Panel's reasoning, virtually anything that [bears] any relation to a product could be construed as a product characteristic, and be potentially considered a technical regulation subject to the disciplines of the TBT Agreement".[55] The Appellate Body overturned the Panel's finding on this point, arguing that there was no basis in the text of Annex 1.1 TBT Agreement or previous case law "to suggest that the identity of the hunter, the type of hunt, or the purpose of the hunt could be viewed as product characteristics".[56] In this regard, the Appellate Body distinguished the EU Seal Regime from the measure at issue in *EC – Asbestos (2001)*, which consisted of a general ban on asbestos and asbestos-containing products subject to limited and temporary exceptions.[57] Unlike that measure, the EU Seal Regime does not prohibit (or permit) the placing on the EU market of products depending on whether or not seal is incorporated into the product as an

[53] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/R, paras. 7.7–7.24, and WTO, report of the Appellate Body, *European Communities – Measures of Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, paras. 5.16–5.17.

[54] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/R, para. 7.110.

[55] WTO, report of the Appellate Body, *European Communities – Measures of Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.3, where the EU further cautioned "this would "subsume [processes and production methods] into product characteristics" and mean that non-product related processes and production methods (PPMs) would fall within the ambit of the TBT Agreement".

[56] WTO, report of the Appellate Body, *European Communities – Measures of Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.45.

[57] WTO, report of the Appellate Body, *European Communities – Measures of Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.41: "under the French Decree, asbestos-containing products were regulated due to the carcinogenicity or toxicity of the *physical properties* of the subject products … By contrast, the EU Seal Regime *does not prohibit seal-containing products merely on the basis that such products contain seal as an input*. Rather, such prohibition is imposed subject to conditions based on criteria relating to the *identity of the hunter or the type or purpose of the hunt from which the product is derived*" (emphasis added); see also paras. 5.53–5.57, elaborating further on why the exceptions in the measure at issue in *EC – Asbestos (2001)* involved 'product characteristics', while those under the EU Seal Regime did not.

input but on the *purpose* and *type* of the seal hunt. But couldn't these criteria then qualify as 'related process and production methods' within the meaning of Annex 1.1 TBT Agreement?

The Appellate Body refrained from completing the analysis on this point, emphasising that "the line between PPMs that fall, and those that do not fall, within the scope of the TBT Agreement raises important systemic issues", and therefore "more argumentation by the participants and exploration in questioning would have been required"[58] in order to develop an interpretation of the phrase 'related' PPMs in Annex 1.1 TBT Agreement and apply it to the EU Seal Regime.[59] Nevertheless, it did signal how this 'systemic issue' may be addressed if raised in future disputes. In particular, based on the dictionary meaning of the terms in Annex 1.1 TBT Agreement, the Appellate Body considered that the reference to '*their* related' PPMs in the first sentence indicates that

> the subject matter of a technical regulation may consist of a process or production method that is ***related to product characteristics***. In order to determine whether a measure lays down related PPMs, a panel thus will have to examine whether the processes and production methods prescribed by the measure have a ***sufficient nexus to the characteristics of a product*** in order to be considered related to those characteristics.[60]

With this statement, the Appellate Body has cleared up the debated meaning of the words 'their related' PPMs in the first sentence of Annex 1.1 TBT Agreement as referring to 'product characteristics' and not merely establishing a link between the PPM and the traded product. Yet it has also left a number of puzzles unresolved. First, as a threshold step, what exactly are then these 'product characteristics' other than the physical properties of the product?[61] Second, how are Panels to determine whether a given PPM is 'sufficiently related' to such product characteristics? And third, what are the implications of this interpretative approach for PPMs covered by the second sentence of Annex 1.1 TBT Agreement, which does not include the words 'their related'?

Before the *EC – Seal Products (2014)* decision, the conventional pr-PPM/npr-PPM distinction seems to have been largely irrelevant in the context of WTO

[58] WTO, report of the Appellate Body, *European Communities – Measures of Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.69.

[59] See, however, WTO, report of the Appellate Body, *European Communities – Measures of Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, footnote 942, discussed below in the section *Nessessity Requirement*.

[60] WTO, report of the Appellate Body, *European Communities – Measures of Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.12 (emphasis added).

[61] See WTO, report of the Appellate Body, *European Communities – Measures of Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.11, restating that 'product characteristics' are not only the "features and qualities intrinsic the product itself" but "*may* also include 'related characteristics'" (emphasis in original), without specifying what these 'related characteristics' may be.

disputes concerning labelling requirements, which are enumerated in the second sentence of Annex 1.1 TBT Agreement. Some WTO Panels just followed the Appellate Body's reasoning in *EC – Asbestos (2001)* seen above:[62] the label on a product *as such* constitutes a 'product characteristic',[63] and thus it is not really relevant what kind of information is being passed on to consumers for the purpose of applying the TBT Agreement.[64] The *US – Tuna II (2012)* dispute opened the door to take a clearer position on the matter, given that the challenged dolphin-safe labelling scheme of the United States (US) conditioned eligibility for a dolphin-safe label upon (*inter alia*) the fishing method used for catching tuna. However, the Panel completely sidelined the fact that the US dolphin-safe label was based on npr-PPM criteria that were not traceable in the final tuna products. It simply found that the US measure laid down 'labelling requirements' that applied to a product (i.e., tuna products) within the meaning of the second sentence of Annex 1.1 TBT Agreement.[65] The implication from this case law seems to be that *all* labelling requirements that apply (i.e., are attached) to a product are, by definition, covered by the TBT Agreement, irrespective of the subject matter being addressed by the label (i.e., product characteristic, pr-PPM, or npr-PPM).

To sum up, what can be concluded from available jurisprudence regarding the coverage of PPM-based measures by the TBT Agreement?

- *Labelling* requirements based on both pr-PPMs and npr-PPMs are covered by the TBT Agreement.[66]
- *Other* measures (e.g., a ban) based on pr-PPMs (i.e., affecting the physical characteristics of the product) are equally covered by the TBT Agreement, but

[62] WTO, report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 67, treating the second sentence of Annex 1.1 TBT Agreement as illustrative of (rather than additional to or distinct from) the first sentence. See, however, apparent shift from this stance in WTO, report of the Appellate Body, *European Communities – Measures of Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.14: "[t]he use of the words "also include" and "deal exclusively with" at the beginning of the second sentence indicates that the second sentence includes elements *that are additional to, and may be distinct from,* those covered by the first sentence of Annex 1.1" (emphasis added).

[63] See, e.g., WTO, report of the Panel, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R, para. 7.449: "[t]he issue is not whether the content of the label refers to a product characteristic: the label on a product is a product characteristic", WTO, report of the Panel, United States – *Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/DS386/R, paras. 7.213–7.214.

[64] Kudryavtsev (2013), p. 17 (46).

[65] WTO, report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, paras. 7.78–7.79, explicitly refraining from considering whether the US measure could also fall under the first sentence of Annex 1.1 TBT Agreement. This particular issue was not appealed before the Appellate Body. For a similar reading, see Pauwelyn (2012b).

[66] The same could presumably apply to other elements enumerated in the second sentences of Annexes 1.1 and 1.2 TBT Agreement.

uncertainty remains in relation to npr-PPMs, turning on whether these are 'sufficiently related' to the 'product characteristics' (with both terms lacking precise definition).

The underlying rationale for this differentiated approach to labelling requirements vis-à-vis other PPM-based measures may well be motivated by a policy preference for market-based product regulation.[67] However, it could lead to a highly counter-intuitive result particularly *if* the 'sufficient nexus' test coined by the Appellate Body in *EC – Seal Products (2014)* is applied (too) narrowly in future cases—let us assume it as only encompassing PPM-based measures that leave a physical trace in the final product (i.e., pr-PPMs). This would mean, for instance, that a law requiring eggs to bear a *label* indicating that in the production process certain animal welfare requirements were met (e.g., 'no battery cages used') would seem to automatically fall under the scope of the TBT Agreement, whereas a law *banning* the sale of eggs not produced under the same animal welfare conditions may not be covered by the agreement (i.e., in our example, this would rest on the debated question of whether the use of battery cages for hens 'sufficiently' affects the physical quality of eggs). But why is the former measure any more of a 'technical' barrier to trade than the latter, given they are both based on the *very same* npr-PPM? And taking another example from climate change policy, does it make sense to subject labelling requirements based on npr-PPMs to stringent TBT disciplines (e.g., a carbon footprint label for energy-intensive products sold on the domestic market) while leaving more trade-restrictive npr-PPM regulation outside the agreement's scope (e.g., a sale prohibition on energy-intensive products with a carbon footprint above a certain level)?

This consequence seems to make little (if any) sense and therefore calls into question whether the language of Annex 1 TBT Agreement can be interpreted literally and in a vacuum, or instead what is a 'technical' barrier to trade needs to be determined in light of the object and purpose of the TBT Agreement and the specific circumstances of the case.[68] As will be argued next, such a contextual and purposive interpretation of Annex 1 TBT Agreement does not support the conventional pr-PPM/npr-PPM distinction in delimiting the scope of application of

[67] See above in the section *NTBs based on Processes and Production Methods – Why is the Related/Unrelated Distinction Contested?*.

[68] The Appellate Body itself admitted this in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.60: "In our analysis above ... we have focused on the text and the immediate context found in Annex 1.1 as well as on previous jurisprudence by the Appellate Body. In future cases, depending on the *nature of the measure* and the *circumstances of the case*, a panel may find it helpful to seek further *contextual guidance* in other provisions of the TBT Agreement, for example, those pertaining to standards, international standards ... in delimiting the contours of the term "technical regulation". It may also be relevant for a panel to examine supplementary means of interpretation such as the *negotiating history* of the TBT Agreement or the types and the nature of claims that have been brought by the complainants" (emphasis added).

the TBT Agreement, and even less so the differentiated approach between labelling requirements and other npr-PPM-based measures emerging from the case law.

A Contextual/Teleological Interpretation of Technical Barriers to Trade: Questioning the pr-PPM/npr-PPM Distinction

As we have seen, the Appellate Body in *EC – Seal Products (2014)* indicated that a plain reading of the first sentence of Annex 1.1 TBT Agreement suggests that it only covers PPMs that are sufficiently related to the characteristics of a product. This conclusion was reached mainly on the basis of the word 'their' as referring back to 'product characteristics', and this reading would seem to be supported by the Spanish version of the TBT Agreement.[69] While it remains unsettled whether this 'sufficient nexus' test implies that only pr-PPMs (i.e., those affecting the physical characteristics of the product) are covered by the first sentence of the Annex 1.1 TBT Agreement,[70] this section cautions against such a (possible) jurisprudential development in future cases. In fact, pursuant to Article 31(1) of the VCLT, the meaning of the term 'their related PPMs' in the first sentence of Annex 1.1 TBT Agreement ought to be construed in their context and in the light of the treaty's object and purpose.[71]

Turning to Annex 1.2 TBT Agreement as the immediate context, if the textualist approach of the Appellate Body is followed, and given the absence of 'their' preceding related PPMs in the first sentence therein, a broader coverage would be presumably warranted in the case of standards (i.e., covering also npr-PPMs). But wouldn't this finding be counter-intuitive? Why scrutinise npr-PPM-based measures under the TBT Agreement only when they take the form of non-mandatory (and arguably less trade restrictive) standards and not when these take the form of mandatory technical regulations? In addition, the explanatory note to Annex 1.2 TBT Agreement states that the TBT Agreement deals with "technical regulations,

[69] The Spanish version of Annex 1.1 TBT reads: "Documento en el que se establecen las características de un producto o los procesos y métodos de producción *con ellas* relacionados, con inclusión de las disposiciones administrativas aplicables, y cuya observancia es obligatoria" (emphasis added), where "con ellas" necessarily refers back to the "características de un product" (i.e., product characteristics). The French version is, as the English, more ambiguous: "Document qui énonce les caractéristiques d'un produit ou les procédés et méthodes de production *s'y rapportant*, y compris les dispositions administratives qui s'y appliquent, dont le respect est obligatoire" (emphasis added).

[70] This was not explicitly stated by the Appellate Body but could be implied from its reasoning in *EC – Seal Products (2014)* and its emphasis on distinguishing this case from *EC – Asbestos (2001)*; see above in the section *Interpreting Technical Barriers to Trade – The Appellate Body's Approach to PPM-based Measures*.

[71] Article 31(1) VCLT; see also Article 3.2 WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), 1869 U.N.T.S. 401.

standards and conformity assessment procedures related to products or process and product methods", omitting again 'their related' and pointing to an undifferentiated approach in the coverage of technical regulations and standards with regard to PPMs. It would seem, therefore, that the meaning of the terms 'their related' PPMs in the first sentence of Annex 1.1 TBT Agreement remains ambiguous when read in light of its immediate context.

With regard to the object and purpose of the TBT Agreement, this is itself subject to debate and in particular the extent to which this agreement does "further the objectives"[72] of the GATT. One possible reading is that the TBT Agreement has essentially the same aim as the GATT and overall is ought not to be read as a more liberalising or integrating legal instrument.[73] This view would seem to be backed by the sixth recital of the Preamble of the TBT Agreement, which has been explicitly referred to in contextual analysis by the Appellate Body in *US – Clove Cigarettes (2012)*[74] and states:

> no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.

From this angle, just like the GATT, the TBT Agreement would be premised on the acceptance of regulatory diversity among WTO members flowing from their right to regulate and protect certain societal objectives and interests at the level they consider appropriate while disciplining 'regulatory protectionism'.[75] However, a more comprehensive reading of the Preamble of the TBT Agreement reflects a desire by the treaty drafters to go beyond non-discrimination in the direction of so-called positive integration, notably by encouraging the harmonisation of domestic regulatory measures on the basis of international standards[76] as means to avoid 'unnecessary obstacles' to international trade.[77]

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[72] TBT Agreement, Preamble, second recital.

[73] Howse (2013), p. 1 (2).

[74] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, paras. 172–173, as relevant context of the term 'less favourable treatment' in Article 2.1 TBT Agreement.

[75] Howse (2013), p. 1 (1).

[76] See, e.g., TBT Agreement, Preamble, third recital: "*Recognizing* the important contribution that international standards and conformity assessment systems can make in this regard by improving efficiency of production and facilitating the conduct of international trade." Even if the substantive requirements in this regard are somehow qualified, see below in the section *Harmonisation on the basis of international standards*.

[77] See TBT Agreement, Preamble, fifth recital, also referred to by the WTO Appellate Body in *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, paras. 92–95.

But neither of these understandings of the purpose of the TBT Agreement excludes, *à priori*, its applicability to npr-PPM-based regulations. If, as noted earlier, there are genuine concerns that npr-PPM-based measures are a covert tool of disguised protectionism or disproportionate to achieve the legitimate objective pursued,[78] this would rather be an argument for subjecting such measures to the TBT disciplines on non-discrimination (e.g., Article 2.1 TBT Agreement for technical regulations)[79] and necessity (e.g., Article 2.2 TBT Agreement for technical regulations)[80] so as to ensure that npr-PPM-based measures—just as pr-PPM-based measures—are non-discriminatory and/or not more trade restrictive than necessary in the pursuance of certain legitimate objectives. Similarly, the GATT-plus requirement of harmonisation could potentially help in reducing the trade-restrictive effects of both pr-PPM-based and npr-PPM-based measures alike, provided a 'relevant' international standard exists.[81] In addition, it could well be that the comparatively elaborate provisions on notification and technical assistance[82] under the TBT Agreement could alleviate some of the burdens associated with PPM-based regulations, such as lack of information and adaptation costs.[83] It would thus seem inefficient that only pr-PPM-based measures are subject to these TBT requirements, while the less transparent and more costly npr-PPM-based measures are not.[84] To put it simply, it seems highly illogical to include pr-PPM-based measures and exclude npr-PPM-based measures from the scope of application of the TBT Agreement when the latter are regarded as more problematic in terms of the matters specifically addressed by the agreement.

In a similar vein, a differentiated approach between labelling requirements and other regulatory measures in relation to npr-PPMs seems at odds with the purpose of the TBT Agreement, whether understood as preventing 'regulatory protectionism' or 'unnecessary' barriers to trade. As illustrated earlier with the cage-free egg and high-carbon product examples,[85] it appears almost absurd to apply the TBT Agreement to a labelling requirement but not to other overtly trade-restrictive measures (e.g., a ban), even if both address the same npr-PPM and thus there is no obvious difference as to their 'technical' content. To further exemplify this point, let's imagine that in *US – Tuna II (2012)*, instead of the challenged dolphin-safe labelling scheme, the US had imposed an outright prohibition on the sale of

[78] See above the section *NTBs based on Processes and Production Methods – Why is the Related/Unrelated Distinction Contested?*.

[79] See further the section *Non-discrimination Obligations* below.

[80] See further below in the section *Necessity Requirement*.

[81] See Article 2.4 TBT Agreement for technical regulations and below the section *Harmonisation on the basis of international standards* for further discussion.

[82] See sections *Other Substantive Provisions and Procedural Obligations* below.

[83] Norpoth (2013), p. 575 (579).

[84] Low et al. (2012), p. 485 (522).

[85] See above the section *Interpreting Technical Barriers to Trade – The Appellate Body's Approach to PPM-based Measures*.

tuna products that had not been certified as caught using 'dolphin-safe' fishing methods: why would that ban be less of a 'technical' barrier to trade, even if based on identical npr-PPM criteria than the US dolphin-safe labelling scheme, while being plainly more restrictive on international trade?

On this background, one would be tempted to look for clarification in the *travaux préparatoires* of the TBT Agreement and the circumstances of its conclusion.[86] However, the negotiating history on the agreement's coverage as recorded by the WTO Secretariat reveals that the treatment of measures based on npr-PPMs by the TBT Agreement was one of the most controversial issues during the process of negotiation. Not surprisingly, the United States and Mexico—respectively, defendant and complainant in the GATT *US – Tuna I (1991)* dispute mentioned below—had divergent views on the matter. In the late 1980s, the United States advanced proposals to include measures addressing all types of PPMs within the scope of application of the TBT Agreement,[87] arguing that "[l]ack of full coverage of PPMs seriously weakened the effectiveness of the Agreement by excluding a growing body of regulations from its disciplines".[88] However, in 1989 an alternative proposal to apply the TBT Agreement only to PPM-based measures "that were necessary to ensure certain legitimate objectives of quality in a final product such as its strength, purity or safety"[89] was put forward by New Zealand and received considerable support but for one (unnamed) delegation.[90]

Ultimately, the draft text of the TBT Agreement submitted to the Brussels Ministerial Conference in 1990 contained a reference to PPMs in the first and second sentences of the definitions in Annex 1 TBT Agreement, without any qualification on the types of PPMs covered (i.e., the terms 'their related'/'related'

[86] Article 32 VCLT.

[87] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), paras. 120–126.

[88] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), para. 121.

[89] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), para. 131, further specifying that "[a] PPM that was required for religious purposes, for example, did not have any direct effect on the quality or the final characteristics of a product and would therefore not be covered".

[90] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), para. 132: "One participant felt the use of PPM-based measures should be viewed in a larger context, both from the point of view of the different problems raised by those related to agricultural and industrial products and from the point of view of the use of certain PPMs related to concepts such as protection of environment, social order, and workers' health and safety."

were not used).[91] Nevertheless, later during informal consultations in October 1991, Mexico proposed inserting the terms 'related' in the definitions in Annex 1 TBT Agreement, with the intent to exclude "PPMs unrelated to the characteristics of a product from the coverage of the Agreement".[92] However, this proposal was seemingly accepted only with regard to the first sentence of the definitions in Annex 1 of the TBT Agreement, while the second sentence remained unchanged in both definitions—no specific reason is recorded for this.[93] Towards the end of the negotiations, Mexico further proposed to insert the word 'their' before 'related', "in the interests of additional clarity and to ensure that the Agreement will only address a narrow selection of processes and production methods".[94] Yet again, this proposal gathered partial consensus, and only the definition of technical regulation (but not of standard) was changed accordingly.[95]

In essence, the negotiating history of the TBT Agreement indicates that, even if a number of negotiating GATT Contracting Parties intended to exclude npr-PPM-based measures from the scope of the TBT Agreement, it was not possible to reach a clear and unambiguous agreement among negotiators on the matter.[96] As a result, *travaux préparatoires* are only of limited value in explaining the significance of the textual differences in the definitions in Annex 1 TBT Agreement. The circumstances in which the TBT Agreement was negotiated and concluded, on the other

[91] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), paras. 140–144.

[92] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), para. 146.

[93] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), para. 146.

[94] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), para. 147.

[95] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), paras. 147 and 150–151.

[96] WTO, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards and Production Methods Unrelated to Product Characteristics, Note by Secretariat, WT/CTE/W/10, G/TBT/W/11 (29 August 1995), para. 3(c): "Towards the end of the negotiations, some delegations proposed changing the language contained in the "definitions" in Annex 1 of the Agreement to make it unambiguous that only PPMs related to product characteristics were to be covered by the Agreement, but although no participant is on record as having opposed that objective, at that late stage of the negotiations it did not prove possible to find a consensus on the proposal."

hand, appear more enlightening in this regard. As pointed out by some scholars, the negotiations of the TBT Agreement were marked by a (mis)perception among many GATT Contracting Parties, especially developing countries, that mandatory npr-PPM-based measures would *prima facie* violate the substantive obligations under the GATT and could not be justified under Article XX GATT.[97] This (mis) understanding was largely based on the two GATT Panel reports in *US – Tuna I (1991)* and *US – Tuna II (1994)*;[98] even though both reports were highly controversial, none was ever adopted due to the requirement of consensus, and they are of almost no legal value following subsequent Appellate Body case law.[99] Based on that premise, the inclusion of npr-PPM-based measures within the scope of the TBT Agreement was often (mis)perceived as an attempt to 'legalise' these measures under WTO law.

Following the conclusion of the Uruguay Round negotiations, discussions in the newly established Committee on Trade and Environment with regard to eco-labelling schemes highlight that this (mis)assumption was still widely shared,[100] and division persisted among the WTO membership on the applicability of the TBT Agreement to npr-PPM-based measures.[101] Similarly, subsequent practice by WTO members has not been fully consistent: for instance, it has been reported that many developing countries have challenged notifications of labelling requirements based on social considerations and timber production processes on the

[97] See, e.g., Charnovitz (2002), p. 59 (63–64 and 75–77), for a list of public statements by WTO officials and delegates on the GATT illegality of npr-PPM-based measures; Kudryavtsev (2013), p. 17 (43–44).

[98] Respectively, GATT, report of the Panel, *United States – Restrictions on Imports of Tuna*, DS21/R, circulated 3 September 1991, not adopted [hereinafter, *US – Tuna I (1991)*]; GATT, report of the Panel, *United States – Restrictions on Imports of Tuna*, DS29/R, circulated 16 June 1994, not adopted [hereinafter, *US – Tuna II (1994)*]. These cases concerned a US import ban on tuna products from countries that did not have a regulatory regime comparable to that of the US in order to prevent the incidental killing of dolphins in the course of tuna fishing operations. Both GATT Panels found that the US measure did not apply to 'a product as such' (but applied to the product's PPM) and as such was not covered by Article III GATT. Instead, the measure constituted an import ban prohibited by Article XI GATT and was not justified under the GATT Article XX general exceptions. For a critical discussion of this case law, see Howse and Regan (2000), p. 249 (258–268).

[99] Pauwelyn (2004), p. 575 (585).

[100] WTO Committee on Trade and Environment, Report (1996) of the Committee on Trade and Environment, WT/CTE/1 (12 November 1996), para. 70: "[...] *many delegations* expressed the view that the negotiating history of the TBT Agreement indicates clearly that there was no intention of *legitimizing the use of measures based on non-product-related PPMs under the TBT Agreement*, and that voluntary standards based on such PPMs are inconsistent with the provisions of the Agreement as well as with other provisions of the GATT. There is objection to any attempt through CTE work on eco-labelling to extend the scope of the TBT Agreement to permit the use of standards based on non-product-related PPMs" (emphasis added).

[101] WTO, Committee on Trade and Environment, Report (1996) of the Committee on Trade and Environment, WT/CTE/1 (12 November 1996), paras. 71–73.

ground that these npr-PPM-based measures are not covered by the TBT Agreement.[102] At the same time, and ironically perhaps in light of the negotiating history outlined above, it was Mexico arguing in favour of the applicability of the TBT Agreement to an npr-PPM-based labelling scheme in *US – Tuna II (2012)*.[103]

However, the belief that npr-PPM-based measures are *per se* 'GATT-illegal' prevailing during the negotiations of the TBT Agreement was later corrected by the (adopted) WTO report of the Appellate Body in the *US – Shrimp (1998)* case,[104] which concerned an npr-PPM requirement to harvest shrimp in a turtle-friendly manner. Not only did the Appellate Body make clear that Article XX GATT can, in principle, justify npr-PPM-based measures,[105] but the revised US measure—still conditioning market access on npr-PPM criteria but allowing for equivalence recognition of foreign regulatory programmes comparable in effectiveness—was found to be justified under Article XX GATT. Moreover, this is the only challenged measure to have successfully met the chapeau requirements of GATT Article XX in WTO dispute settlement proceedings to date.[106] This 'new' understanding of the status of npr-PPM-based measures under the GATT—i.e., not *per se* GATT-illegal/unjustifiable—changes profoundly the legal ramifications of incorporating such measures within the scope of application of the TBT Agreement: it does *not* alter their status from 'GATT-illegal' to 'TBT-legal' but merely permits them to be scrutinised with respect to the TBT disciplines in addition to GATT. Against this background, the key question becomes how best npr-PPM-based measures are regulated under WTO law. With a view to shedding light on this question, the next section explores the implications of applying the TBT Agreement to npr-PPM-based measures via-à-vis the GATT.

[102] Low et al. (2012), p. 485 (521).

[103] Norpoth (2013), p. 575 (581).

[104] WTO, report of the Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/AB/R.

[105] WTO, report of the Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 121, stating that "[. . .] It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure *a priori* incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply."

[106] WTO, report of the Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products /Recourse to Article 21.5 of the DSU by Malaysia)*, WT/DS58/AB/RW, paras. 144–152. For further discussion of the implications of this case law, see Charnovitz (2002), p. 59 (92–103); Potts (2008), pp. 23–26.

Npr-PPM-Based Measures and the TBT Agreement: How Different to the GATT?

TBT Agreement and GATT: Relationship and Structural Differences

As a backdrop to our comparative analysis, it is first important to clarify the relationship between the GATT and the TBT Agreement, as well as the main differences in their structure. As to the former, the TBT Agreement does not contain specific provisions concerning its relationship with the GATT. However, in *EC – Asbestos (2001)*, the WTO dispute settlement organs took the view that the relationship between the TBT Agreement and the GATT is not such that the applicability of one agreement triggers the exclusion of the applicability of the other, but both agreements can apply cumulatively to the same measure.[107] In a dispute settlement process, the issue of consistency with the TBT Agreement must in principle be examined first since this agreement deals more specifically and in detail with technical barriers to trade.[108] Yet importantly, consistency with the TBT Agreement does not lead to a presumption of consistency with the GATT,[109] and thus a TBT-consistent measure still requires analysis under the GATT. The key implication for our purpose is that we should not approach the applicability of the TBT Agreement to npr-PPM-based measures as an 'either/or' question vis-à-vis the GATT but as both agreements being capable of applying simultaneously to the same measure.[110]

In terms of structure, the GATT operates as a rule-exception framework, whereby the consistency of a measure will be first assessed against core obligations (e.g., Articles I and III GATT), with the complainant required to make a *prima facie* case. Once a violation of GATT rules has been substantiated, Article XX GATT may be raised as an affirmative defence by the respondent, which largely bears the burden of proof.[111] Conversely, the TBT Agreement only stipulates positive obligations and does not contain a general exception clause, which implies a more

[107] Cf. with Article 1.5 TBT Agreement, whereby the application of the SPS Agreement to a given measure precludes the application of the TBT Agreement.

[108] WTO, report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 80; WTO, report of the Panel, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, para. 8.16.

[109] Cf. with Article 2.4 SPS Agreement, whereby compliance with SPS provisions leads to a presumption of consistency with the GATT.

[110] See, however, General Interpretative Note to Annex 1A of the WTO Agreement, according to which the TBT Agreement would prevail over the GATT to the extent there is a conflict.

[111] With the exception of the necessity test, where it rests upon the complainant to first identify less trade-restrictive alternatives to the challenged measure that the respondent could have taken. The burden then shifts back to the respondent to demonstrate why the proposed alternatives are not, in fact, 'reasonably available' and thus the challenged measure remains 'necessary'. WTO, report of the Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, para. 156.

onerous burden of proof for the complainant in dispute settlement proceedings, as will be further illustrated below.

Before proceeding, it should be also noted that the analysis here focuses on TBT provisions applicable to mandatory technical regulations that, unlike those applicable to non-mandatory standards, have been subject to interpretation and application in WTO case law, thus providing a firmer basis for a comparative assessment with GATT disciplines.

TBT Agreement and GATT: Similar but Different Disciplines?

The substantive provisions of the TBT Agreement contain several disciplines that are similar—albeit not identical—to those found in the GATT, and notably, the non-discrimination obligations (most-favoured-nation treatment and national treatment) and the requirement to refrain from creating unnecessary obstacles to international trade. In *US – Clove Cigarettes (2012)*, the Appellate Body emphasised that the two agreements "should be interpreted in a coherent and consistent manner"[112] and held that the "balance set out in the preamble of the TBT Agreement between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX".[113] At the same time, in *EC – Seal Products (2014)*, the Appellate Body clarified that the principle of coherent and consistent interpretation does not mean that "the legal standards for *similar* obligations – such as Articles I:1 and III:4 of the GATT 1994, on the one hand, and Article 2.1 of the TBT Agreement, on the other hand – must be given identical meanings".[114] But if different sets of legal tests and standards are to lead to the same balance overall, why would it matter whether the GATT or the TBT Agreement applies to npr-PPM-based measures? As will be shown next, the answer to this question is somehow more nuanced.[115]

[112] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 91.

[113] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 96.

[114] WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.123 (emphasis in original).

[115] In this sense, this contribution differs from Conrad (2014), pp. 379–381, arguing that there are no significant differences in the substantive provisions of the GATT and TBT Agreement and favouring a text-based interpretative approach to Annex 1 TBT Agreement, which would exclude from its coverage npr-PPM-based measures other than labelling/marking requirements.

Non-discrimination Obligations

The most-favoured-nation (MFN) and national treatment obligations of WTO members in relation to technical regulations are laid down in Article 2.1 TBT Agreement,[116] which reads:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded ***treatment no less favourable*** than that accorded to ***like products*** of national origin and to like products originating in any other country (emphasis added).

The language of this provision bears close resemblance with the GATT national treatment obligation applicable to internal regulation (Article III:4 GATT), while there are textual differences with the MFN obligation under the GATT (Article I:1 GATT).[117] Just as under the GATT, the determination of whether the products at issue are 'like' (or not) is of critical importance for the application of the MFN treatment and national treatment obligations under the TBT Agreement—i.e., it is only between like products that discrimination is prohibited. In this respect, the Appellate Body held in *US – Clove Cigarettes (2012)* that the determination of likeness under Article 2.1 TBT Agreement is, as under Article III:4 GATT, "a determination about the nature and extent of a competitive relationship between and among the products at issue",[118] while regulatory concerns underlying a measure (e.g., health or environmental risks associated with a given product) are only relevant to the analysis of likeness to the extent that they have an impact on that competitive relationship.[119] The traditional approach in WTO case law for determining likeness is based on the following four criteria: (1) the products' physical characteristics, (2) the products' end uses; (3) consumers' tastes and habits, (4) the products' tariff classification.[120] These criteria beg the question as to whether npr-PPMs may be relevant to the assessment of likeness: that is, could products that differ only on the basis of PPMs that do not affect their physical characteristics

[116] Analogous non-discrimination obligations are prescribed with respect to standards (Annex 3.D TBT Agreement) and with respect to conformity assessment procedures (Article 5.1.1 TBT Agreement).

[117] WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.81, noting that Article I:1 GATT does not contain a 'less favourable treatment' standard but requires instead WTO members to extend '*any* advantage' granted to *any* product originating in or destined for *any* other country 'immediately and unconditionally' to the 'like product' originating in or destined for all other Members.

[118] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 120.

[119] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 119, thereby rejecting the purpose-based approach to the determination of likeness adopted by the Panel. For further discussion, see, *inter alia*, Piérola (2012), p. 347; Broude and Levy (2014), p. 357.

[120] For an overview of relevant case law, see van den Bossche (2013), pp. 325–328, 360–368, and 386–394.

(i.e., first criteria) be, nonetheless, considered 'unlike' and thus treated more favourably?

In principle, nrp-PPMs may have an impact on the preferences and tastes of consumers for products (i.e., third criteria) and hence on consumer demand and the nature and the extent of the competitive relationship between these products in a given market.[121] For instance, as van den Bossche notes, "if carpets made by children are shunned by consumers in a particular market, a situation may arise in which there is in fact no (or only a weak) competitive relationship between these carpets and carpets made by adults",[122] making children-made and adult-made carpets 'unlike' in that particular market. However, it seems improbable that this type of situation will often arise in practice: first, consumers in most markets are in their choice between products primarily guided by the price rather than the conditions (e.g., environmental, labour, or animal welfare conditions) under which the products were produced,[123] and second, even when they do genuinely care about these npr-PPM conditions, consumers may not always be able to bear the extra cost of buying environmentally friendly, animal-friendly, or labour-friendly products.[124] Furthermore, the approach of the Panel in *US – Tuna II (2012)* suggests that the intensity of consumer preferences would need to be very high for products to be deemed 'unlike' on the basis of their npr-PPMs: while recognising that the evidence presented confirmed that US consumers had a "certain preference" for dolphin-safe tuna products, such products were found to be like dolphin-unfriendly (imported) tuna products.[125] In essence, the competition-based approach to the determination of likeness is prone to ensure that a broad range of npr-PPM-based measures is scrutinised under the non-discrimination obligations, and this is equally so for the GATT and TBT Agreement.

That being said, the incorporation of the likeness criteria under GATT Article III:4 into Article 2.1 TBT Agreement would seem to undermine the view that the conventional pr-PPM/npr-PPM distinction matters for delimiting the scope of application of the TBT Agreement. First, since the question of whether a given PPM alters the physical characteristics of the final product is relevant for determining whether *one* specific substantive provision of the TBT Agreement applies

[121] This was explicitly recognised by the WTO Panel in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, para. 7.249.

[122] See van den Bossche et al. (2007), p. 63.

[123] See van den Bossche et al. (2007), p. 64.

[124] Howse and Regan (2000), p. 249 (273).

[125] WTO, report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, paras. 7.249–7.251 and 7.352, noting that no "major US grocery retailers sell tuna products that contain tuna caught by setting on dolphins". Note that this issue was not addressed by the Appellate Body, as the US did not appeal the Panel's finding that Mexican (dolphin-unsafe) tuna products were 'like' (dolphin-safe) tuna products of US origin and tuna products originating in any other country: WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 202.

(i.e., Article 2.1 TBT), why should it also determine the applicability of the agreement *as a whole*? In other words, is it reasonable to apply the same legal test twice, or should the standard of proof applied in these two types of enquires (i.e., agreement/provision application) be different?[126] Second, and following from the previous point, applying the same standard of proof would put the disputing parties in a rather awkward position. For instance, say a WTO member wishes to bring a complaint against a sale ban on battery-cage eggs under Article 2.1 TBT Agreement: On the one hand, this complaining WTO member would need to show that the battery-cage PPM is sufficiently incorporated into the eggs so that the TBT Agreement applies in the first place. On the other hand, in the likeness analysis (first criteria) under Article 2.1 TBT Agreement, it would need to provide evidence to the contrary (i.e., the battery-cage PPM does not leave any, or only a minor, physical trace on eggs), so that battery-cage and cage-free eggs can be considered 'like' in terms of their physical characteristics.

Whereas there is no difference in relation to the likeness analysis between the TBT Agreement and the GATT, the 'less favourable treatment' test does appear to differ significantly. In *EC – Seal Products (2014)*, the Appellate Body confirmed that for a violation of Articles I:1 and III:4 GATT, all that matters is whether the measure at issue has a 'detrimental impact' on the competitive opportunities between like products[127]—i.e., imported for Article I:1 GATT and imported/domestic for Article III GATT.[128] This means that any npr-PPM-based measure that has an asymmetric impact on imported like products would be deemed *ipso facto* discriminatory, regardless of the regulatory purpose of the measure and no matter how incidental its effect are on competitive opportunities.[129] To retake the US dolphin-safe labelling scheme as an illustrative example, if we assume dolphin-friendly and dolphin-unfriendly tuna products are like, all that needs to be shown for a *prima facie* violation of the GATT non-discrimination obligations is that the label modifies the conditions of competition on the US market to the

[126] In favour of the latter approach, see, e.g., Pauwelyn (2012a), p. 448 (484), establishing a parallel with Article III:4 GATT and arguing that what matters at the stage of setting the scope of application of the TBT Agreement is whether the regulation at issue applies to, or affects, the internal sale of a product and not the reason why it does so (be it product-based, pr-PPM-based, or npr-PPM-based regulation).

[127] WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, paras. 5.82, 5.92–5.93, and 5.116–5.117, rejecting thereby the EU's argument that the same non-discrimination standard should be applied under these GATT provisions and Article 2.1 TBT Agreement.

[128] In essence, the MFN treatment obligation prohibits a WTO member from discriminating *between* countries and thus demands a comparison between imported products, while the national treatment obligation prohibits a WTO member from discriminating *against* other WTO members and thus demands a comparison between imported and domestic products.

[129] On the rejection of the 'aims-and-effect' approach to Article III GATT, see notably Hudec (1998), p. 619; Regan (2003), p. 737.

detriment of imported (dolphin-unfriendly) products. Following such a finding, the US dolphin-safe labelling scheme would need to be justified under Article XX GATT, where the regulatory purpose of the measure becomes relevant.[130]

In contrast, and particularly due to the fact that the TBT Agreement does not contain a general exception clause similar to Article XX GATT, the Appellate Body stated in *US – Clove Cigarettes (2012)* that Article 2.1 TBT Agreement does not prohibit *any* detrimental impact on competitive opportunities for imports but only detrimental impact that does not stem exclusively from 'legitimate regulatory distinctions'.[131] An additional step enquiring into the regulatory purpose of the measure is, therefore, required for a determination of less favourable treatment under Article 2.1 TBT Agreement. The Appellate Body added that, in order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination, WTO Panels should carefully scrutinise whether the measure is even-handed in its design and application.[132] In *US – COOL (2012)* and *US – Tuna II (2012)*, the Appellate Body elucidated further on the factors that may be relevant for assessing 'legitimate regulatory distinctions': in essence, regulatory distinctions (e.g., differences in labelling criteria in *US – Tuna II (2012)* or exemptions from a general rule in *US – Clove Cigarettes (2012)*) are assessed in light of the stated objective of the measure in order to determine whether difference in treatment is rationally and proportionally related to, or conversely goes against, that policy objective.[133] For instance, in *US – Tuna II (2012)*, the Appellate Body found that the difference in labelling conditions applicable under the US dolphin-safe labelling scheme was not "calibrated to the risks to dolphins arising from different fishing methods in different areas of the ocean", particularly because "the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does 'not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP'".[134] In this sense,

[130] That is, first in assessing its provisional justification under one of the 'legitimate' grounds of exception recognised in paragraphs (a)–(j) of Article XX GATT, as well as in assessing 'arbitrary and unjustifiable discrimination' under the chapeau. On Article XX GATT jurisprudence, see generally van den Bossche (2013), pp. 552–580.

[131] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, paras. 174 and 179–181.

[132] WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 182.

[133] WTO, report of the Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/DS386/AB/R, paras. 343–349. However, see: WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 225, where the Appellate Body seemed to adopt a more flexible approach, assessing the regulatory distinction (i.e., exemption of menthol cigarettes from US general ban on flavoured cigarettes) not only in light of the primary objective of the measure (i.e., reduce youth smoking), but considering also other secondary objectives (i.e., risks of health care costs and illicit trade) presented by the US as reasons for the exemption.

[134] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 297. As a consequence,

the Appellate Body appears to conduct a 'good faith' analysis with a view to ascertaining that the responding party has not exercised its right to regulate in an abusive or arbitrary manner.

As others have pointed out, this approach to the 'less favourable treatment' test under Article 2.1 TBT Agreement closely resembles the analysis of 'arbitrary and unjustifiable discrimination' under GATT Article XX-chapeau[135] and reminds in particular of the Appellate Body's reasoning in *Brazil – Retreaded Tyres (2007)* that discrimination is 'arbitrary or unjustifiable' when it is explained by a rationale that bears no relationship to the objective of the measure or even goes against that objective.[136] Yet this does not necessarily mean that the legal tests under Article 2.1 TBT Agreement and GATT Article XX-chapeau are identical.[137] In fact, in *EC – Seal Products (2014)*, the Appellate Body stressed that the relationship of the discrimination to the objective of the measure is "one of the most important factors, but not the sole test, that is relevant to the assessment of arbitrary and unjustifiable discrimination"[138] under the chapeau of Article XX GATT. Recalling its ruling in *US – Shrimp (1998)*, the Appellate Body emphasised that additional factors may also be relevant for establishing 'arbitrary and unjustifiable' discrimination under GATT Article XX-chapeau,[139] some of which are important for npr-PPM-based measures.

Notably, the *US – Shrimp (1998)* decision suggests that npr-PPM-based measures are likely to amount to 'arbitrary discrimination' if applied in an overly rigid and inflexible manner, by conditioning market access on the adoption by the exporting country of essentially the same regulatory programme (in that case, US-approved turtle excluder devices), without any regard for the specific conditions prevailing in WTO members.[140] Conversely, it would follow from the Appellate

some tuna products caught outside the ETP were eligible for the US dolphin-safe label, even though dolphins were in fact killed or seriously injured in the course of the fishing trip (paras. 289–292).

[135] See, e.g., Marceau (2013), p. 1 (9–12); Norpoth (2013), p. 575 (592–594); Zhou (2012), p. 1075 (1118–1120).

[136] WTO, report of the Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, paras. 225–232, where the Appellate Body found that the rationale provided for the discrimination between MERCOSUR countries and other WTO members in the application of the import ban on retreaded tyres (i.e., a MERCOSUR tribunal ruling) "bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree".

[137] WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, paras. 5.293–5.313, where the Appellate Body noted the important parallels and also the significant differences between the analyses under Article 2.1 TBT Agreement and the chapeau of Article XX GATT and found that the Panel erred in applying the same legal tests.

[138] WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.321.

[139] WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.305.

[140] WTO, report of the Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 164–165 and 177.

Body's ruling in *US – Shrimp (Article 21.5 – Malaysia)* that npr-PPM-based measures would not constitute 'arbitrary discrimination' if these allow sufficient flexibility by conditioning market access on the adoption by the exporting country of regulatory programmes that are comparable in effectiveness vis-à-vis the policy objective pursued.[141] It could be argued, however, that this embryonic requirement to take account of the specific circumstances prevailing in different WTO members and to recognise foreign measures as equivalent if comparable in effectiveness is not so much an additional factor under GATT Article XX-chapeau but another way of assessing the relationship of the discrimination to the objective of the measure—i.e., a failure to recognise as equivalent foreign regulatory programmes even if equally effective at achieving the policy objective pursued (e.g., protecting sea turtles) can hardly be 'reconciled with', or be 'rationally related to', that objective. Nonetheless, it would not seem appropriate to integrate these considerations as part of the analysis of 'less favourable treatment' under Article 2.1 TBT Agreement, as such a reading would render largely redundant and inutile Article 2.7 TBT Agreement dealing specifically with equivalence recognition, even if in best-endeavour terms.[142] Apart from this issue, another additional factor that could be significant in assessing 'unjustifiable discrimination' under GATT Article XX-chapeau, following *US – Shrimp (1998)* and *US – Shrimp (Article 21.5 – Malaysia)*, is the extent to which the regulating WTO member makes serious good-faith efforts to negotiate a multilateral solution before resorting to the adoption of unilateral npr-PPM-based measures.[143]

In sum, as the law currently stands,[144] whether the GATT or TBT Agreement applies to npr-PPM-based measures matters insofar as (1) it is comparatively less burdensome for the complainant to establish a *prima facie* violation of Articles I:1 and III:4 GATT vis-à-vis Article 2.1 TBT Agreement, given that the latter does not condemn detrimental impact that stems exclusively from a 'legitimate regulatory distinction', and (2) it is comparatively harder for the respondent to seek justification under Article XX GATT, as there is a broader range of factors that may lead to 'arbitrary or unjustifiable discrimination' under the chapeau vis-à-vis the 'legitimate regulatory distinction' criterion under Article 2.1 TBT Agreement.[145] It is

[141] WTO, report of the Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)*, WT/DS58/AB/RW, para. 144.

[142] On Article 2.7 TBT Agreement, see further the section *Other Substantive Provisions* below.

[143] WTO, report of the Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 166–172; WTO, report of the Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products (Recourse to Article 21.5 of the DSU by Malaysia)*, WT/DS58/AB/RW, paras. 115–134. See further, van den Bossche et al. (2007), pp. 123–127.

[144] For a thought-provoking revised interpretative approach to the chapeau requirements, see Bartels (2015)

[145] See, e.g., WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.338, where

therefore conceivable that an npr-PPM-based measure is consistent with Article 2.1 TBT Agreement and yet violates Articles I:1 or III:4 GATT while failing to be justified under Article XX GATT. That being said, this is not *per se* an argument against the applicability of the TBT Agreement to npr-PPM-based measures: as both agreements can apply cumulatively, nothing prevents a complaining party to raise both TBT and GATT non-discrimination claims if the circumstances of the case so require.

Necessity Requirement

Article 2.2 TBT Agreement requires WTO members to "ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade"[146] and further provides:

> For this purpose, technical regulations shall ***not be more trade-restrictive*** than necessary to fulfil a ***legitimate objective***, taking account of the ***risks non-fulfilment would create***. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

In interpreting this provision in *US – Tuna II (2012)*, the Appellate Body drew on its previous case law on the necessity test in the context of Article XX GATT,[147] which involves a sequential process of 'weighing and balancing' of a series of factors.[148] In a similar vein, the Appellate Body held that, in order to establish

several features in the EU Seal Regime are found to indicate that the regime is applied in a manner that amounts to arbitrary and unjustifiable discrimination under GATT Article XX-chapeau, in particular with respect to the IC exception. This is not only because the discriminatory treatment between seal products derived from IC hunts and those derived from commercial hunts cannot be reconciled with the objective of the measure but also due to the "considerable ambiguity" in the criteria of the IC exception coupled with the "broad discretion" in applying them, as well as the EU's failure to make "comparable efforts" to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit.

[146] Comparable obligations prohibiting the creation of unnecessary obstacles to trade are prescribed with respect to standards (Annex 3.E TBT Agreement) and conformity assessment procedures (Article 5.1.2 of the TBT Agreement), albeit there are significant textual differences as the second sentence of Article 2.2 TBT Agreement has no equivalent in the provisions applicable to standards.

[147] Article XX GATT: (a) necessary to protect public morals; (b) necessary to protect human, animal or plant life or health; (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement [...] and the prevention of deceptive practices.

[148] That is, (1) the relative importance of the interests or values furthered by the challenged measure, (2) the degree of contribution of the measure to the realisation of ends pursued, (3) its restrictive impact on international commerce, and if this yields a primary conclusion that the measure is 'necessary', this result must be confirmed by (4) comparing the challenged measure

whether a technical regulation is 'more trade-restrictive than necessary' to fulfil a legitimate objective within the meaning of Article 2.2 TBT Agreement, a 'relational' and (in most cases) a 'comparative' analysis of the following factors should be undertaken: (1) the degree of contribution made by the measure to the legitimate objective at issue, (2) the trade restrictiveness of the measure, (3) whether a less trade-restrictive measure is reasonably available that would make an equivalent contribution to the relevant legitimate objective, taking into account the risks non-fulfilment would create.[149] The Appellate Body clarified that this latter requirement in the text of Article 2.2 TBT Agreement to consider the risks non-fulfilment would create suggests an additional element in the weighing and balancing process vis-à-vis Article XX GATT. That is, under Article 2.2 TBT Agreement, the comparison of the challenged measure with less trade-restrictive alternatives ought to be made in light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective.[150]

When considering the applicability of the TBT Agreement to npr-PPM-based measures, it is important to fully gauge the differences between the necessity requirement under Article 2.2 TBT Agreement and the necessity test in the context of Article XX GATT. Foremost, Article 2.2 TBT Agreement imposes a positive obligation on WTO members and therefore provides an independent basis for challenging an npr-PPM-based measure *just* on the ground that it is more trade restrictive than necessary to fulfil a certain legitimate objective. Admittedly, the complainant bears a difficult burden of proof in making a *prima facie* case under Article 2.2 TBT Agreement, and to date no successful violation of this provision has been established in WTO dispute settlement practice (at appeal stage).[151] Still, only the TBT Agreement provides the possibility of a direct and independent claim against the necessity of the trade restrictiveness of npr-PPM-based measures, *even if* these are designed and applied in a non-discriminatory manner. Conversely, under the GATT, the necessity of a measure is only scrutinised to the extent that a violation of a GATT substantive obligation (i.e., non-discrimination, market access, or others) has been previously found and Article XX GATT is raised as an

with less trade-restrictive reasonably available alternatives. For an overview, see van den Bossche (2013), pp. 556–565. For a more critical discussion, see Regan (2007), p. 347.

[149] See further van den Bossche (2013), pp. 872–878; Kudryavtsev (2013), p. 17 (59–62).

[150] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 321.

[151] WTO, report of the Panel, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, paras. 7.429–7.432, finding that Indonesia had failed to demonstrate that the measure at issue was inconsistent with Article 2.2 TBT Agreement (not appealed); WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 324–331, reversing the Panel's finding that the measure at issue was inconsistent with Article 2.2 TBT Agreement; WTO, report of the Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/DS386/AB/R, paras. 452–491, reversing the Panel's finding that the measure at issue was inconsistent with Article 2.2 TBT Agreement, but unable to complete the analysis.

affirmative defence by the respondent.[152] Furthermore, in the specific case of npr-PPM-based measures adopted for environmental protection purposes, Article XX(g) GATT lacks a strict necessity test.[153] Accordingly, the necessity requirement (and associated less trade-restrictive alternative test) under the TBT Agreement offers a significant advantage vis-à-vis the GATT in tackling directly concerns that npr-PPM-based measures are unnecessarily trade restrictive to achieve the desired policy goal. That being said, is Article 2.2 TBT Agreement suited to scrutinise *any* kind of npr-PPM-based measure, regardless of its aim and content?

Some guidance in this regard may be inferred from the list of policy objectives explicitly recognised as 'legitimate' under Article 2.2 TBT Agreement, which presents both similarities and differences with Article XX GATT. Both provisions share a number of legitimate policy objectives—e.g., the protection of public health and safety and of the environment—and give WTO members the sole prerogative to determine the level of protection they deem appropriate to ensure.[154] In doing so, Article 2.2 TBT Agreement—like Article XX GATT, and unlike the SPS Agreement[155]—contains no explicit territorial/jurisdictional limitation on WTO members' right to regulate, questioning the supposition that the TBT Agreement was intended to cover and discipline only PPM-based measures having an effect within the territory of the regulating State.[156] However, a significant difference is that the list of legitimate objectives under Article 2.2 TBT Agreement is illustrative and open,[157] whereas that under Article XX GATT is more elaborated but clearly exhaustive.[158]

It is therefore open to question which policy objectives may be considered legitimate within the meaning of Article 2.2 TBT Agreement, other than for the

[152] Marceau and Trachtman (2014), p. 351 (378).

[153] Article XX(g) GATT provides: "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption"; see WTO, report of the Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 127–145.

[154] TBT Agreement, Preamble, sixth recital; WTO, report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 168.

[155] SPS Agreement, Annex A.1, providing that it only covers measures aimed at protecting public health from certain specified risks "within the territory" of the regulating WTO member.

[156] The Appellate Body has not yet directly addressed the question of whether there is an *implied* jurisdictional limitation in Article XX GATT and, if so, the nature or extent of such limitation: see WTO, report of the Appellate Body, *United States – Import Prohibition of Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 133, simply noting that there was a "sufficient nexus" between the migratory and endangered marine populations involved and the US, as sea turtles migrate to or traverse waters subject to the jurisdiction of the US. See generally on this issue Bartels (2002), p. 353.

[157] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 313.

[158] It contains ten grounds of exception in paragraphs (a)–(j), of which six may provide a basis for justifying otherwise GATT-inconsistent measures based on PPMs; see Potts (2008), p. 23.

four explicitly enumerated therein. Whereas the protection of 'animal health' in Article 2.2 TBT Agreement could include measures based on animal welfare criteria,[159] it is debatable whether other npr-PPMs requirements, such as fair labour practices, could be deemed 'legitimate' in this TBT context. In *US – Tuna II (2012)*, the Appellate Body took the view that it is for WTO Panels (and ultimately itself) to decide whether a particular objective is legitimate under Article 2.2 TBT Agreement and pointed out that objectives recognised in the provisions of other WTO-covered agreements may provide guidance for such an assessment.[160] This approach would imply that policy objectives listed under Article XX GATT but not under Article 2.2 TBT Agreement—such as the protection of 'public morals'[161]—could nonetheless be transposed into the latter, and thus fade away textual differences between the two provisions with regard to the aim of the measure.

Alternatively, Howse and Langille posit that the exclusion of 'public morals' from the list of legitimate objectives in Article 2.2 TBT Agreement is indicative of the more limited category of measures to which the TBT Agreement was intended to apply. In their view, the provisions of the TBT Agreement are inherently unsuited to assess the WTO consistency of "measures of a noninstrumental character that are intended to express intrinsic moral beliefs"[162] and that cannot be properly characterised as being 'technical' regulations. Support for this argument is most evidently found in the less trade-restrictive alternative test in Article 2.2 TBT Agreement that, as seen above, includes an additional element to be weighted and balanced vis-à-vis Article XX GATT: the *risks* of non-fulfilment of the objective pursued by the regulating WTO member. Therefore, the application of Article 2.2 TBT Agreement seems to implicate an identification of certain risks or dangers that the challenged measure seeks to address, as well as an evaluation of the gravity of the consequences that would arise from non-fulfilment. Arguably, it would be difficult to perform such a risk assessment for domestic product regulations that

[159] WTO, report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, paras. 7.437 and 7.499.

[160] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 313–314. See also WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.128, where some relation to the objectives recognised in the WTO legal *acquis* seems also preferred in the context of Article 2.1 TBT Agreement.

[161] This seemed to be the approach of the WTO Panel in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/R, paras. 7.415–7.420, albeit this issue was not addressed by the Appellate Body after finding that the EU measure was not a technical regulation and declaring moot and with no legal effect all the Panel's findings under the TBT Agreement: WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.70.

[162] Howse and Langille (2011), p. 367 (423), pointing to the Greek roots in the notion of *techn*ē, implying something instrumental, not a moral expression or valuation.

are ostensibly grounded on moral, religious, or cultural choices and do not seek to mitigate any particular risk.

This view finds further support in the Appellate Body's statement in *EC – Seal Products (2014)*, which recognised that the notion of risk may not be equally pertinent for all legitimate policy objectives recognised under Article XX GATT: "while the focus on the dangers or risks to human, animal, or plant life or health in the context of Article XX(b) GATT may lend itself to scientific or other methods of enquiry, such risk-assessment methods do not appear to be of much assistance or relevance in identifying and assessing public morals."[163] Take, for instance, Israel's ban on the importation of non-kosher meat and meat products:[164] few would dispute the importance of the religious/cultural values and beliefs at stake for that particular community, but on which basis could we evaluate the risks of non-fulfilment?

In this regard, Article 2.2 TBT Agreement provides that, in assessing risks of non-fulfilment, relevant elements of consideration include available scientific and technical information. While this is not a strict requirement for technical regulations to be based on scientific principles or criteria,[165] it would appear that the application of Article 2.2 TBT Agreement implies some degree of 'technical content' in the measures coming under its purview.[166] To be sure, 'technical content' can take various forms but seems more pertinent for delimiting the applicability of the TBT Agreement to PPM-based measures than the rigid pr-PPM/npr-PPM distinction. In other words, the critical question is whether a given PPM requirement is based on criteria that can be considered of a 'technical' nature and seeks to address a particular risk. Yet importantly, this suggests that an assessment of whether a product regulation is a TBT measure should focus on the *technical content* of the measure rather than its declared policy objective. Otherwise, it could open the door for WTO members to tailor the objective of their product regulations to exclude the application of the TBT Agreement. Indeed, this could be particularly problematic if the view advanced above was followed that the TBT Agreement does not apply to measures that are purposely adopted for the protection of public morals, given the broad discretion given to WTO members to define for themselves what 'public morals' are within their respective territories.[167]

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[163] WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, para. 5.198.

[164] WTO Trade Policy Review Body, Trade Policy Review—Report by the Secretariat: Israel, WT/TPR/S/272 (25 September 2012), section III, para. 23.

[165] This is in contrast with Article 2.2 SPS Agreement, which provides that "Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except ...".

[166] This is further supported by Article 2.9 TBT Agreement, which clearly envisages that technical regulations have 'technical content': "Whenever a relevant international standard does not exist or the *technical content* of a proposed technical regulation is not in accordance with the technical content of relevant international standards ..." (emphasis added).

[167] WTO, report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, para. 6.461; for a discussion, see, e.g., Diebold (2007), p. 1.

For instance, a requirement that eggs sold in a given market be produced from hens in battery cages holding no more than 8 laying hens per m^2 could well be prompted by public moral concerns for hen welfare in that particular country, but does this mean it cannot be considered a 'technical' barrier to trade?

The point raised here is better illustrated by a comparison with the measure at issue in the *EC – Seal Products (2014)* case discussed earlier, which, while adopted to address EU public moral concerns on seal welfare, did not condition market access for seal-containing products upon compliance with animal welfare requirements.[168] As the Appellate Body noted, "[w]hile the term "technical" can have a range of meanings, it does not appear plausible that a measure that purportedly distinguishes between seal products on the basis of criteria relating to the identity of the hunter and the purpose of the hunt would be 'technical' in nature or have 'technical' content".[169] These criteria underlying the IC and MRM exceptions in the EU Seal Regime do not, in fact, differentiate between seal-containing products depending on the hunting method used and associated risks to seal suffering (i.e., humane/inhumane killing practices). Put another way, these criteria do not permit access to the EU market of seal-containing products on the basis of PPMs that are more animal friendly.[170] Instead, such criteria stem from a value judgement and policy choice on the part of the EU regarding the appropriate balance between animal welfare and other competing objectives (e.g., protection of Inuit communities),[171] which seems hardly a 'technical' matter. Admittedly, WTO members do have divergent assessments and attitudes towards animal welfare risks in seal-hunting methods in the same way that they do in respect of the dolphin-safety of fishing techniques or the health risks of lead paint in children's toys. Yet the issues raised by this kind of PPM-based measures appear more 'technical' in nature and thereby tractable to the balancing analysis based on risk assessment embodied in Article 2.2 TBT Agreement.

[168] In fact, this was the less trade-restrictive alternative measure proposed by the complainants, but it was considered not to be 'reasonably available' to the EU by both the Panel and the Appellate Body, given, inter alia, the inherent animal welfare risks and challenges found to exist in seal hunting: see WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, paras. 5.265–5.289.

[169] WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, footnote 942.

[170] WTO, report of the Appellate Body, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/DS401/AB/R, paras. 5.319–5.320, where it is recognised that these criteria are not related to seal welfare and that IC hunts can cause pain and suffering to seals in the same way as 'commercial' hunts.

[171] See further on this point Sykes (2014), p. 471 (493).

Additional Obligations Under the TBT Agreement

Having discussed the implications of applying the TBT Agreement to npr-PPM-based measures with respect to disciplines that are also found in the GATT, this section turns to consider additional GATT-plus obligations under the TBT Agreement. In doing so, the focus will be on two central disciplines of the TBT Agreement, namely, the (qualified) requirement that WTO members use relevant international standards as a basis for their technical regulations, as well as transparency and notification requirements.

Substantive Obligations

Harmonisation on the basis of International Standards

Whereas the GATT does not specifically require the use of international standards,[172] the TBT Agreement encourages both the development and use of international standards as a means to advancing regulatory convergence and preventing unnecessary barriers to trade. As explicitly recognised in its Preamble, harmonisation on the basis of international standards can facilitate the conduct of international trade by reducing differences in regulatory requirements, lowering transaction costs, and increasing production efficiency.[173] In line with this premise, Article 2.4 TBT Agreement provides with respect to technical regulations:[174]

> Where technical regulations are required and ***relevant*** international standards exist or their completion is imminent, Members ***shall use*** them, or the relevant parts of them, as a basis for their technical regulations ***except*** when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems (emphasis added).

In addition, with a view to harmonising technical regulations on as wide a basis as possible, WTO members are required to "play a full part, within the limits of their resources, in the preparation by appropriate international standardising bodies of international standards".[175] The obligation of WTO members to base their technical regulations on relevant international standards is further strengthened by the so-called safe haven in Article 2.5 TBT Agreement, whereby technical

[172] Whether a measure is based on an international standard may still have a bearing on the necessity test and chapeau analysis under Article XX GATT, but the point made here is that there is no positive requirement to rely on international standards as the basis for domestic regulations under the GATT.

[173] TBT Agreement, Preamble, third and fourth recitals.

[174] Analogous obligations are prescribed with respect to standards (Annex 3.F TBT Agreement) and with respect to conformity assessment procedures (Article 5.4 TBT Agreement).

[175] Article 2.6 TBT Agreement.

regulations are rebuttably presumed to be consistent with the necessity requirement of Article 2.2 TBT Agreement if they are in accordance with the relevant international standard(s). It should be stressed, however, that such rebuttable presumption only exists for technical regulations pursuing one of the legitimate policy objectives explicitly enumerated in Article 2.2 TBT Agreement. Arguably, this could be seen as an indication that the TBT Agreement was not intended to promote harmonisation in other policy fields—e.g., intrinsic religious/cultural values as discussed above[176] or even labour standards.[177]

While glaringly framed in mandatory terms ("shall use"), the obligation prescribed in Article 2.4 TBT Agreement is not absolute but qualified and balanced by the need to grant WTO members some 'policy space'. This flexibility finds expression in a number of ways.[178] For instance, the requirement to use relevant international standards 'as a basis' for technical regulations leaves some room for manoeuvre in terms of actual application.[179] In addition, WTO members are exempted from using a relevant international standard as the basis for their technical regulations if such a standard is an 'ineffective or inappropriate means' for the fulfilment of the legitimate objectives pursued. Even if this deviation from relevant international standards is explicitly provided for as an exception in Article 2.4 TBT Agreement ("except"), it falls upon the complainant to demonstrate that the international standard in question is an effective and appropriate means for achieving the legitimate objective of the regulating WTO member.[180] A *prima facie* violation of Article 2.4 TBT Agreement is therefore difficult to prove.[181] Notwithstanding these limitations, the harmonisation requirement of Article 2.4 TBT Agreement can considerably add to GATT disciplines in diminishing the trade-restrictive effects of domestic product regulations and promoting regulatory cooperation among WTO

[176] See above the section *Necessity Requirement*.

[177] For a similar view, see Howse (2014).

[178] See also Article 12.4 TBT Agreement, which provides that developing-country WTO members should not be expected to use international standards as a basis for their technical regulations or standards, which are not appropriate to their development, financial, and trade needs.

[179] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, paras. 243–249, coming down to a requirement of non-contradiction between the technical regulation and the relevant international standard. See further, Wijkström and McDaniels (2013), p. 1013 (1030–1031).

[180] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, paras. 274–275 and 287, referring to its jurisprudence under Article 3 SPS Agreement and finding that there is no 'rule-exception' relationship between the first and second sentences of Article 2.4 TBT Agreement. For a critique of the burden of proof under Article 2.4 TBT Agreement, see Mavroidis (2013), p. 509 (523–524).

[181] A violation of Article 2.4 TBT Agreement was successfully established in *EC – Sardines (2002)* with respect to Codex Stan 94, but not in *US – COOL (2012)* with respect to the CODEX-STAN 1-1985, which was considered a 'relevant' international standard but 'ineffective' and 'inappropriate' for accomplishing the objective sought by the challenged measure. For a more detailed discussion of this case law, see further Kudryavtsev (2013), p. 17 (64–67); Wijkström and McDaniels (2013), p. 1013 (1031–1032).

members. In principle, this GATT-plus obligation is no less important for npr-PPM-based measures,[182] *provided* a 'relevant' international standard can be shown to exist (or will come into existence imminently).

However, the TBT Agreement offers no guidance on what is an international standard, under what conditions it must be adopted, and when it may be deemed relevant for the purpose of applying Article 2.4 TBT Agreement.[183] This is markedly different from the SPS Agreement, which specifically names three international standardising bodies[184] as responsible for setting the international standards that are deemed relevant and can create a presumption of SPS/WTO consistency.[185] For its part, the Appellate Body has thrown some light on these issues in *EC – Sardines (2002)* and *US – Tuna II (2012)*, but there remains considerable uncertainty as to the concrete boundaries of relevant international standards in the TBT context.

At one level, the Appellate Body has broadened the harmonisation potential of Article 2.4 TBT Agreement by ruling in *EC – Sardines (2002)* that relevant international standards can include standards not adopted by consensus within the international standardising body.[186] This significantly departs from the position of the TBT Committee in the 2000 Decision on Principles for the Development of International Standards[187] and may have the somewhat controversial consequence that WTO members are bound to take into account by virtue of Article 2.4 TBT Agreement international standards that they did not accept—in fact, rejected—

[182] Notably, in *US – Tuna II (2012)*, Mexico raised a claim of violation of Article 2.4 TBT based on the dolphin-safe standard established by the Agreement on International Dolphin Conservation Programme (AIDCP). The Appellate Body, however, found that this was not a 'relevant' international standard within the meaning of Article 2.4 TBT Agreement because the AIDCP is not open to the relevant bodies of at least all Members and thus not an 'international standardising body' for purposes of the TBT Agreement: WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 398–399.

[183] Annex 1.2 TBT Agreement only defines the term 'standard', while Annex 1.4 TBT Agreement only defines an 'international body or system' as a "body or system whose membership is open to the relevant bodies of at least all Members".

[184] These are (1) the Codex Alimentarius Commission (CAC) with respect to food safety, (2) the World Organisation for Animal Health (formerly International Office for Epizootics, OIE), and (3) the Secretariat of the International Plant Protection Convention (IPPC) in the area of plant health (Annex A.3 SPS Agreement).

[185] Article 3.2 SPS Agreement.

[186] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, paras. 219–227. Note, however, that this issue was not later addressed by the Appellate Body in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 353.

[187] WTO Committee on Technical Barriers to Trade, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, reproduced in: Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, G/TBT/1/Rev.10 (9 June 2011), p. 46, Principle 3 'Impartiality and Consensus'.

within the relevant international standardising body.[188] At the same time, and in line with the TBT Committee's 2000 Decision,[189] the Appellate Body introduced an important caveat in *US – Tuna II (2012)* that relevant international standards within the meaning of Article 2.4 TBT Agreement need to be adopted by a standardising body[190] whose membership is open on a non-discriminatory basis to the relevant bodies of at least all WTO members.[191]

WTO members, for their part, could play a more influential role in delineating the harmonisation requirement of Article 2.4 TBT Agreement by establishing the bodies or/and standards that are to be recognised as relevant under the agreement. The TBT Committee's 2000 Decision sets out important principles and procedures that should be observed in international standard setting—i.e., transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and concerns of developing countries—but leaves the nature of relevant international standards rather open-ended. In the context of the Doha Development Round negotiations,[192] some WTO members have sought to promote the explicit identification of relevant international standardising bodies under the TBT Agreement. In their view, this would facilitate regulatory convergence and avoid competition

[188] Marceau and Trachtman (2014), p. 351 (392).

[189] WTO, Committee on Technical Barriers to Trade, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, reproduced in: Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, G/TBT/1/Rev.10 (9 June 2011), p. 46, Principle 1 'Openness'; see WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 370–379, referring to the Decision as a 'subsequent agreement' within the meaning of Article 31(3)(a) of the VCLT informing the interpretation of the terms in the TBT Agreement.

[190] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras 356–357, finding that an international standardising body is a "body that has recognised activities in standardisation" and not necessarily an international organisation.

[191] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 398–399, disqualifying the AIDCP as an 'international standardising body' on the basis that new parties can accede only by invitation and parties to the AIDCP have to take the decision to issue an invitation by consensus. The Appellate Body further elaborated on the notion of 'open body' as one that does not apply restrictions on membership by WTO members (para. 364), accession to which should be practically automatic (para. 386), and it must be open at every stage of standard development (para. 374). For a more detailed and critical discussion of WTO case law on Article 2.4 TBT Agreement, see Wagner (2013), p. 238.

[192] WTO Negotiating Group on Market Access, Textual Report by the Chairman, Ambassador Luzius Wasescha, on the State of Play of the NAMA Negotiations, TN/MA/W/103/Rev.3/Add.1 (21 April 2011), para. 4.

between standard-setting bodies, market fragmentation, and unnecessary compliance costs.[193]

However, other WTO members oppose the designation of any particular international standardising body under the TBT Agreement, arguing that whether a standard is relevant, effective, and appropriate in fulfilling a member's particular regulatory or market need depends on the standard itself and not the body that develops it. It is further posited that a limited number of named bodies could not produce the breadth and diversity of standards needed in light of the broader range of regulatory measures covered by the TBT Agreement when compared to the SPS Agreement.[194] While these claims are not misplaced, it would be then useful for WTO members to focus on the nature of the standard itself and further elaborate on the Principle of 'Relevance and Effectiveness' in the 2000 Decision. Such a principle emphasises that a solid scientific/technical basis will significantly contribute to making international standards relevant and effective,[195] but what exactly is meant by 'technical' content? Would, for instance, core labour standards developed by the International Labour Organization[196] be considered sufficiently

[193] WTO Negotiating Group on Market Access, International Standards—Communication from Mauritius on behalf of the ACP Group, JOB/MA/80 (14 January 2011); WTO Negotiating Group on Market Access, International Standardisation—Communication from the Delegations of the European Union, India, Malaysia, Norway, the Philippines, Switzerland and Thailand, JOB/MA/81 (19 January 2011); and WTO Negotiating Group on Market Access, International Standardisation—Communication from the Delegations of the European Union, India, Malaysia, Norway, the Philippines, Switzerland and Thailand, TN/MA/W/142 (13 April 2011), p. 2, proposing a non-exhaustive list of bodies issuing 'relevant international standards' for the purpose of the TBT Agreement, including the International Organisation for Standards (ISO), the International Electrotechnical Commission (IEC), the International Telecommunication Union (ITU) and Codex Alimentarius.

[194] See, e.g., WTO Committee on Technical Barriers to Trade, Good Practice for the Acceptance of Results of Conformity Assessment: Second Triennial Review of the Agreement—Contribution from Australia, G/TBT/W/138 (28 July 2000); WTO Negotiating Group on Market Access, International Standards in Support of Trade and Economic Development: Strengthening the Contribution of the Committee Decision—A Proposal from the United States, TN/MA/W/141 (29 March 2011).

[195] WTO, Committee on Technical Barriers to Trade, Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement, reproduced in: Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, G/TBT/1/Rev.10 (9 June 2011), p. 46, Principle 4 'Effectiveness and Relevance', providing that: "In order to serve the interests of the WTO membership in facilitating international trade and preventing unnecessary trade barriers, international standards need to be relevant and to effectively respond to regulatory and market needs, as well as scientific and technological developments in various countries".

[196] Available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO. *Cf* with ISO 26000 standard on social responsibility, which contains a disclaimer to the effect that, for the purpose of WTO law, "it is not intended to be interpreted as an 'international standard', 'guideline' or 'recommendation', nor is it intended to provide a basis for any presumption or finding that a measure is consistent with WTO obligations": http://www.iso.org/iso/catalogue_detail?csnumber=42546.

technical and relevant in the context of the TBT Agreement? Such guidance from WTO members would also assist in clarifying to which technical barriers to trade they intended the TBT Agreement, including its harmonisation requirement, would apply.

Other Substantive Provisions

Apart from the core harmonisation requirement just examined, the TBT Agreement contains other substantive provisions that add to the basic disciplines of the GATT. For instance, in recognition that harmonisation on the basis of international standards may not be desirable in all contexts due to divergent national preferences and circumstances, Article 2.7 TBT Agreement requires WTO members to "give *positive consideration to accepting* as equivalent technical regulations of other Members, even if these regulations differ from their own, provided they are satisfied that these regulations adequately fulfil the objectives of their own regulations".[197] Similarly, the TBT Agreement explicitly recognises the specific challenges faced by developing-country and least-developed-country WTO members in relation to TBT measures and includes provisions on both technical assistance and special and differential treatment. Pursuant to Article 11 TBT Agreement, WTO members shall, upon request and "on mutually agreed terms and conditions", provide advice and technical assistance to developing-country and least-developed-country members with regard to, *inter alia*, meeting the technical regulations of the requested member,[198] the establishment of national standardising bodies and regulatory bodies for the assessment of conformity with technical regulations and standards,[199] participation in the international standardising bodies and in international or regional bodies for conformity assessment.[200] In addition, Article 12 TBT Agreement grants special rights to developing-country and least-developed-country WTO members in terms of implementing their TBT obligations[201] and further requires other members to "take account" of their "special development, financial and trade needs" in the implementation of the TBT Agreement as well as in the preparation and application of technical regulations.[202]

As the *US – Shrimp (1998)* case demonstrates, recognition of equivalence can play an important role in addressing the trade-restrictive effects of npr-PPM-based measures, particularly where harmonisation is not plausible or desirable. Similarly, technical assistance and special and differential treatment may alleviate the

[197] (Emphasis added). A similar provision on recognition of equivalence with respect to conformity assessment procedures is found in Article 6.1 TBT Agreement.

[198] Article 11.3.2 TBT Agreement.

[199] Articles 11.2 and 11.3.1 TBT Agreement.

[200] Articles 11.2, 11.6 and 11.7 TBT Agreement.

[201] See, e.g., Articles 12.4 and 12.8 TBT Agreement.

[202] Articles 12.2 and 12.3 TBT Agreement.

adjustment costs faced by developing and least developed countries in meeting both pr-PPM and npr-PPM requirements in their export markets. However, a common shortcoming of these TBT provisions is that they are couched in hortatory language—e.g., 'give positive consideration', 'take into account'. As illustrated by the *US – Clove Cigarettes (2012)* and *US – COOL (2012)* cases in relation to Article 12 TBT Agreement, this type of 'best-endeavour' obligations are not easily enforceable in WTO dispute settlement and have been interpreted as not prescribing any particular result.[203] These additional TBT provisions are therefore of limited value but entail at least a formal recognition of some of the difficulties associated with the implementation of domestic product regulations, including those based on npr-PPMs, in the international trade context.

Procedural Obligations

An important, and perhaps underestimated, set of provisions in the TBT Agreement is the notification, consultation, and publication requirements, which go considerably beyond the transparency obligations found in the GATT.[204] Essentially, WTO members are obliged to notify other members, through the WTO Secretariat,[205] of proposed technical regulations[206] that have a significant impact on trade and are not in accordance with relevant international standards. Such advance notification must take place at an early appropriate stage, when amendments can still be introduced so that written comments by other WTO members can be taken into account.[207] WTO members are further required, upon request, to explain the justification for technical regulations in terms of the necessity (Article 2.2) and harmonisation (Article 2.4) requirements of the TBT Agreement.[208] Once technical regulations have been adopted, WTO members shall ensure that these are published

[203] WTO, report of the Panel, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/DS386/R, paras. 7.790–7.799; WTO, report of the Panel, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, paras. 7.630–7.648.

[204] Article X GATT.

[205] The WTO Secretariat has further taken active steps to provide transparency with respect to measures coming under the purview of the TBT Agreement and most notably with the establishment of the TBT Information Management System: http://tbtims.wto.org/.

[206] Similar notification and publication provisions are found with regard to standards (Annex 3 L-O TBT Agreement) and conformity assessment procedures (Articles 5.6–5.9 TBT Agreement).

[207] Article 2.9 TBT Agreement; see also Article 2.10 TBT Agreement, providing a special procedure for technical regulations adopted to address urgent problems of safety, health, environmental protection, or national security, whereby WTO members are subject to certain notification and consultation obligations only after the adoption of the measure.

[208] Article 2.5 TBT Agreement.

promptly or otherwise made available in such a manner as to enable interested parties in other members to become acquainted with them.[209] Importantly, a reasonable interval is required between the publication of technical regulations and their entry into force "in order to allow time for producers in exporting members, and particularly in developing-country members, to adapt their products or methods of production to the requirements of the importing member".[210]

Being clearly mandatory and for the most part enforceable in WTO dispute settlement proceedings, these procedural requirements are of great benefit in promoting *ex-ante* and *ex-post* transparency of domestic product regulations in general[211] and are equally (if not more) significant for npr-PPM-based measures, given their alleged complexity and opaqueness. Coverage of these measures by the TBT Agreement would enable their review by the TBT Committee which, as Mavroidis and Wijkström show, has been a successful vehicle for information exchange, dialogue, and mutual understanding on a large subset of NTBs among WTO members.[212] In particular, the TBT Committee has acted as a forum to discuss the so-called specific trade concerns (STCs) with regard to notified draft measures or the implementation of existing ones. In fact, according to the WTO database, 42/460 STCs raised in the TBT Committee have already dealt with npr-PPMs concerns.[213]

Concluding Thoughts: Chasing Away Old GATT Phantoms Over PPMs

As we have seen, the negotiations of the TBT Agreement were conducted under a cloud of suspicion surrounding the use of trade measures contingent upon npr-PPM criteria, as well as a misperception that such measures were *per se* 'GATT-illegal'. In such circumstances, it is not surprising that the Uruguay Round negotiators failed to reach consensus on a precise and unambiguous text regarding the scope of application of the TBT Agreement, with the sticky point being the coverage of measures specifying npr-PPMs. And yet, almost 20 years after the conclusion of the TBT Agreement, this issue remains hotly debated among WTO members and in the literature. As a point of departure, it is posited that old GATT phantoms concerning

[209] Article 2.11 TBT Agreement. For a more detailed examination, see Prévost (2013), p. 120.

[210] Article 2.12 TBT Agreement; see further report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, paras. 275–297, where it was found that the US had acted inconsistently with Article 2.12 TBT Agreement. Note that these TBT provisions refer to 'methods of production' without any ('related') qualification.

[211] On the benefits of *ex-ante* and *ex-post* transparency, see Prévost (2013), p. 120 (121–124).

[212] Mavroidis and Wijkström (2013), p. 204 (230–237).

[213] TBT Information Management System, available at: http://tbtims.wto.org/web/pages/search/stc/Results.aspx.

npr-PPM-based product regulation ought to cease haunting these WTO and academic discussions. That is, recognising the correct legal status of npr-PPM-based measures under the GATT1994 is a precondition to reasonably assessing what is really at stake if such measures are incorporated into the scope of the TBT Agreement: it does *not* alter their status from 'GATT-illegal' to 'TBT-legal' but merely permits them to be scrutinised with respect to the TBT disciplines in addition to GATT.

Accordingly, the central question is whether npr-PPM-based measures can be sensibly regulated under TBT Agreement in addition to GATT. The debate over the applicability of the TBT Agreement to npr-PPM-based regulation cannot, therefore, be disassociated from more fundamental questions of why the agreement was concluded in the first place and what it adds to the GATT. Arguably, focusing on this more pragmatic, implication-based perspective to the debated applicability of the TBT Agreement to npr-PPM-based measures can help in bridging enduring divisions among WTO members. In other words, why exactly does it matter whether the TBT Agreement applies to these measures for the balance between domestic regulatory autonomy and international trade liberalisation? This article has sought to shift attention in this direction by pondering on the implications of applying the TBT Agreement to npr-PPM-based measures vis-à-vis the GATT.

Meanwhile, the WTO dispute settlement organs have thrown some light on the extent to which PPM-based measures are covered by the TBT Agreement, although doctrinal ambiguity remains as recapitulated in the table below:

Type of measure	Pr-PPM	Npr-PPM
Labelling requirements	✔	✔
Other measures	✔	? ('sufficient nexus' to product characteristics)

In adopting a literal reading of the definitions in Annex 1 TBT Agreement, the WTO dispute settlement organs are presumably favouring a differentiated approach between labelling requirements and other regulatory measures in relation to npr-PPMs, which is patently at odds with the very object and purpose of the TBT Agreement. Indeed, this leads to a seemingly unreasonable consequence of subjecting less trade-restrictive labelling requirements based on npr-PPMs to more stringent TBT disciplines, while leaving highly trade-restrictive npr-PPM regulation (i.e., a sale ban) outside the agreement's scope. On this background, this article has cautioned against applying the 'sufficient nexus' test established in *EC – Seal Products (2014)* too restrictively (i.e., as only incorporating pr-PPMs) in future cases and against interpreting the language of Annex 1 TBT Agreement textually and in the vacuum. Rather, what is and is not a 'technical' barrier to trade needs to be delineated on the basis of contextual and teleological analysis that, as it was argued, does not support a strict pr-PPM/npr-PPM distinction or a general exclusion of npr-PPM-based measures from the scope of application of the TBT Agreement. Quite the contrary, as it was shown, the TBT Agreement has considerable potential vis-à-vis the GATT in addressing some of the challenges raised with regard to npr-PPM-based regulation, including through an independent

necessity requirement, an additional harmonisation requirement, and enhanced transparency obligations. Yet to be clear, the argument being made here is *not* that the TBT Agreement should apply to *all* npr-PPM-based measures but that whether it applies or not needs to be evaluated on the basis of the *technical* content of the measure at issue and the extent to which it is amenable to scrutiny under the GATT-plus disciplines of the TBT Agreement.

Following from the previous point, the critical questions remain: what is 'technical' content, and, as with any ambiguous term in the WTO agreements, who should decide on this question? As rightly alluded by the Appellate Body in *EC – Seal Products (2014)*,[214] the term 'technical' can have a variety of meanings, and it is beyond the scope of this article to attempt to identify definitional parameters. Ideally, further clarification from the WTO membership regarding what is and is not deemed technical in the TBT context would be preferred, for instance in the context of the ongoing Doha Round discussions on relevant international standards under the TBT Agreement. Pending such guidance, and should the matter be raised more explicitly by WTO members in future disputes, the cautious case-by-case analysis advanced by the Appellate Body in *EC – Seal Products (2014)*—i.e., depending on the nature of measure and circumstances of the case[215]—may well be a wise approach for its own legitimacy within the multilateral trading system.

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Non-tariff Barriers and Private Conduct: The Case of Labelling

Nikolay Mizulin and Huijian Zhu

Introduction

With the proliferation of product labelling schemes such as origin labels, nutrition labels, animal welfare labels, social labels, and eco-labels by governments, industry, and private entities, there is an increasing concern that these schemes may have a distortive impact on international trade.

WTO law regulates the non-tariff barriers, including labelling requirements, adopted by government bodies. In practice, the WTO allows its members to pursue legitimate public policy objectives through the use of non-tariff barriers, but they should not be implemented in such a way as to pose unnecessary obstacles to trade. As shown by recent WTO case law in *US – COOL* (country of origin labelling)[1] and *US – Tuna II* (dolphin safe labelling),[2] WTO law gives certain policy space to governments to pursue non-trade public policy objectives.

On the other hand, it is widely perceived that WTO law does not regulate purely private labelling schemes. Notwithstanding the fact that WTO Agreements such as

[1] WTO, report of the Panel, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R; WTO, report of the Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R.

[2] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R.

N. Mizulin (✉)
Mayer Brown Europe–Brussels LLP, Avenue des Arts 52, Brussels 1000, Belgium
e-mail: nmizulin@mayerbrown.com

H. Zhu
Mayer Brown Europe–Brussels LLP, Avenue des Arts 52, Brussels 1000, Belgium

Institute of European Studies, Brussels, Belgium
e-mail: huijianz@gmail.com

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the Agreement on Technical Barriers to Trade[3] (the "TBT Agreement") and the Agreement on the Application of Sanitary and Phytosanitary Measures[4] (the "SPS Agreement") contain certain disciplines in this area, these rules have been considered to be ineffective, "vague" and "weak".[5]

Is private labelling not causing any concrete problems in practice? Do exporters simply accept private labelling schemes as a price to be paid to gain access to a given market? Or are the current WTO rules simply not capable of effectively disciplining private labelling schemes? This article aims to explore the regulation of private labelling by WTO law as it currently stands, to identify specific issues and policy challenges, and to analyse the meaning and scope of the WTO rules related to private labelling in light of the WTO jurisprudence and the underlying purpose of such rules.

We conclude that despite of the lack of direct WTO discipline over private conducts, WTO Agreements contain clear obligations on the members to "control" the behaviours of private entities in the preparation, adoption, and use of private standards, including labelling schemes, to ensure that they are not misused as a disguised discrimination in international trade. However, there is no clear indication as to the extent and scope of such "control" because of the lack of guidance on what "reasonable measures as may be available to them" under the TBT Agreement and the SPS Agreement mean. Accordingly, the potential of the existing WTO rules as a discipline on private labelling has yet to be fully realised. Ambiguities in the rules undoubtedly affect the breadth and strength of such disciplines. However, given past jurisprudence concerning similar issues or terms, the WTO dispute settlement is not only capable of filling in the gaps by providing more clarity in the body of rules governing private labelling but can do so legitimately as well. There appears to be room to expect WTO members to do more, both at the WTO and domestically, about private labelling schemes to ensure that they meet their obligations under the WTO Agreements.

The Necessity to Regulate Private Labelling Schemes

Private labels are adopted for a variety of reasons or motivations. Some are used as a marketing technique to endorse quality and safety of their products; others are adopted as part of companies' corporate social responsibility to pursue public interests such as environmental protection and animal welfare. Legitimate private labelling schemes have the potential to promote best practices and improve productivity, to empower the consumer in their choices, and to serve public interests. Private eco-labels, for example, provide consumers with a product's carbon

[3] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120.

[4] Agreement on the Application of Sanitary and Phytosanitary Measures, 1867 U.N.T.S. 493.

[5] Wlostowski (2010), p. 205 (229).

footprint throughout its entire life cycle, from production to disposal, with a view to helping them identify low-emission food products.[6] Private labelling schemes for food safety, such as GlobalGAP, which was first set up in 1996 by European retailers, set voluntary standards for the certification of safe and sustainable production of agricultural products.

These private labelling schemes are by their nature not mandatory. Suppliers are not required by law to use them regardless of whether they meet the relevant criteria for their use. Consumers have the choice to choose a labelled product or not. Nevertheless, private labelling schemes have the potential to have a negative impact on trade as much as government schemes.[7] A private label can become so prevalent on a market as to constitute a *de facto* market access barrier. In such a case, exporting producers have to adopt this label regardless of whether it is imposed by a government, a non-governmental organisation, a major retailer, or a large corporate firm.

In today's world, powers are no longer concentrated with governments alone. In an increasing number of policy areas, non-governmental bodies, including multinational retailers, have greater capacity to influence the practice of producers both domestically and abroad, not least because of the sheer scale of these market players. Of the world's 100 largest economies, 51 are companies (in terms of revenue), while only 49 are countries:

> To put this in perspective, General Motors is now bigger than Denmark; DaimlerChrysler is bigger than Poland; Royal Dutch/Shell is bigger than Venezuela; IBM is bigger than Singapore; and Sony is bigger than Pakistan.[8]

Some multinational retailers have adopted their own standards and labels, for example, Tesco's Tesco Farming scheme for fruit and vegetables, Carrefour's Filière Qualité scheme,[9] Marks & Spencer's Field-to-Fork, and Auchan's Filière Agriculture Raisonnée. Suppliers have to comply to be able to sell at these supermarkets because these major retailers project an enormous amount of market power internationally. In addition, industry-wide schemes operating nationally, regionally, or internationally also proliferated.[10] Some of these labelling schemes potentially have the effect of excluding imported products. For example, Red Tractor is an UK food assurance scheme that covers production standards developed by

[6] Examples include the Blue Angel programme in Germany, the Forest Stewardship Council that promotes the responsible management of the world's forests, the Marine Stewardship Council for sustainable fishing, Fairtrade Labelling Organizations International, and the International Federation of Organic Agriculture Movements. See UNEP and Earthprint (2005), p. 1.

[7] See examples in Appleton (2007), p. 10 (11).

[8] Anderson and Cavanagh (2000), p. 3.

[9] Cited in WTO, Committee on Sanitary and Phytosanitary Measures, Private Standards and the SPS Agreement, Note of the Secretariat, G/SPS/GEN/746 (24 January 2007), p. 2.

[10] WTO, Committee on Sanitary and Phytosanitary Measures, Private Standards and the SPS Agreement, Note of the Secretariat, G/SPS/GEN/746 (24 January 2007), p. 2; see also UNCTAD website.

experts on safety, hygiene, animal welfare, and the environment, among other things. According to its website, "the Red Tractor logo on pack means your food or drink has met these responsible production standards and is fully traceable back to independently inspected farms in the UK". Arguably, imported food from elsewhere will be difficult to meet the certification requirements, if not at much higher costs associated with the inspection requirements.

The perceived problem with private labels is essentially threefold. First of all, regardless of the voluntary nature of private labels, their wide use may impose a *de facto* mandatory labelling requirement in a given market.[11] Second, most labels nowadays are created and managed by private entities that are not directly subject to the discipline of WTO Agreements. Third, the cost burdens and lack of transparency and equality in the certification and compliance process can potentially act as a market access barrier for small and medium-sized enterprises and for developing country exporters. Despite the fact that the trade effects—positive or negative—of private labelling are difficult to quantify because trade statistics do not differentiate between labelled and non-labelled products,[12] concerns are increasingly voiced out at formal WTO Committee meetings. The discussion at the WTO on eco-labelling started in 1999, when the EU raised this issue during preparations for the Third Ministerial Conference of the WTO in Seattle in 1999.[13] The issue of private standards was first raised at the WTO Committee on Sanitary and Phytosanitary ("SPS Committee") meeting held on 29–30 June 2005,[14] when Saint Vincent and the Grenadines was the first to raise concern regarding the operation of an SPS-related EurepGAP scheme in relation to trade in bananas with supermarkets in the United Kingdom. During a meeting of the WTO Informal Ad Hoc Group on Private Standards in December 2008, the group of Latin American countries presented a statement raising a number of concerns about private standards. At the SPS Committee meeting in March 2014,[15] Belize complained that its own papaya and citrus exporters are suffering from the high costs of meeting buyers' requirements that are unjustified and can differ even when the buyers are from the same country. Sharing the concerns were El Salvador, India, and Ecuador.

[11] In 2007, UNCTAD and the UN Food and Agricultural Organization prepared a series of case studies on the developmental and market access implications of the private EurepGAP (later renamed GlobalGAP) standard for fresh fruits and vegetables in Africa (including Ghana, Kenya, Uganda), Asia (for Malaysia, the Philippines, Thailand, and Vietnam), and South and Central America (focusing on Argentina, Brazil, Chile, and Costa Rica).

[12] See UNEP and Earthprint (2005), p. 1.

[13] See European Commission, Communication from the Commission to the Council and to the European Parliament: The EU Approach to the WTO Millennium Round, COM (99)331 final, p. 15.

[14] WTO (2005), paras. 16–20.

[15] WTO, Committee on Sanitary and Phytosanitary Measures, Report of the Co-Stewards of the private standards e-Working Group on Action 1 (G/SPS/55), Submission by the Co-Stewards of the e-Working Group, G/SPS/W/276 (18 March 2014).

Accordingly, especially from the perspective of developing countries, some sort of regulation enforceable at the WTO level is desirable to ensure that the multilateral trading system can continue to be relevant and can meet the challenges of the realities of global trade.

WTO Discipline of Private Conduct: The Principle of Attribution

Where the preparation, adoption, and operation of a private labelling scheme are delegated by the government to a private body, such a scheme will normally fall within the purview of WTO discipline. Where private labelling schemes are incorporated into public laws of a WTO member, they are equally subject to WTO discipline. For example, in the EU, biofuels need to comply with sustainability criteria[16] in order to receive government support or count towards mandatory national renewable energy targets. To this end, the sustainability of biofuels is checked by Member States or through the 17 private schemes that have been approved by the European Commission through Commission Implementing Decision. Despite of the private nature of these schemes, incorporation by the public authorities may bring them within the purview of WTO discipline.

Moreover, private conduct can sometimes be attributed to a WTO member in certain circumstances because of the entrustment, direction, or control exercised by the government over private entities.

When Private Conduct Can Be Attributed to a WTO Member

Trade restrictive conduct by private parties can be attributed to a WTO member where the government concerned has entrusted or directed such conduct. In *US – DRAMS*, the WTO Appellate Body clarified that Article 1.1(a)(1)(iv) of the SCM Agreement "covers situations where a private body is being used as a proxy by the government to carry out one of the types of functions listed in paragraphs (i) through (iii)".[17] It further noted that the terms "entrusts" and "directs" of Article 1.1(a)(1)(iv) of the SCM Agreement identify those cases where seemingly private

[16] These criteria aim at preventing the conversion of areas of high biodiversity and high carbon stock for the production of raw materials for biofuels. The entire biofuel production and supply chain has to be sustainable.

[17] WTO, report of the Appellate Body, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, para. 108.

conduct is attributable to the government for the purpose of determining whether there has been a "financial contribution".

The question whether particular private conduct may be attributed to a WTO member for the purpose of dispute settlement was discussed extensively in *Japan – Film*. In that case, the United States challenged Japan's measures affecting the sale of imported film and paper, in particular a code of conduct created by private retailers' council. The panel examined whether certain non-binding administrative guidance in Japan could be considered as a measure for the purpose of a non-violation claim under Article XXIII:1(b) of GATT 1994,[18] and concluded that the Ministry's approval of the code helped create "a sufficient likelihood" that private parties would conform with the code, which makes the code attributable to Japan. The panel noted in particular that in Japan, although companies may not be legally bound by administrative guidance, "compliance may be expected in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy".[19]

The panel therefore established the principle that an action taken by a private party 'may be deemed to be governmental if there is sufficient government involvement with it'. However, it did not provide any specific guidance on the requisite extent of governmental involvement to attribute a private conduct to the government because "[i]t is difficult to establish bright-line rules in this regard" and that the "possibility will need to be examined on a case-by-case basis".[20]

In an earlier case, *Japan – Trade in Semiconductors*, a GATT panel examined a scheme under which the Japanese government requested but not mandated Japanese producers of semiconductors covered by the US/Japan Semiconductor Agreement not to export at prices below company-specific costs. Short of compelling the producers to export at a given price, the scheme included a mandatory reporting requirement of information on costs and export prices, and a system of automatic export licensing under which an export licence for semi-conductors had been granted only after the Japanese Government had examined the information on costs and export prices.

Notwithstanding its non-mandatory nature, the panel found that the scheme comprised a set of incentives and disincentives for Japanese semiconductor exporters to conform. It concluded that private conduct could be attributable to a government under the GATT, even where the State did not compel or mandate the trade-restricting behaviour. For a non-mandatory scheme that was followed by private parties to constitute a measure for purposes of Article XI GATT, two criteria need to be satisfied: 1) there were sufficient 'incentives or disincentives' established by the government "for the measures to take effect" and 2) the operation of the

[18] General Agreement on Tariffs and Trade (1994), 1867 U.N.T.S. 187.

[19] WTO, report of the Panel, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, para. 10.44.

[20] *Ibid*, para. 10.56.

measures was "essentially dependent on Government action or intervention".[21] Therefore, where trade restrictions have taken effect through private conduct, the question is whether these restrictions take place within an environment of governmental incentives or disincentives so as to attribute them to the government. Moreover, it would appear necessary to find, from the manner in which the measures operated, further interventions by the government to encourage compliance, so as to make the operation of the measure dependent on the government.

Substantive Disciplines Applicable to Labelling Schemes Attributed to the Government

If a private labelling scheme can be attributed to the government of a WTO member as the real driving force behind it (e.g., by providing technical or financial support and creating an environment of incentives and disincentives for its adoption and operation), it will be subject to the substantive obligations under the GATT (non-discrimination and transparency) and the TBT Agreement[22] or SPS Agreement. In *EC – Asbestos*, the panel considered the relationship between the GATT and the TBT Agreement and held that both agreements may be applied cumulatively to a given measure. Where this is the case, the issue of consistency with the TBT Agreement must be examined first as it deals "specifically, and in detail" with technical barriers to trade.[23] This was confirmed by the Appellate Body on appeal, which stated:

> We observe that, although the TBT Agreement is intended to "further the objectives of GATT 1994", it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on Members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994.[24]

[21] GATT, report of the Panel, *Japan – Trade in Semiconductors*, L/6309, BISD 35S/116, para. 109.

[22] There was some doubt about the applicability of the TBT Agreement to non-product-related processes and production methods. See WTO Committee on Sanitary and Phytosanitary Measures, Private Voluntary Standards within the WTO Multilateral Framework, Submission by the United Kingdom to the Committee on Sanitary and Phytosanitary Measures, G/SPS/GEN/802 (9 October 2007). However, this doubt was more or less resolved following *US – Tuna II*, where the panel stated that "the terms of the second sentence [of Annex I.2] make it clear that the subject matter of a technical regulation may be confined to one of the items enumerated in the second sentence". The same reasoning can be applied by analogy to standards.

[23] WTO, report of the Panel, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R, paras. 8.16 and 8.17.

[24] WTO, report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, para. 80. This approach was followed by the WTO Panel in *EC – Sardines*, see Report of the Panel, *European Communities – Trade Description of Sardines*, WT/DS231/R, para. 7.15.

In *US – Tuna II,* the panel assumed that provisions of Article 2.1 of the TBT Agreement are substantially the same as Articles I:1 and III:4 of GATT 1994 and on that basis exercised judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994 after finding inconsistencies under the TBT Agreement. Upon appeal, the Appellate Body held that "the scope and content of these provisions is not the same" and reversed that finding as "false judicial economy".[25] According to one author, "voluntary social labelling schemes will not encounter more difficulties under the TBT Agreement than the ones encountered under the GATT with respect to the most favoured nation treatment and national treatment rules as well as to the requirement to avoid unnecessary obstacles to trade. In fact, the obligations under the TBT Agreement appear to be more lenient".[26]

A recent string of WTO case law provides guidance on the two key issues of the TBT Agreement: (1) when are product standards/labels discriminatory (Article 2.1 TBT Agreement), and (2) when are they "more trade-restrictive than necessary" (Article 2.2 TBT Agreement)?

Non-discrimination

The non-discrimination principle is embodied in a number of provisions of the TBT Agreement. In so far as technical regulations are concerned, Article 2.1 of the TBT Agreement states: "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country." Regarding standards, Paragraph D of Annex 3: Code of Good Practice for the Preparation, Adoption and Application of Standards contains the following:

> In respect of standards, the standardizing body shall accord treatment to products originating in the territory of any other Member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country.

Similar requirements are imposed under Article 5.1.1 with respect to the operation of conformity assessment procedures. These provisions essentially impose the national treatment and most-favoured-nation treatment obligations.

To date there is no jurisprudence on Paragraph D of Annex 3. Several WTO panels and the Appellate Body have, however, addressed legal issues that could be important for determining the WTO consistency of private labelling schemes.

[25] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 405.

[26] See Lopez-Hurtado (2002), p. 719 (740–741).

The first WTO case in which the national treatment obligation was examined was the *US – Clove Cigarettes*[27] case. There the panel adopted a competition-based approach to determining whether a technical regulation provides "less favourable treatment" to imported like products. The panel essentially drew guidance from previous Appellate Body's jurisprudence on a finding of *de facto* less favourable treatment as follows:

1. impact of the measure on the competitive relationship of groups of imports versus groups of domestic like products;
2. whether the measures modify these conditions of competition to the detriment of the group of imported like products; and
3. whether the detrimental effect(s) can be explained by factors or circumstances unrelated to the foreign origin of the product, but no separate demonstration that the measures are applied "so as to afford protection" is required.[28]

The Appellate Body affirmed this competition-based approach in *US – Tuna II*. In that case, Mexico's challenge arose from the fact that most tuna caught by the US fishing fleet was eligible for the government-operated "dolphin safe" label in the United States, whereas most tuna caught by the Mexican fishing fleet was not. Mexico argued that this put its products at a disadvantage in the US market. Even though the US labelling regime did not explicitly discriminate against Mexican products, it did single out tuna caught in the eastern tropical Pacific Ocean where the Mexican fleet operated. The US fleet and other ships operating outside that area and using alternative methods automatically qualified for the label. The Appellate Body held that in assessing a claim of less favourable treatment of imports under Article 2.1 TBT Agreement, a panel should "seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products or like products originating in any other country".[29]

The Appellate Body's approach to *de facto* discrimination could potentially be applied with regard to standards under paragraph E of the Code of Good Practice, given the textual similarities. This is significant because in most of the cases, a challenge of private labelling schemes would likely to be based on *de facto* discrimination where all products, regardless of their country of origin, are eligible for the label if they meet the criteria.

[27] See WTO, reports of the Panel and the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R and WT/DS406/AB/R.

[28] WTO, report of the Panel, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, para. 7.269.

[29] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 215.

Unnecessary Obstacle to International Trade

The second key substantive provision concerns the prohibition of unnecessary obstacles to trade, as reflected in paragraph E of the Code of Good Practice for standards and Article 2.2 TBT Agreement concerning technical regulations. Paragraph E of the Code of Good Practice states that "[t]he standardizing body shall ensure that standards are not prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade". Article 2.2 TBT Agreement contains the same language in its first sentence but contains more specific guidance:

> For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.

This difference is thought to reflect the "flexibility and freedom" in the setting of standards as opposed to technical regulations.[30]

In *US – Tuna II*, the panel explained that the analysis under Article 2.2 TBT Agreement "involves an assessment of the degree of trade-restrictiveness of the measure at issue in relation to what is 'necessary' for the fulfilment of the legitimate objective being pursued, and this can be measured against possible alternative measures that would achieve the same result with a lesser degree of trade-restrictiveness".[31] Accordingly, the panel found two issues to be relevant: (1) the manner and extent to which the measures fulfil the objective; and (2) whether this objective could be similarly fulfilled by a less trade-restrictive measure.[32]

The Ability of the Current WTO System to Regulate Private Labelling Schemes

WTO disciplines on non-tariff barriers, including labelling requirements, are built around three general principles: non-discrimination, transparency, and proportionality. They are principally set out in the TBT Agreement and the SPS Agreement. Both Agreements contain some limited obligations on WTO Members to interfere with private conducts affecting international trade, which are by nature distinct from the principle of attribution discussed above.

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[30] Koebele and LaFortune (2007), p. 249.

[31] WTO, report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, para. 7.458.

[32] *Ibid*, para. 7.475.

Regulation of Private Labelling Schemes Under the TBT Agreement

The TBT Agreement is the most specific and detailed WTO Agreement applicable to private labelling schemes. It applies to a "limited class of measures",[33] including technical regulations, standards,[34] and conformity assessment procedures to ensure that they are not used as disguised measures to protect domestic industries from foreign competition and that they do not create unnecessary obstacles to international trade. On the other hand, it acknowledges the right of WTO members to establish for themselves the objectives of its technical regulations and standards, including but not limited to the prevention of deceptive practices and the protection of human health or safety, animal or plant life or health, or the environment.[35]

The TBT Agreement is essentially a government-to-government agreement and is thus mainly concerned with measures taken by central government bodies. Nevertheless, it explicitly provides for rules applicable to other bodies responsible for the establishment of technical regulations, standards, or execution of conformity assessment procedures, such as local government bodies and non-governmental bodies.

Article 4.1 of the TBT Agreement and the "Code of Good Practice for the Preparation, Adoption and Application of Standards ("Code of Good Practice")"

Most relevant for private labelling schemes is the Code of Good Practice contained in Annex 3 of the TBT Agreement, which sets out the procedural and substantive regulatory framework for standards. It was inserted at the proposal of the European Communities in order to make "the obligations already laid down in Articles 4, 6 and 8 of the [TBT] Agreement more concrete, and to provide some yardstick by which the performance of both Parties and private bodies could be measured".[36]

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[33] WTO, report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, para. 80.

[34] The TBT Agreement distinguishes between technical regulations and standards. Technical regulations are defined as mandatory requirements for products or related process and production methods. Standards, on the other hand, are defined as voluntary requirements for products or related process and production methods. Both regulations and standards may also relate to "terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method"; see TBT Agreement, Annex I.

[35] Article 2.2 TBT Agreement.

[36] WTO, Committee on Trade and Environment and Committee on Technical Barriers to Trade, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, voluntary Standards and Processes and Production Methods unrelated to Product Characteristics, Note by the Secretariat, G/TBT/W/11 (29 August 1995), para. 65.

The Code of Good Practice essentially contains a restatement of the substantive provisions under the TBT Agreement in respect of technical regulations. It requires a standardising body to, *inter alia*, (1) accord treatment to products originating in the territory of any other member of the WTO no less favourable than that accorded to like products of national origin and to like products originating in any other country; (2) ensure that standards are not prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade; (3) adopt existing or imminent international standards, except where they would be ineffective or inappropriate; (4) make reasonable efforts to harmonise standards at the international level; (5) make every effort to avoid duplication or overlap with the work of other standardising bodies and achieve a national consensus on the standards they develop; and (6) make available to any interested party within the territory of a member, a copy of a draft standard submitted for comments, its most recent work programme, and standards that it has produced.[37]

Article 4.1 TBT Agreement refers to the Code of Good Practice and states:

> Members shall ensure that their central government standardizing bodies accept and comply with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement (referred to in this Agreement as the "Code of Good Practice"). They shall take such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such standardizing bodies to act in a manner inconsistent with the Code of Good Practice. The obligations of Members with respect to compliance of standardizing bodies with the provisions of the Code of Good Practice shall apply irrespective of whether or not a standardizing body has accepted the Code of Good Practice.

Thus, the TBT Agreement imposes essentially two distinctive obligations on WTO members with respect to the behaviours of their standardising bodies:

1. a positive obligation to take measures in order to ensure compliance with the TBT Agreement; and
2. a negative obligation to refrain from taking measures that could directly or indirectly require or encourage actions by these bodies that are inconsistent with the Code of Good Practice.

For central government standardising bodies, members have to ensure unconditionally that they accept and comply with the Code of Good Practice. In this regard, the TBT Agreement attributes full responsibility of the central government standardising bodies to the WTO member. On the other hand, the obligation to ensure that local or non-governmental bodies[38] accept and comply with the Code of

[37] Annex 3 to the TBT Agreement.

[38] Non-governmental standardizing body is defined as "[b]ody other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation"; see Annex 1 to the TBT Agreement, para. 8.

Conduct is not absolute. In the latter case, members need only take such reasonable measures as may be available to them. This difference reflects the negotiators' understanding that the actions of local governmental or non-governmental standardising bodies may not be within the full and effective control of the central government of WTO Members. Thus, members are only required to make best efforts to ensure compliance with the Code of Good Practice by their local and non-governmental standardising bodies, but not to demonstrate the concrete result of acceptance and compliance. This gives WTO members a certain margin of appreciation in light of the circumstances of their domestic constitutional and governance systems. By contrast, the negative obligation not to take measures that have the effect of, directly or indirectly, requiring or encouraging *such standardising bodies* to act in a manner inconsistent with the Code of Good Practice under the third sentence of Article 4.1 TBT Agreement extends to central governmental, local governmental and non-governmental standardising bodies.

Under Article 4.2 TBT Agreement, standardising bodies that have accepted and are complying with the Code of Good Practice shall be acknowledged by members as complying with the principles of the TBT Agreement. According to the most recent statistics,[39] since 1 January 1995, 164 standardising bodies from 124 members have accepted the Code of Good Practice, among them, 90 central governmental standardising bodies, 68 non-governmental standardising bodies, 3 statutory bodies, 2 parastatal bodies, 3 non-governmental regional bodies, 1 central governmental/non-governmental body, 1 central governmental/local governmental body, and 1 autonomous body.

As discussed below, Article 4.1 TBT Agreement and the Code of Good Practice are rather significant for the regulation of private labelling schemes because they set out the rules to be followed by governments as well as non-governmental entities. Unfortunately, however, Article 4.1 is not an exemplar of clear legislative drafting. A number of ambiguities hinder realising the full potential of this provision to regulate private labelling schemes. What are "non-governmental standardizing bodies"? To what extent must a WTO member police the private labelling schemes in its territory? Which measures are reasonable measures? Is the concept of reasonableness different for "local government standardizing bodies" and "non-governmental standardizing bodies"?

The Scope of "Non-governmental Standardizing Bodies"

Given that there is no definition of "non-governmental standardizing body", it is not entirely clear whether its scope covers all private entities responsible for the

[39] WTO, Committee on Technical Barriers to Trade, List of Standardizing Bodies that have accepted the Code of Good Practice for the Preparation, Adoption, and Application of Standards since 1 January 1995, Note by the Secretariat, G/TBT/CS/2/Rev.20 (26 February 2014).

adoption of private labelling schemes. "Non-governmental standardizing body" entails two elements: "non-governmental" and "standardizing body".

"Non-governmental body" is defined in Annex I (8) of the TBT Agreement in a very broad fashion as "[b]ody other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation". The term "including" indicates that non-governmental bodies include those that have "legal power to enforce a technical regulation" but does not necessarily exclude private bodies that do not have such power. Thus, in theory private entities that adopt one or more standard(s) falls within the scope of "non-governmental body" regardless the existence of any delegated legal power or not.

Defining a "standardizing body" can be more problematic. First of all, the TBT Agreement itself does not contain a definition of "standardizing body". Annex I only contains a definition of "standard" with a reference to the term "recognized body":

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.[40]

The predecessor to the TBT Agreement, the Tokyo Round Standards Code,[41] contained a definition of "standardizing body" as "a governmental or non-governmental body, one of whose recognized activities is in the field of standardization".[42] This definition however contains no indication as to the sources and format of the necessary "recognition". Who must recognise a body's standardising activities for the purposes of the TBT Agreement? Must a standardising body be recognised by a government as active in the field of standardisation? Or is it sufficient to trigger the discipline of the TBT Agreement by the recognition of the market players? Does it matter if standardisation is only part of activities of the body concerned? What if standardisation is only ancillary to the activities of the body concerned? Such level of vagueness probably explains the eventual exclusion of this definition from the TBT Agreement.

US – Tuna II provides guidance on the concept of "recognized activities in standardization" regarding the "dolphin-safe" scheme as an international standard established under the Agreement on the International Dolphin Conservation Program (AIDCP), to which both the US and Mexico are parties. The panel took the view that recognition (of an international body's standardisation activities) can be

[40] Paragraph 2 of Annex I to the TBT Agreement (emphasis added).

[41] At the end of the Tokyo Round in 1979, 32 GATT Contracting Parties signed the plurilateral Agreement on Technical Barriers to Trade. The Standards Code, as the Agreement was called, laid down the rules for preparation, adoption, and application of technical regulations, standards, and conformity assessment procedures.

[42] Point 9 of Annex I to the Tokyo Round Standards Code.

inferred from either the participation of a government in the standardisation activities or the subsequent recognition of the resulting standard. The panel stated that "the term 'recognized' refers to the body's activities in standards development, and that the participation in these activities of the countries that are parties to the Agreement is evidence of their recognition".[43] Moreover, "such recognition may also be inferred from the recognition of the resulting standard, i.e. when its existence, legality and validity has been acknowledged".[44] Upon appeal, the United States claimed that if the act of creating a standard was at the same time an act of recognition by the creators, there would be no need to specify that standardising activity needs to be recognised since the existence of a standard would, in itself, establish that recognition occurred. The Appellate Body held that whether a body has recognised standardisation activities requires that WTO members are aware of, or have reason to believe, that the international body engages in such activities. It saw no reason why participation in a body's standardising activities could not constitute evidence suggesting that a body is engaged in "recognized" activities.[45] Furthermore, the Appellate Body clarified that evidence of recognition by WTO members of international standards, as well as evidence of their recognition by national standardising bodies, would be relevant. However, since the obligations and privileges associated with international standards pursuant to the TBT Agreement apply with respect to all WTO members, not merely those who participated in the development of the respective standard, participation by some members, such as those in AIDCP, would not necessarily be sufficient to find that a body has recognised activities in standardisation. The larger the number of countries that participate in the development of a standard, the more likely it can be said that the respective body's activities in standardisation are "recognized".[46] Although the Appellate Body's finding relates to international standards, it shows that the threshold of "recognized activities in standardization" is high. A number of factors including but not limited to participation and recognition of the resulting standards will be considered on a case-by-case basis.

In any event, the value of the Tokyo Round Standards Code definition would seem to be limited. If a private labelling scheme finds its way to the WTO dispute settlement process, a panel faced with the problem of defining "standardizing body" may find it difficult to incorporate in its definition an element of "recognized" as such a definition under the Tokyo Round Standards Code was clearly ruled out by members at the conclusion of the TBT Agreement. One author even argued that such an omission indicates that "the Members wanted to leave the concept of non-governmental standardisation body more open-ended than it had been under

[43] WTO, report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, para. 7.686.

[44] *Ibid*.

[45] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 390.

[46] *Ibid*.

the previous text".[47] On the other hand, a broad definition of anybody engaged in the activities of standardisation may risk being too encompassing. Clearly not all sorts of standardising activities should fall within the scope of the TBT Agreement.

Whether the private entity responsible for the labelling scheme is a "non-governmental standardizing body" has to be determined on a case-by-case basis. Non-governmental entities whose core activities are in adopting and applying the labelling schemes, such as the Forest Stewardship Council, are more likely to be considered as a non-governmental standardising body than, for example, supermarket chains such as TESCO or Carrefour, which adopted a few labelling schemes as part of their sourcing and retailing activities. Regarding the latter, it is worth mentioning that the Explanatory Note to the definition of "standard" under Annex I of the Tokyo Round Standards Code expressly stated that "[the definition of standard] does not cover technical specifications prepared by an individual company for its own production or consumption requirements [. . .]".[48] Again, this statement was not incorporated in Annex I to the TBT Agreement and is of limited assistance.

WTO Jurisprudence on "Reasonable Measures as May Be Available to Them"

Regarding the activities of local government or non-governmental standardising bodies, members need only take "such reasonable measures as may be available to them". On the one hand, so far as its application to local government standardising bodies is concerned, the formulation of this qualified obligation does not fit in well with the international law principle that the State is responsible for all actions of its officials and organs at all levels,[49] even if the organ or official is formally independent[50] and even if the organ or official is acting *ultra vires*.[51] On the other hand, so far as its application to non-governmental standardising bodies is concerned, it does not fit in well with the general principle of international law that a State is not responsible for private acts undertaken on its territory. The design for different levels of responsibility for central governmental and other standardising bodies (local or non-governmental) reflects the need to take into account the varying governance and regulatory systems of the members at the time of the negotiation. The central governments of certain members may have limited authority to compel and control the local or non-governmental standardising bodies, while others do have sufficient legal instruments to compel private entities. However, in our view, it

[47] Arcuri (2013), p. 505.

[48] Annex I to the Tokyo Round Standards Code.

[49] International Law Commission, Responsibility of States for Internationally Wrongful Acts, A/56/10 (2001), Article 4(1).

[50] *Ibid*, Article 5.

[51] *Ibid*, Article 7.

potentially creates different substantive obligations on different WTO members. A member that has no central governmental standardising bodies is arguably under much more lenient and limited obligations than a member that has both central governmental and non-governmental standardising bodies, despite of the fact that standards are prepared, adopted, and applied in a similar fashion in both countries.

This formulation may have been derived from Article XXIV:12 of GATT 1994, which contains identical language[52]:

> Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories. (emphasis added)

Similar wording is to be found in the Dispute Settlement Understanding[53] for the implementation concerning regional or local violation.[54] However, the scope of the qualified obligation is limited to regional or local governments, not non-governmental bodies as Article 4.1 TBT Agreement. Moreover, contrary to Article 4.1 TBT Agreement, which concerns a member's *substantive* obligations concerning interference with private standardising activities, it should be noted that Article 22.9 DSU only limits a member's *implementation* obligations in so far as bringing its local or regional measures into conformity with the WTO Agreement is concerned. The dispute settlement provisions relating to compensation and the suspension of obligations continue to apply. Therefore, a member found to have breached WTO rules and that is not able to ensure compliance despite of its best efforts within its domestic legal and regulatory system is still liable for its breach.

Availability

Apart from the conceptual issues above, Article 4.1 TBT Agreement also raises the fundamental practical question as to what measures are reasonable measures as may be available to the members. It should be noted that reasonableness and availability are cumulative in nature. Even though a measure may be available, it may not be reasonable in the circumstances. In such a case, there would seem to be no obligation on the part of a member to take such a measure under Article 4.1 TBT Agreement.

The first limit on a member's obligation to interfere with private standardising activities concerns availability of "reasonable" ways and means to interfere. Such an obligation is only limited to situations where a Member has the necessary means to control, direct, or influence private standardising activities. A number of legal or

[52] Similar wordings are also found in Article I:3(a) GATS, in Article 13 SPS Agreement, and in TBT Articles 3.1, 5.3, 7.1, 8.1, 9.2, 10.3, 10.4, 11.3, 11.4, 12.5, and 12.6.

[53] Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401.

[54] Article 22.9 of the Dispute Settlement Understanding.

other factors may limit the availability of such means. It may be that a member is not legally competent to compel the action of its non-governmental standardising body, or it may be lack of financial means to achieve a certain result. If a member is unable to interfere for any legal or factual reasons, it seems that it is not under any obligation to do so.

Reasonableness

Reasonableness is an important term found in many legal systems.[55] It is more of a technique employed by lawyers to examine and shape legal values rather than a value in itself. Therefore, it is difficult to define reasonableness in abstract terms as it usually embraces different qualitative values in different scenarios. Reasonableness in WTO jurisprudence often requires a case-by-case analysis, taking into account all of the circumstances.[56] A GATT panel in *Canada – Provincial Liquor Boards (EEC)* once held that what is reasonable cannot be determined by the defending party alone[57] and is subject to the review of the panels. Although there is no direct jurisprudence on Article 4.1 TBT Agreement, GATT and WTO jurisprudence does shed some light on what the implications of "reasonable measures" have on the members' obligations and what factors are to be considered for the purpose of determining reasonableness.

The panel in *US – Tuna II* referred to similar wording appeared in Article 3.1 TBT Agreement, which states that members "shall take such reasonable measures as may be available to them to ensure compliance" by local government bodies and non-governmental bodies. The panel stated:

> We also note that the obligation placed on Members [in Article 2.1 concerning technical regulations] is to 'ensure that products [. . .] shall be accorded treatment no less favourable'. This language requires the achievement of 'treatment no less favourable', and not only 'reasonable measures' to that end, as is the case under Article 3 in relation to technical regulations by local government bodies and non-governmental bodies.[58]

Unfortunately, the panel only contrasted the difference in the wording but provided no guidance on the practical implications of such difference. It is clear, however, that the obligation to interfere with private standardising activities is less stringent than the full responsibility to ensure acceptance and compliance for

[55] For example, the first case on reasonableness in English is the Rooks Case in the sixteenth century concerning the assessment of a fee for maintaining the bank of River Thames for a land owner. For a study of reasonableness under public international law, see generally Corten (1999), p. 613.

[56] See Cook (2013), p. 713.

[57] GATT, report of the Panel, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies,* L/6304, BISD 35S/37, paras. 4.34–4.35.

[58] WTO, report of the Panel, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, para. 7.277.

central government standardising bodies. Evidently, the scope of "reasonable measures" is narrower than "all measures available" or "all necessary measures".

In *Canada – Gold Coins*, the GATT panel stated:

> The Panel noted that the only indication in the General Agreement of what was meant by 'reasonable' was contained in the interpretative note to Article III:1, which defined the term 'reasonable measures' for the case of national legislation authorizing local governments to impose taxes. According to this note the question of whether the repeal of such enabling legislation would be a reasonable measure required by Article XXIV:12 should be answered by taking into account the spirit of the inconsistent local tax laws, on the one hand, and the administrative or financial difficulties to which the repeal of the enabling legislation would give rise, on the other. The basic principle embodied in this note is, in the view of the Panel, that in determining which measures to secure the observance of the provisions of the General Agreement are "reasonable" within the meaning of Article XXIV:12, the consequences of their non-observance by the local government for trade relations with other contracting parties are to be weighed against the domestic difficulties of securing observance.[59]

This case provides some indication as to the potential interpretative approach of a panel faced with similar issues of interpretation in the context of the TBT Agreement. A panel will need to weigh the consequences of non-compliance against the domestic difficulties of securing compliance. Express reference was made to administrative and financial difficulties.

Canada – Provincial Liquor Boards (EEC) provides some insight as to the potential "reasonable measures" as perceived by the two sides of a given dispute. In that case, Canada cited the validity of the infringing provincial legislation under domestic legal order as a defence to the failure to ensure the removal of the measures by the federal government. It accepted that it had to take such measures as might be reasonable in the circumstances to attempt to convince the provinces to observe the provisions of GATT and argued that the federal government had been in constant contact with provincial authorities to review their implementing progress. In reply, the EEC argued that the provincial measures in question were *ultra vires* and that the federal government had the power to rectify this situation. It argued that a reasonable measure for the federal legislature to take would be legislative action requiring that the provinces respected Canada's GATT obligations. It also argued that the initiation by the federal government of a formal constitutional challenge to the provincial rules in violation of Canada's GATT obligations could also be considered a reasonable measure.[60] Canada replied that a constitutional challenge by the federal government had to be made through a reference that is in its view reserved for definitive ruling in emergency situations of national importance.

[59] GATT, report of the Panel, *Canada – Measures Affecting the Sale of Gold Coins*, L/5863, para. 69.

[60] GATT, report of the Panel, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies,* L/6304, BISD 35S/37, paras. 3.71 and 3.72.

Interestingly, Canada proposed the following general guidelines in applying the standard of "reasonable measures":

> (a) Reasonable measures implied efforts made by a contracting party in good faith and with diligence with a view to ensuring observance of the GATT;
> (b) what was 'reasonable' must vary with the factual circumstance of each case;
> (c) foremost among these circumstances was the general character of the federation in question, and in particular the measure of autonomy enjoyed in law and in practice by the regional and local governments within the federation and the constitutional practices it adopted in co-ordinating its internal affairs;
> (d) for these reasons, 'reasonable measures' were steps that were consistent with the normal political functioning of a federation, and exclude measures that would be considered exceptional or extraordinary within that context;
> (e) the nature and effect of the non-observance on the balance of rights and obligations under the General Agreement must be considered.[61]

However, the GATT panel did not fully address the parties' concrete arguments and in particular the guidelines proposed by Canada. Instead, it simply rejected Canada's argument that reasonableness is to be determined by the compliance party itself. Since, in the view of the panel, Canada had only undertaken what itself considered to be reasonable measures, but not all available reasonable measures, Canada had not fulfilled its obligations under Article XXIV:12 GATT. Here, the GATT panel seemed to have applied a very strict approach on "reasonable measures" to ensure compliance.

Canada's proposed guidelines have certain values for the interpretation of Article 4.1 TBT Agreement, despite of its focus on the constitutional relationship between the central government and local government. Arguably, despite the fact that Article 4.1 TBT Agreement applies the same obligations on the part of the member concerning both local governmental standardising bodies and non-governmental standardising bodies with no differentiation, the circumstances concerning the standardising activities of a local government standardising body are bound to be different from those regarding a non-governmental standardising body. In the latter situation, the constitutional problems faced by Canada will not arise. In addition, there would seem to be a lot more options available to a member to compel a private entity to act in compliance with the Code of Good Practice.

Based on the above, in the context of Article 4.1 TBT Agreement and the Code of Good Practice, what measures are reasonable for or available to a WTO member depends on the circumstances of the case, particularly but not limited to the domestic legal and regulatory system. Some commentators have argued against a too lenient approach for the reasonableness test because "any broad understanding of unreasonableness would result in the further disadvantaging of non-federal WTO members for which legal impediments to implementation on lower stages of their internal hierarchy are usually unknown".[62] This makes sense as a large amount of

[61] GATT, report of the Panel, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies,* L/6304, BISD 35S/37, para. 3.69.

[62] Koebele and LaFortune (2007), p. 257.

standards are prepared, adopted, and applied by non-governmental entities. On the contrary, only a limited number of them have accepted and complied with the Code of Good Practice. Members must do more to ensure that these standardising activities are not unnecessarily impeding international trade. Therefore, "reasonable measures" arguably should include measures that are legally available to require strict compliance with the Code of Good Practice by non-governmental bodies. Financial difficulties, domestic political sensitivities cannot be relied upon to discharge a member of its obligation to interfere with trade distortive behaviour of its non-governmental standardising bodies. On the other hand, it is conceivable that they could not include the use of powers normally exercised in national emergency or time of war or include legislation that would depart from established constitutional practice and that would be open to serious legal challenge under the internal law of the relevant contracting party.

Regulation of Private Labelling Schemes Under the SPS Agreement

The key provision relevant to SPS-related private labelling schemes is Article 13 SPS Agreement, which provides, in relevant part, that

> [....] Members shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary or phytosanitary measures only if these entities comply with the provisions of this Agreement. (emphasis added)

This provision is identical to Article 4.1 TBT Agreement, as both oblige a WTO member to "take such reasonable measures as may be available to them" to ensure that "non-governmental entities" within their territories comply with certain substantive rules of these Agreements. Similar questions related to the meaning and scope of the terms "reasonable measures as may be available to them" and "non-governmental entities" arise in the context of Article 13 as neither "reasonable measures" nor "non-governmental entities" are defined in the SPS Agreement. Does "non-governmental entities" include private entities such as NGOs or large retailers? What measures are open to members to support observance of the SPS Agreement by non-governmental entities? What would be a reasonable measure to ensure compliance by a such entities? Thus, the private labelling schemes that address, in particular, the risks to human health face essentially the same type of issues as discussed above under the TBT Agreement.

What is more problematic for SPS-related private labelling schemes is the uncertainty as to whether private standards are SPS measures within the scope of

the SPS Agreement. Article 1.1 specifies the scope of the SPS Agreement and provides that the Agreement applies to "all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade" without explicitly limiting to SPS measures adopted by governmental authorities. The focus of this provision seems to rest on the trade effects of the SPS measures rather than their author. Once a private SPS measure affects international trade, it is arguable that it becomes subject to the disciplines available in the SPS Agreement and in the GATT 1994. Moreover, the definition of an SPS measure in Annex A(1) focuses on the purpose of a given measure, and likewise does not explicitly limit its scope to governmental measures. We note that the first three items of the second paragraph of Annex A(1) ("laws, decrees, regulations") are by their nature typically adopted by government authorities, whereas the latter two ("requirements and procedures") can also be adopted by non-governmental entities. On the other hand, other provisions of the SPS Agreement, particularly Article 2, explicitly refer to the rights and obligations of "Members" when taking sanitary and phytosanitary measures. Furthermore, it is also not clear whether the certification requirements related to private standards would be within the scope of Article 8 and Annex C of the SPS Agreement. Suffice it to say, it would require a delicate balancing excercise of rights and obligations in the multilateral framework to find a solution to the problems which have become the reality of today's international trade.

Conclusion

Private labelling schemes exist like a double-edged sword. They have the potential to achieve legitimate public interest objectives but can also be misused as an instrument of protectionism jeopardising weaker players of international trade. A careful balance needs to be struck both at the domestic level and at the level of the WTO to regulate the development of these schemes. Moreover, labelling schemes, which are both illegitimate and trade distortive, need to be weeded out, either through the market itself or through domestic regulation.

Current rules of the WTO have the potential to regulate private labelling schemes in a number of ways. First, where a member is really the driving force behind what appears to be private labelling schemes, or where a member might decide to permit the use of private schemes as fulfilling its regulatory requirements, it is arguably a measure that can be attributed to the WTO member in line with the principles in *Japan – Film* and *Japan – Trade in Semiconductors*. Moreover, under the TBT Agreement, members are under a more stringent obligation not to take measures that have the effect of, directly or indirectly, requiring or encouraging such standardising bodies to act in a manner inconsistent with WTO rules. Finally, members are positively required under the TBT Agreement or the SPS Agreement to interfere with private standardising activities to bring them in line with WTO discipline to the extent that there are reasonable measures available to them.

Despite the lack of clear indication as to a number of elements of such rules, there appears to be room to expect WTO members to do more about voluntary schemes to ensure they meet WTO requirements. This, however, will probably come when the existing gaps and uncertainties in the TBT Agreement are filled in through work at the WTO level or, alternatively, through the WTO dispute settlement system.

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Transatlantic Trade and Investment Partnership Agreement and the Development of International Standards

Christian Pitschas

Introduction

Horst-Günter Krenzler conducted and steered trade negotiations on behalf of the EU for a long time. After his resignation from the European Commission, he continued to be closely involved in matters concerning the Union's common commercial (trade) policy, both as a professional and academic, until his untimely death. There is no doubt that he would have been intrigued by the ongoing attempt of the EU and the US to build a more integrated "transatlantic marketplace"[1] by concluding a transatlantic free trade agreement (hereinafter *FTA*). With this in mind, the following observations will address the current negotiations between these two global (trade) players and focus specifically on the *regulatory* aspects of these negotiations.[2]

[1] Statement by former EU Trade Commissioner Karel De Gucht on the Transatlantic Trade and Investment Partnership (TTIP) ahead of the second round of negotiations, 30 September 2013, p. 1, available at: http://ec.europa.eu/trade/policy/in-focus/ttip/.

[2] In its announcement of launching trade negotiations with the US, the European Commission stressed that TTIP "will aim to go beyond the classic approach of removing tariffs and opening markets on investment, services and public procurement. In addition, it will focus on aligning rules and technical product standards which currently form the most important barrier to transatlantic trade." Further, the European Commission pointed out that "the most significant trade barrier is not the tariff paid at the customs, but so-called 'behind-the-border' obstacles to trade." European Commission, press release MEMO/13/95, European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, pp. 1–2, available at: http://europa.eu/rapid/press-release_MEMO-13-95_en.htm. The EU's chief negotiator, Bercero, stated at the end of the sixth negotiating round in July 2014 that the regulatory agenda "is considered to be the most economically significant part of TTIP and what makes TTIP different

C. Pitschas (✉)
Rue de l'Arquebuse 10, 1204 Genève, Switzerland
e-mail: pitschas@msbh.de

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Early 2013, the EU and the US announced their intention to start negotiating a bilateral FTA dubbed the "Transatlantic Trade and Investment Partnership" (hereinafter *TTIP*).[3] The name does not seem to be coincidental: it indicates that the negotiations regarding the conclusion of a Trans-Pacific Trade Agreement, currently conducted by a number of Pacific countries, including the US, form a backdrop to the negotiations between the EU and the US. For the EU, therefore, the TTIP negotiations are also an attempt to prevent being sidelined, in political and economic terms, by those other plurilateral trade negotiations. For the US, the TTIP negotiations serve at least two goals: first, to put pressure on their Pacific partners to agree on an ambitious trade deal as a means of avoiding to fall behind in the "race" with the EU and, second, to place the US in the middle of two "major" trading regions with—politically close—third countries,[4] thereby also trying to keep the People's Republic of China in check as regards trade matters.[5] Moreover, the lack of progress in the Doha Round[6] is a prime motive for both the EU and the US in seeking to conclude an FTA.[7] Most recently, Russia's annexation of Crimea, which

from the other trade agreements." European Commission (Trade), press release, EU–US trade—latest round of talks on transatlantic trade pact ends in Brussels, 18 July 2014, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1132.

[3] European Commission, press release MEMO/13/95, European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, pp. 1–2, available at: http://europa.eu/rapid/press-release_MEMO-13-95_en.htm. The Council adopted a decision on the negotiating directives for the Commission on 14 June 2013; see European Commission, press release MEMO/13/564, Member States endorse EU–US trade and investment negotiations, 14 June 2013, available at: http://europa.eu/rapid/press-release_MEMO-13-564_en.htm.

[4] Biden (2014), p. 9 ("The two agreements now in the works would place the US at the centre of two vast trading regions").

[5] See the comments by Stevens (2013), p. 9; and Donnan (2014a), p. 2.

[6] In spite of the modest success of the ninth WTO Ministerial Conference held in Bali in December 2013, which agreed on a Trade Facilitation Agreement and certain measures in the areas of agriculture as well as special and differential treatment of LDCs (see the overview on the WTO website, available at: http://www.wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm), the core elements of the Doha Round—market access in agriculture, nonagricultural goods and services—still awaits its conclusion (see the statement of WTO Director-General Azevêdo to the General Council, WTO, news, Azevêdo reports "excellent start" on efforts to put Doha Round back on track, 14 March 2014, available at: http://www.wto.org/english/news_e/news14_e/gc_rpt_14mar14_e.htm). The momentary inability of WTO members to adopt the protocol on the application of the Trade Facilitation Agreement had cast a new shadow on their willingness to revive the dormant Doha Round and even threatened the proper functioning of the multilateral trading system, according to WTO Director-General Azevêdo; see his statement at the informal meeting of the Trade Negotiations Committee, WTO news (2014).

[7] Former EU Trade Commissioner De Gucht stressed that "good multilateral rules on these kind of issues take a lot more time to achieve, if at all, because they are complicated. Working bilaterally within the TTIP to begin with is therefore much easier than working with the 159 members of the WTO." European Commission, press release SPEECH/24/357, De Gucht (2014d), p. 3.

has thrown the relationship of Western democracies with Russia into disarray, provided another strong geopolitical impetus to the TTIP negotiations.[8]

Prior to announcing the start of the TTIP negotiations, both sides had set up a so-called High-Level Working Group on Jobs and Growth, whose task consisted of identifying policies and measures that could spur the transatlantic trade and investment relationship. After intensive deliberations, this working group issued a final report that recommended negotiations on "a comprehensive, ambitious agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributes to the development of global rules."[9] In particular, the economic gains that could be potentially reaped from a transatlantic FTA are estimated to be significant: a study commissioned by the European Commission estimates that an FTA between the EU and the US, once fully implemented, would increase the EU GDP by 0.4 % (or EUR 120 billion per annum) and the US GDP by 0.5 % (or EUR 95 billion per annum) as a result of expanded bilateral trade between the EU and the US.[10] In their efforts to explain to the civil society why they have entered into these negotiations, both sides allude persistently to these potential economic benefits. Much of these welfare aspects, namely as much as 80 %,[11] would stem from the reduction of non-tariff barriers to trade (NTBs) or "behind the border policies," given that the average tariff rates of the EU and US are rather low.[12]

Against this backdrop, it is not surprising that the TTIP negotiations pursue the goal of aligning the respective norms, standards, and technical regulations of both

[8] ICTSD (2014), p. 4; Kafsack (2014b); Malmström (2014a), p. 4.

[9] High-Level Working Group on Jobs and Growth, Final report, 11 February 2013, p. 6, available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

[10] European Commission (2013b), pp. 6–7. See also European Commission, press release MEMO/13/211, Independent study outlines benefits of EU–US trade agreement, 13 February 2013, available at: http://europa.eu/rapid/press-release_MEMO-13-211_de.htm.

[11] European Commission (2013b), p. 6. In its communication "Global Europe: Competing in the World," the European Commission had already emphasised that "the economic gains from tackling non-traditional, behind-the-border barriers are potentially significant in the EU and US," p. 10, COM(2006) 567 final. In the same vein, the Commission's communication "Trade, Growth and World Affairs" states with respect to the trade relationship with the US that "the biggest remaining obstacles lie in the divergence of standards and regulations across the Atlantic, even though we have very similar regulatory aims," p. 11, COM(2010) 612 final. See also ECORYS (2009) for an overview of NTBs in various sectors of economic activity and the possible effects of their reduction.

[12] On average, EU tariffs amount to 5.2 % and US tariffs amount to 3.5 % (see European Commission, press release MEMO/13/95, European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, p. 2, available at: http://europa.eu/rapid/press-release_MEMO-13-95_en.htm). Interestingly, the final report of the High-Level Working Group on Jobs and Growth notes that "both sides should consider options for the treatment of the most sensitive products," High-Level Working Group on Jobs and Growth, Final report, 11 February 2013, p. 3, available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf, which presumably means that the planned removal of customs duties will not cover 100 % of bilateral trade.

parties and, more broadly, their approach to regulatory action so as to minimise the impact on cross-border trade.[13] At the same time, the TTIP agenda of "regulatory coherence" stirs a public debate within the EU and US about the ensuing consequences for consumers; there is widespread concern that this regulatory agenda will trigger a race to the bottom and thus lead to a lowering of standards (in a broad, nontechnical sense), thereby creating risks for consumers' health and safety.[14] Former EU Trade Commissioner *De Gucht* sought to assuage these concerns by insisting that no European standard relating to the areas of health, environment, and food would be lowered as a result of TTIP.[15]

In this context, it is worth recalling that this is not the first time the EU will negotiate an FTA containing specific disciplines on NTBs. The FTA with South Korea, for instance, sets forth (sector-specific) commitments relating to the elimination and reduction of NTBs, in particular as regards consumer electronics, motor vehicles, pharmaceuticals, and chemicals.[16] In a similar manner, the FTA negotiated with Singapore also includes (sector-specific) disciplines on NTBs, especially as regards electronics, motor vehicles, pharmaceuticals, and equipment to generate renewable energy.[17] The focus on NTBs and regulatory barriers to trade in FTA

[13] "The goal of this trade deal is to reduce unnecessary costs and delays for companies, while maintaining high levels of health, safety, consumer and environmental protection"; see European Commission, press release MEMO/13/95, European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, p. 2, available at: http://europa.eu/rapid/press-release_MEMO-13-95_en.htm. In his press statement following the political stocktaking meeting with USTR Froman, former EU Trade Commissioner De Gucht stressed: "What we aim to achieve in TTIP is that these regulatory agencies coordinate more closely with each other," European Commission, Statement/14/12, "Stepping up a gear": Press Statement by EU Trade Commissioner Karel De Gucht following the stocktaking meeting with USTR Michael Froman on the Transatlantic Trade and Investment Partnership (TTIP), 18 February 2014, p. 2, available at: http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc_152198.pdf. See also European Commission (Trade) (2014), p. 1.

[14] See Financial Times (2013a), p. 2; Financial Times (2014b), p. 6; Financial Times (2014a); Donnan (2014b), p. 3; Kafsack (2014a), p. 9; Caldwell (2014), p. 9. A similar concern is voiced with respect to the TTIP chapter on investment protection, in particular as regards its investor-State arbitration provisions, in that firms from the other party would avail themselves of the investor-state arbitration mechanism against regulatory measures, e.g. in the environmental area, that may have a negative impact on their businesses; see Frankfurter Allgemeine Zeitung (2013), p. 19; ICTSD (2014), p. 4.

[15] European Commission, press release SPEECH/14/52, De Gucht (2014c); see also European Commission (Trade) (2014), p. 5; Malmström (2014b), p. 2.

[16] European Commission (2010), pp. 1 and 3–5. The EU–South Korea FTA is "the first of the new generation of FTAs launched in 2007 as part of the 'Global Europe' initiative" and "the most comprehensive free trade agreement ever negotiated by the EU," id., p. 1. The Commission stated that the EU–South Korea FTA "will inform our approach for further FTAs under negotiation," Commission, Staff Working Document, External sources of growth, 2012, p. 12, available at: http://trade.ec.europa.eu/doclib/docs/2012/july/tradoc_149807.pdf.

[17] European Commission (Trade) (2013), pp. 4–6. Contrary to the EU–South Korea FTA, the FTA with Singapore has not entered into force yet but is expected to become effective by late 2014; European Commission, press release MEMO/13/1080, The EU's bilateral trade and investment

negotiations corresponds to the Union's strategy of pursuing deep and comprehensive trade agreements that dismantle NTBs and establish a more systematic regulatory cooperation with major third countries.[18]

What would set the TTIP apart is, of course, its scale and scope since the EU and US stand for roughly one-third of global trade flows.[19] Inevitably, therefore, these negotiations attract a lot of attention from third parties due to the effect that a TTIP would have on their trade relations with the EU and the US.[20] Indeed, the EU and the US are cognisant of the impact on third countries but claim that such impact would be benign in nature due to positive (direct and indirect) spill-over effects.[21] They argue that the envisaged alignment of the EU's and the US's regulatory regimes would reduce compliance costs of companies in third countries that export to the EU or the US and provide an incentive to third countries to move towards any new common standard created in the framework of TTIP.[22]

In fact, the negotiating parties envisage that "there may be areas in which the development of common or technically equivalent standards could be considered."[23] In turn, it is suggested that such common standards "are more likely to be followed around the world"[24] and hence stand "a good chance of becoming

agreements—where are we?, p. 4, available at: http://europa.eu/rapid/press-release_MEMO-13-1080_en.htm.

[18] European Commission, Trade, Growth and World Affairs, COM(2010) 612 final, pp. 4–5, 7; see also European Commission (2013a), pp. 5–6, European Commission, press release SPEECH/14/405, De Gucht and Malmström (2014d), pp. 3–4.

[19] European Commission, press release MEMO/13/95, European Union and United States to launch negotiations for a Transatlantic Trade and Investment Partnership, 13 February 2013, p. 1, available at: http://europa.eu/rapid/press-release_MEMO-13-95_en.htm. Together, the EU and the US account for 46 % of world GDP; see European Commission (2013b), p. 10.

[20] See The Economist (2013), p. 39; Le Temps (2014), p. 8.

[21] European Commission (2013b), pp. 10–11. In contrast, a study conducted by the Ifo-Institute on behalf of the Bertelsmann-Stiftung finds that TTIP would have negative effects on third countries; see Financial Times (2013b).

[22] European Commission (2013b), p. 11. See also European Commission, press release SPEECH/14/141, De Gucht, pp. 4–5 ("many of the regulatory barriers we remove will not only benefit European and American companies but also exporters from developing countries").

[23] European Commission, EU–US Transatlantic Trade and Investment Partnership – Technical barriers to trade, Initial EU position paper, p. 5, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151627.pdf.

[24] European Commission, Transatlantic Trade and Investment Partnership – The Regulatory Part, p. 2, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151605.pdf. As was candidly pointed out by De Gucht, "many of the technical solutions will be able to be applied more widely, especially as they will already be operating in 40% of the world economy," European Commission, press release SPEECH/14/141, De Gucht, p. 5. De Gucht reiterated this stance in a speech in Berlin on 5 May 2014: "And if the agreement covers 40% of the world economy, that will be a basis for future work with a wider set of partners." European Commission, press release SPEECH/24/357, De Gucht (2014d), p. 3.

international standards."[25] It appears that this latter aspect is very present in the negotiators' minds: their public announcements proclaim that both sides could set the benchmark for developing global standards.[26] In his welcoming remarks prior to the first stocktaking meeting with USTR *Froman* on February 2014, former Commissioner *De Gucht* stated openly: "What we are trying to do is [. . .] work together to make sure that we can continue to play a leading role in world markets about norms and standard setting – not in a 'closed shop' manner, but in an open way."[27]

Given that the regulatory alignment sought under the TTIP should ostensibly serve also as a vehicle for (contributing to) the development of international standards, this "standard setting" for the international community is further examined below along the following lines: firstly, the main components of the envisaged regulatory chapter of the TTIP and their perceived potential to contribute to international standard setting are identified (see below section "Regulatory Chapter of the TTIP"); secondly, the approach to international standard setting under the TTIP is compared to the understanding of this process in relevant WTO Agreements (see below section "International Standards and WTO Law"); and, finally, some concluding remarks are offered (see below section "Conclusions").

Regulatory Chapter of the TTIP

Main Elements and Instruments

The "regulatory part" of the TTIP negotiations is composed of five elements: (a) sanitary and phytosanitary measures, (b) technical barriers to trade, (c) annexes for specific goods and services sectors, (d) cross-cutting disciplines on regulatory coherence and transparency regarding goods and services, and (e) a framework for regulatory cooperation.[28] Although these elements differ in scope, as

[25] European Commission, press release SPEECH/13/801, De Gucht (2013), p. 6. In a recent speech in Paris, De Gucht pointed out that "the third way people would benefit from regulatory cooperation is because whatever we do together would provide an excellent basis for future global efforts towards regulatory coherence." European Commission, press release SPEECH/14/314, De Gucht (2014a), p. 5.

[26] European Commission, Press release at the occasion of the conclusion of the third round of negotiations, 20 December 2013. De Gucht stressed that common approaches of the EU and the US "may shape regulation around the world, including in countries like Brazil, India, China and Russia, where today standards are typically much lower than in the US and the EU," European Commission, press release SPEECH/14/52, De Gucht (2014c), pp. 6–7. See also European Commission (Trade) (2014), p. 3.

[27] European Commission, Statement/14/11, 17 February 2014, p. 1. In a similar vein, De Gucht stated: "This means that TTIP will be an important way for us to shape regulations, norms, including on investment, and ultimately values that govern economic exchange worldwide," European Commission, press release SPEECH/14/405, De Gucht, p. 2; similarly Malmström (2014b), p. 3.

[28] High-Level Working Group on Jobs and Growth, Final report, 11 February 2013, p. 4, available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.

some are sectoral and some are horizontal in nature, they share two overarching aims: first, to make—both existing and future—regulations more *compatible* and, second, to promote increased *cooperation* between the regulatory bodies of both sides.[29] Regulatory compatibility and cooperation are intertwined because the compatibility of regulations will ultimately bear fruit only if the competent regulatory bodies, which are responsible for applying and enforcing those regulations, are willing to cooperate with one another.[30]

In order to achieve regulatory compatibility and cooperation, the aforementioned elements have to rely on certain instruments. In this respect, the final report of the high-level working group on jobs and growth referred to "early consultations on significant regulations, use of impact assessments, periodic review of existing regulatory measures, and application of good regulatory practices," as well as "regulatory harmonization, equivalence, or mutual recognition, where appropriate."[31] It should be noted in this context that some of these instruments form part of a broader set of regulatory policies and practices that were identified by the OECD Regulatory Policy Committee and recommended to OECD members with a view to improving regulatory quality,[32] including the promotion of regulatory coherence through coordination mechanisms between the supranational, national, and subnational levels of government.[33]

Irrespective of their distinct characteristics, the various elements and instruments of TTIP's regulatory chapter are first and foremost intended to foster regulatory compatibility and cooperation in the *bilateral* trade relationship between the EU and the US. This raises the question of how the bilateral process of

[29] European Commission, Transatlantic Trade and Investment Partnership – The Regulatory Part, pp. 3–4, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151605.pdf; European Commission, EU–US Transatlantic Trade and Investment Partnership. Trade Cross-cutting disciplines and Institutional provisions. Initial EU position paper, p. 3, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf. See also European Commission, press release SPEECH/13/801, De Gucht (2013), pp. 4–5; European Commission, press release SPEECH/14/406, De Gucht (2014b), p. 3; Malmström (2014c), pp. 2–3. The EU's chief negotiator, Bercero, underlined at the end of the sixth negotiating round that "enhanced regulatory cooperation is essential if the EU and the US wish to play a leading role in the development of international regulations and standards based on the highest levels of protection." European Commission (Trade), press release, EU–US trade—latest round of talks on transatlantic trade pact ends in Brussels, 18 July 2014, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1132.

[30] Malmström (2014b), p. 2. It has been pointed out that the early identification of potential regulatory friction is a key part of regulatory cooperation, and an effective regulatory cooperation should operate as a means of preempting trade concerns, WTO (2014), p. 32.

[31] High-Level Working Group on Jobs and Growth, Final report, 11 February 2013, p. 4, available at: http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf. On the use of harmonisation, equivalence, and mutual recognition in bilateral and regional FTAs as a means to achieve regulatory coherence as well as the differences in the approaches pursued by the US and the EU, see Lesser (2007), paras. 27 et seq., paras. 43–44 and 51–53; see also WTO (2011), pp. 140–141.

[32] OECD (2012).

[33] OECD (2012), recommendation no 10.

regulatory alignment between the EU and the US is supposed to bring about *international* standards.

Potential Contribution to International Standard Setting

Three patterns of how the regulatory agenda of the TTIP could potentially contribute to international standard setting are discernible at this stage of the negotiations: (1) cooperation of the parties' regulatory bodies in international standardisation organisations,[34] (2) use of international standards as a basis for regulatory action,[35] and (3) unilateral adoption by third countries of newly created transatlantic standards.[36] The manner and extent to which these patterns would or could contribute to the development of international standards differs considerably.

The first pattern—cooperation of the EU and US regulatory bodies within international standardisation organisations—seems to be the most obvious and possibly most promising way to contribute to the making of international standards. The responsibility of devising relevant international standards lies with the international standardising organisation concerned. Any international standard adopted by such organisations will have benefitted, in principle, from input received from all of their members. By coordinating and cooperating their input into the process of developing a relevant international standard within an international standardisation organisation, the EU and the US will be more influential in the standard-setting process than if they acted on their own, especially if they pursued different or even divergent objectives instead. This type of "coalition building" is a natural phenomenon occurring within any international organisation that seeks to establish a common denominator for its membership.[37] It is also a sign for members' willingness to engage in the collaborative effort of the organisation's members to find such common denominator that will then form the basis for an international standard.

In contrast, the second pattern—the use of existing international standards as a basis for regulatory action—will only have an *indirect* effect on international standards. This behaviour does not contribute *per se* to the development of international standards since it relies on an existing standard as a foundation for subsequent regulatory action.[38] Nonetheless, this kind of behaviour is meaningful

[34] European Commission, EU–US Transatlantic Trade and Investment Partnership – Technical barriers to trade, Initial EU position paper, p. 5, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151627.pdf; European Commission (Trade) (2014), p. 1.

[35] European Commission, EU–US Transatlantic Trade and Investment Partnership. Trade Cross-cutting disciplines and Institutional provisions. Initial EU position paper, p. 2, available at: http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151622.pdf.

[36] European Commission (2013b), p. 10.

[37] It has been noted that the "development of international standards is, by definition, a form of multilateral cooperation," WTO (2012), p. 179.

[38] The abovementioned recommendations of the OECD Regulatory Policy Committee include a recommendation to give consideration to all relevant international standards, OECD (2012), recommendation no 12.

in relation to international standards in two respects: first, it confirms that the international standard concerned is sufficiently appropriate and effective so as to serve as a relevant basis for regulatory action at the national level; second, it fulfills the core purpose of the international standard in constituting a common benchmark for regulatory action at the domestic level of all members of the organisation that has set the standard in question.[39]

The third pattern—the expectation that third countries would unilaterally adopt transatlantic standards created under the TTIP—appears to be the most sensitive and possibly most controversial one since it seeks to exploit the dominant position of the transatlantic trade relationship within global trade. The first pattern consists of multilateral action through participation in the international standard-setting process, while the second pattern consists of unilateral action; this unilateral action is rooted in a multilateral outcome, i.e. an existing international standard previously adopted by an international standardising organisation, and may induce widespread reliance on the international standard in question for regulatory action at the national level. In contrast, the third pattern bears no (direct) relationship to plurilateral or multilateral discussions and efforts regarding the setting of international standards since this pattern implies that no relevant international standard yet exists or, conversely, an existing international standard will be deemed not to be relevant, appropriate, or effective for the pursuit of the regulatory goal in question. Thus, the third pattern relies simply on the fact that the EU and the US stand for roughly one-third of global trade and that this, in and of itself, would provide third countries with an "incentive to move towards any new transatlantic standards that the TTIP creates."[40] Although this so-called indirect spill-over effect may well materialise, as a *factual* matter, it appears somewhat difficult to reconcile this policy stance with the understanding that international standards should result from a collaborative effort of the membership of a relevant international standardisation organisation provided that one exists and is active in the area in question.

The aforementioned patterns will be contrasted below with pertinent WTO rules that relate to international standards.

International Standards and WTO Law

Several WTO Agreements refer, in one way or the other, to international standards. In light of the abovementioned elements of the regulatory chapter of the TTIP, three WTO Agreements are particularly relevant: as regards trade in goods, the

[39] It must be noted, though, that the linkage between regulatory action and international standards is often very difficult to establish because of a lack of transparency, i.e. there is a lack of information that would allow to identify, for a given sector, whether and to which extent international standards form the basis for regulatory action; see Fliess et al. (2010), paras. 74–75 and 76 et seq. As regards services, the problem is compounded by the fact that international standards are much less prevalent as compared to goods, WTO (2012), p. 185.

[40] European Commission (2013b), p. 10.

Agreement on Technical Barriers to Trade (hereinafter *TBT Agreement*) and the Agreement on the Application of Sanitary and Phytosanitary Measures and, as regards trade in services, the General Agreement on Trade in Services (hereinafter *GATS*). The following considerations differentiate between goods trade, on the one hand, and services trade, on the other, because of their distinct characteristics and the different rules that apply under the said Agreements; the focus here is on the TBT Agreement and the GATS, respectively.

Before turning to these two multilateral trade agreements in more detail, though, it is noted that these agreements serve in the present context as the most important examples of multilaterally agreed "benchmarks" for the three regulatory patterns regarding international standard setting that are currently contemplated in the TTIP negotiations. What is of interest here is the question of how the common intention of the EU and the US to proceed with respect to international standard setting compares to the multilateral "benchmarks" established by the TBT Agreement and the GATS. As WTO members, the EU and the US have to adhere to their obligations under those agreements. Neither Article XXIV GATT 1994 nor Article V GATS allows them to "opt out" from those obligations. For one thing, both provisions provide for exceptions from (nondiscrimination) obligations under the GATT or GATS as regards the *internal* (*inter se*) trade between or among the parties to an FTA.[41] When it comes to the contribution of FTA parties to the standard setting at the international level, though, said exceptions do not apply because in this instance their internal (*inter se*) trade relationship is not a stake. For another, Article XXIV GATT 1994 is *ipso iure* inapplicable to obligations under the TBT Agreement,[42] whereas the two GATS provisions that are relevant in the present context—Articles VI and VII GATS—do not come under the scope of Article V GATS.[43]

[41] Notwithstanding the fact that both provisions also set out requirements regarding the impact of an FTA on the trade with other WTO members not parties to the FTA in question.

[42] The Appellate Body observed that "the *TBT Agreement* does not contain among its provisions a general exceptions clause. This may be contrasted with the GATT 1994, which contains a general exceptions clause in Article XX." WTO, report of the Appellate Body, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 101. Referring to this ruling, the Appellate Body later stated that "Article XX of the GATT 1994 has been found by the Appellate Body not to be available to justify a breach of the Agreement on Technical Barriers to Trade (TBT Agreement)." WTO, report of the Appellate Body, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, para. 5.56. The same conclusion applies, *mutatis mutandis*, to Article XXIV GATT 1994.

[43] Article V GATS allows the conclusion of economic integration agreements by WTO members if two conditions are met: such agreements must have substantial sectoral coverage and provide for the absence or elimination of substantially all discrimination, in the sense of Article XVII. However, Articles VI and VII GATS relate to domestic regulation and recognition, which are both distinct from national treatment in the sense of Article XVII GATS. See also Marchetti and Mavroidis (2012), p. 415 (426–427), who argue that recognition is not necessary for the establishment of a PTA.

Trade in Goods and Technical Barriers to Trade

The preamble of the TBT Agreement recognises the important contribution that international standards can make to improving the efficiency of production, facilitating the conduct of international trade, and enabling a technology transfer to developing countries. It is not surprising, therefore, that the preamble encourages the development of international standards in order to promote the harmonisation of technical regulations.[44]

Article 2 of the TBT Agreement concerning the preparation, adoption, and application of technical regulations by central governmental bodies[45] imposes two obligations on WTO members with respect to international standards that are particularly relevant in the present context: (1) to base national technical regulations on relevant international standards[46] and (2) to participate in the preparation of international standards by appropriate international standardising bodies.[47] Before turning to these obligations in some more detail, it is important to apprehend how the TBT Agreement understands the notion of "international standard" as this has an impact on the contours of the aforementioned obligations.

International Standard Within the Meaning of the TBT Agreement

Annex 1 to the TBT Agreement (hereinafter *Annex 1*) sets out the terms and their definitions for purposes of the TBT Agreement. The definitions of the terms "standard" and "international body or system" seem to be particularly relevant as regards the meaning of international standard in the framework of the TBT Agreement since there is no explicit definition of the terms "international standard" or "international standardisation organisation/body."

The definition of "standard" reads as follows: "Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." The explanatory note to this definition states in relevant part: "For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This

[44] In this way, international standards can play a crucial role in the process of achieving regulatory alignment on a global scale, Wijkström and McDaniels, para. 2.1.

[45] The provisions of the Agreement on Technical Barriers to Trade (TBT Agreement), 1868 U.N.T.S. 120 regarding central government bodies apply to the EU, as per the explanatory note to paragraph 6 of Annex 1 to the TBT Agreement.

[46] Article 2.4 TBT Agreement.

[47] Article 2.6 TBT Agreement.

Agreement covers also documents that are not based on consensus." Moreover, the definition of the term "international body or system" reads as follows: "Body or system whose membership is open to the relevant bodies of at least all Members." The aforementioned definitions of the terms "standard," including the explanatory note, as well as "international body or system," when read together, may serve to understand the meaning of "international standard" in the context of the TBT Agreement.

Moreover, the introductory part of Annex 1 refers to the definitions used in the sixth edition of the "ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities" (hereinafter *Guide*). The latter definitions have the same meaning under the TBT Agreement when used in that agreement provided that they do not conflict with the definitions spelled out by Annex 1.[48] The Guide defines "international standard" as a "standard that is adopted by an international standardizing/standards organization and made available to the public." Further, the Guide defines "standards body" as a "standardizing body recognized at national, regional or international level, that has as a principal function, by virtue of its statutes, the preparation, approval or adoption of standards that are made available to the public."

Based on the aforementioned definitions, the Appellate Body arrived at the conclusion that a "standard has to be adopted by an 'international standardizing *body*'" in order to constitute an international standard in the sense of the TBT Agreement.[49] In turn, an international standardising body is a "body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all Members."[50] As regards the element of "recognized activities in standardization," the Appellate Body held that "evidence of recognition by WTO Members as well as recognition by national standardization bodies would be relevant."[51] As regards the element of "openness," the Appellate Body noted that "a body will be open if membership to the body is not restricted. It will not be open if membership is *a priori* limited to the relevant bodies of only some WTO Members."[52]

In this respect, the Appellate Body also had recourse to the TBT Committee Decision on Principles for the Development of International Standards, Guides and

[48] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 354.

[49] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 356 (emphasis in the original).

[50] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 359.

[51] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 363.

[52] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 364.

Recommendations with Relation to Articles 2, 5, and Annex 3 of the Agreement,[53] which it considered to constitute a subsequent agreement within the meaning of Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties.[54] This decision was adopted with a view to guiding WTO members in the development of international standards by setting out six principles that relate to transparency, openness, impartiality and consensus, effectiveness and relevance, coherence and development.[55] Relying on the principle of openness, as set out by said TBT Committee decision, the Appellate Body took the view that "in order for a standardizing body to be considered 'international' for the purposes of the *TBT Agreement*, it is not sufficient for the body to be open, or have been open, at a particular point in time. Rather, the body must be open 'at every stage of standards development.'"[56] Further, a standardising body "must be open 'on a non-discriminatory basis.'"[57]

The foregoing observations lead to a preliminary conclusion with respect to the development of standards under the TTIP: any such standard would not constitute an *international* standard in the sense of the TBT Agreement because the TTIP will not constitute an international standardising body within the meaning of that agreement. In particular, the TTIP will not be open on a nondiscriminatory basis since membership to the TTIP will *a priori* be limited to the EU and the US. That being said, standards developed by the EU and the US in the TTIP framework could serve as a template for the development of international standards by international standardising bodies if the EU and the US work together in such bodies to this end, as envisaged by the first pattern of TTIP's regulatory agenda.

International Standards as a Basis for Technical Regulations

Having clarified the meaning of international standard under the TBT Agreement, the obligation imposed by Article 2.4 TBT Agreement can now be addressed. This provision reads: "Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when

[53] WTO, Committee on Technical Barriers to Trade, Decisions and recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, Note by the Secretariat, G/TBT/1/Rev. 11 (16 December 2013).

[54] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 372.

[55] The observance of these principles has been a prominent feature in the discussions of WTO members within the TBT Committee. Following the last triennial review of the TBT Agreement by the TBT Committee, it is likely that WTO members will focus on how standardising bodies implement these six principles in their standard-setting practice, Wijkström and McDaniels, para. 3.16.

[56] Wijkström and McDaniels, para. 374.

[57] Wijkström and McDaniels, para. 375.

such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

This provision mandates WTO members to use international standards as a basis for their technical regulations but subjects this obligation to certain conditions.[58] The words "as a basis" circumscribe the link that has to exist between a relevant international standard and a technical regulation: it has to be "a very strong and very close relationship."[59] For this to be the case, the international standard has to be the "principal constituent or fundamental principle for the purpose of enacting the technical regulation."[60]

The said obligation is qualified in several respects, however. To start with, the obligation only applies if an international standard exists or its completion is imminent. This condition is self-explanatory.

Next, an international standard has to be (at least partially) relevant for the technical regulation in question. This condition is closely linked to the aforementioned obligation of using international standards as a basis for technical regulations since an international standard cannot be the principal constituent of a technical regulation unless it is *relevant* for that technical regulation. For this to be the case, the international standard must somehow matter or be material to the substantive (i.e., scientific and/or technical) content of the technical regulation in question. As per the definition in Annex 1, a technical regulation lays down product characteristics or their related processes and production methods in a mandatory manner. It may also include or deal exclusively with terminology, symbols, packaging, marking, or labelling requirements as they apply to a product, process, or production method. Accordingly, the international standard in question has to "bear upon, relate to, or be pertinent to"[61] (one of) the elements (i.e., product characteristics, terminology, labelling, etc.) that are laid down, included, or dealt with by the technical regulation in question so as to be relevant for that technical regulation. Put differently, a comparison between the international standard and the technical regulation has to show that their respective (scientific and/or technical) subject matters overlap, at least partially.

Finally, WTO members may refrain from resorting to a relevant international standard if it were an ineffective or inappropriate means for the fulfilment of the

[58] By codifying scientific and technical knowledge developed at the global level, the use of international standards in technical regulations may help to generate economies of scale and production efficiencies, reduce transaction costs, and facilitate international trade, thereby contributing to regulatory convergence; see WTO (2014), p. 22.

[59] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 245.

[60] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, paras. 243–244.

[61] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, paras. 229–232.

legitimate objective pursued by the technical regulation in question. Clearly, the adjectives "ineffective" and "inappropriate" refer to distinct situations, as is also reflected by the examples referred to in Article 2.4 TBT Agreement.[62] Conceptually, effectiveness has to do to with the *results* of the means employed, while appropriateness pertains to the *nature* of the means employed.[63] Accordingly, an international standard is an ineffective means if it is not capable of achieving the legitimate objectives pursued by the technical regulation and an inappropriate means if it is not suitable for accomplishing the legitimate objectives pursued by the technical regulation at stake.[64] It follows that both the effectiveness and the appropriateness (or suitability) of an international standard have to be determined in relation to the legitimate objective(s) pursued, and the level of protection sought, by the technical regulation in question.[65] The determination of the effectiveness and the appropriateness (or suitability) of international standards involves inevitably an element of discretion, given that WTO members may pursue different policy objectives with distinct levels of protection due to divergent national preferences and circumstances.[66] Depending on the preferences and circumstances involved, an international standard may thus be deemed by some WTO members to be an ineffective or inappropriate means for achieving a particular legitimate objective or the desired level of protection,[67] irrespective of the fact that international standards should not give preference to the characteristics or requirements of specific countries or regions when different needs or interests exist in other countries or regions.[68]

The second pattern discerned in the regulatory agenda pursued by the TTIP negotiations correlates to the requirement set forth by Article 2.4 TBT Agreement since this pattern contemplates to rely on international standards as a basis for regulatory action at the domestic level. In order to give full meaning to Article 2.4 TBT Agreement, TTIP parties would have to adopt the following approach under the said pattern: first, they would have to determine whether there are or will be in the near future any (at least partially) relevant international standards in relation to

[62] By way of example, Article 2.4 TBT Agreement mentions three situations where an international standard could be ineffective or inappropriate, namely because of fundamental climatic or geographical factors or fundamental technological problems. These examples provide an indication as to the meaning of "ineffective" and "inappropriate," respectively.

[63] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 285.

[64] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 288.

[65] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 287.

[66] WTO (2014), p. 21.

[67] See Wijkström and McDaniels, para. 2.5.

[68] WTO, Committee on Technical Barriers to Trade, Decisions and recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995, Note by the Secretariat, G/TBT/1/Rev. 11 (16 December 2013), para. 10 (principle of effectiveness and relevance).

an envisaged technical regulation; second, they would have to establish whether the identified international standard would be both an effective and appropriate means to achieve the legitimate objectives, and the desired level of protection, that the envisaged technical regulation is intended to pursue.

The suggested approach would be important not only so as to abide by the obligation set out by Article 2.4 TBT Agreement. Additionally, said approach would have the benefit that TTIP parties could avail themselves of the presumption provided for by Article 2.5 TBT Agreement. Pursuant to this provision, a technical regulation that is "prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards [...] shall be rebuttably presumed not to create an unnecessary obstacle to international trade."[69] However, the presumption only arises if a technical regulation meets two conditions: first, it seeks to achieve a legitimate objective listed *explicitly* in Article 2.2 TBT Agreement,[70] and, second, it is in conformity with the international standard in question. This "conformity" requirement is linked to the obligation that WTO members must use relevant international standards as a basis for their technical obligations. The latter requirement would not be met if a technical regulation and the international standard concerned contradicted each other or if a technical regulation was based on only some (as opposed to all) of the relevant parts of the international standard concerned.[71] Even if a technical regulation is in accordance with relevant international standards, though, the presumption is only *rebuttable* in nature.[72] Yet in order to rebut a presumption arising under Article 2.5 TBT Agreement, it would have to be demonstrated that a technical regulation is more trade restrictive than necessary to fulfill a legitimate objective, in terms of Article 2.2 TBT Agreement.[73]

[69] Article 2.2 TBT Agreement explicitly mentions, albeit only by way of example, a number of legitimate objectives: national security requirements, the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment.

[70] The presumption does not arise if the legitimate objective pursued by the technical regulation in question is not "explicitly" mentioned in Article 2.2 TBT Agreement in spite of the fact that policy objectives other than those explicitly listed in Article 2.2 TBT Agreement may be legitimate in terms of that provision; see WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 313; WTO, report of the Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, para. 370.

[71] WTO, report of the Appellate Body, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, paras. 248 and 250.

[72] WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 348.

[73] On Article 2.2 TBT Agreement and its conditions see WTO, report of the Appellate Body, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, paras. 311–323, and WTO, report of the Appellate Body, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, paras. 369–379.

Participation in the Preparation of International Standards

The obligation to use relevant, effective, and appropriate international standards as a basis for technical regulations is complemented by the requirement set forth by Article 2.6 TBT Agreement. Pursuant to this provision, WTO members have to "play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expect to adopt, technical regulations." The introductory part of this provision highlights the rationale underlying this obligation, namely to harmonise technical regulations on as wide a basis as possible. The participation of as many WTO members as possible in standard-setting activities of international standardising bodies will mean that the international standards will be apt to become benchmarks for future technical regulations,[74] thereby contributing to regulatory convergence.[75] The said rationale is related to the abovementioned obligation to use relevant, appropriate, and effective international standards as a basis for technical regulations since the harmonisation sought by international standards would not be realised if WTO members could simply neglect such standards.

The obligation to play a full part in the preparation of international standards by appropriate international standardising bodies is mitigated by a condition of a *factual* nature, namely the limits of WTO members' resources, in terms of human, financial, and technical resources. This condition takes into account that developing countries, especially the least developed among them, have only (very) limited (or even no) resources at their disposal. The participation of WTO members in the preparation of international standards may thus range from full to partial to no participation at all, depending on the resources available to them to this end.[76]

Notwithstanding the said resource limitation, the obligation to participate in standard-setting activities of international standardising bodies applies if the standard-setting activity relates to a *product* for which WTO members have already adopted technical regulations, or expect to do so. For the obligation to apply, it is thus sufficient that technical regulations adopted by WTO members pertain to the same products as the international standards being prepared by the appropriate international standardising bodies. In other words, the nexus between technical regulations of WTO members and nascent international standards is created by the products that are covered by both the technical regulations and the nascent international standards. This shows the interaction between Article 2.6 and Article 2.4 of the TBT Agreement: the former is concerned with the situation where international standards have not yet come into existence, whereas the latter addresses the situation where international standards exist, or their completion is imminent.

[74] Wijkström and McDaniels, para. 2.2.

[75] WTO (2014), p. 22.

[76] This state of affairs may create a risk of capture or bias in international standard-setting activities, Wijkström and McDaniels, para. 4.4.

The first pattern identified in the regulatory agenda of TTIP corresponds to the aforementioned obligation. The caveat relating to the limits of WTO members' resources is irrelevant for the TTIP parties. Consequently, they are duty bound to participate fully in the preparation by appropriate international standardising bodies of international standards for products for which they will have adopted technical regulations, or expect to do so. The intention of the TTIP parties to cooperate in international standardising bodies does not contradict said duty. To the contrary, the rationale underlying that duty, namely to harmonise technical regulations on as wide a basis as possible, lends support to WTO members willing to cooperate within international standardising bodies and coordinate their participation in the standard-setting activities of such bodies since such behaviour is conducive to the development of international standards by the bodies concerned.

This leads to the third pattern perceived in the regulatory agenda of the TTIP, namely the expectation that standards developed by the TTIP parties would be adopted by third countries in order to gain a better access to the transatlantic market for their goods. Even if this expectation became reality, it would not mean that the EU and the US could disregard their obligation under Article 2.6 TBT Agreement. If they adopt, or expect to adopt, technical regulations in the TTIP framework for products for which international standards are being prepared by the appropriate international standardising bodies, they have to play a full part in the preparation of those standards, even if they could advocate that their transatlantic standards should provide a blueprint for the international standards to be prepared.

Trade in Services and International Standards

In contrast to the preamble of the TBT Agreement, the GATS' preamble does not mention international standards and their relevance for (the regulation of) international trade in services. Rather, the GATS' preamble refers to the right of WTO members to regulate, and introduce new regulations, on the supply of services within their territories in order to meet national policy objectives. The short-hand reference of the GATS for this particular right of WTO members is "domestic regulation."

Domestic regulation is subject to certain disciplines set forth by Article VI GATS, most of which only apply to services sectors in which WTO members have undertaken specific commitments on market access and/or national treatment.[77] One of these disciplines is concerned with the *application* of licensing and qualification requirements and procedures as well as technical standards by

[77] The General Agreement on Trade in Services, 1869 U.N.T.S. 183 (GATS), disciplines that hinge on specific commitments are commonly referred to as "conditional" obligations whereas disciplines that apply irrespective of specific commitments are commonly referred to as "unconditional" obligations; see Adlung and Mattoo (2008), p. 48 (63 and 66).

WTO members and makes reference to international standards applied by WTO members.[78] The authorisation, licensing, or certification of (domestic and foreign) service suppliers is governed by domestic standards or criteria. Accordingly, the *recognition* of education or experience obtained, requirements met, or licenses or certifications granted in a particular country plays a crucial role in determining whether these domestic standards or criteria are met. In this respect, Article VII GATS calls on WTO members to contribute to the establishment and adoption of common international standards by relevant intergovernmental and nongovernmental organisations.[79]

The requirements under Articles VI and VII GATS relating to international standards, including the understanding of this notion in the GATS context, and their import for the regulatory patterns identified in the TTIP context, are explored in the following.

International Standards for Trade in Services

The definitions set out by Article XXVIII GATS for purposes of this agreement comprise neither a definition of the term "international standard" nor a definition of the notion "technical standard." In the area of services, a standard may be understood to mean a document that provides for criteria or rules that specify the characteristics of a service and/or the manner in which a service is performed.[80] Performance-related standards ultimately serve the aim to improve the quality of a service and assist service suppliers in meeting regulatory requirements, for instance pertaining to public health, safety, and the environment.[81] Given that the quality of a service is inextricably linked to the competence of the supplier, standards often lay down qualification criteria to be met by service suppliers.[82]

A standard is international in nature if it has been developed by an international body or organization.[83] It is interesting to note that Articles VI:5(b) and VII:5 GATS use a somewhat different language in this respect: Article VI:5(b) GATS refers to "international standards of relevant international organizations"; the latter term is defined as "international bodies whose membership is open to the relevant bodies of at least all Members of the WTO."[84] By way of analogy to the principle of

[78] Article VI:5(b) GATS.

[79] Article VII:5 GATS.

[80] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 20.

[81] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 38.

[82] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 30.

[83] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 44. See also WTO (2012), p. 185.

[84] Footnote 3 to Article VI:5(b) GATS. This definition is identical to the definition of the notion "international body or system" in para. 4 of Annex 1 to the TBT Agreement.

openness applicable in the context of the TBT Agreement, it may be argued that an international body in the aforementioned sense has to be open at every stage of its standardisation activity on a nondiscriminatory basis.[85] In contrast, Article VII:5 GATS refers to "relevant intergovernmental and non-governmental organizations" as regards the establishment and adoption of international standards. Despite the difference in wording, it is submitted that the meaning is the same as in the case of Article VI:5(b) GATS. As Article VII:5 GATS is concerned with *multilaterally* agreed criteria for recognition as well as the development of *international* standards in this respect, the intergovernmental and nongovernmental organisations also must have an international character. Accordingly, they constitute international organisations of either an intergovernmental or a nongovernmental nature, as the case may be. Furthermore, it is irrelevant that Article VII:5 GATS differentiates between intergovernmental and nongovernmental organisations, whereas Article VI:5(b) GATS simply refers to international organisations. This is because international standardising activities are carried out by both nongovernmental and intergovernmental bodies of an international nature.[86] In view thereof, it has to be assumed that Article VI:5 (b) GATS also extends to international bodies of a nongovernmental nature; otherwise, a large part of international standardisation activities would be excluded from its scope of application.

For (technical) standards to fall within the scope of the GATS, they have to meet the conditions of Article I:1 GATS.[87] This provision states that the GATS "applies to measures by Members affecting trade in services." While a technical standard adopted by a WTO member, as envisaged by Article VI:4 GATS, constitutes a measure within the meaning of Article I:1 GATS,[88] international standards do not because of their *international* nature, i.e. they cannot be attributed to WTO members unless a member has transposed an international standard into its domestic law.[89] Yet this does not mean that international standards do not come within the scope of the GATS since Articles VI:5(b) and VII:5 GATS confer on international standards a specific function in relation to (certain) regulatory measures by WTO members affecting trade in services. Therefore, international standards are relevant to the regulatory measures by WTO members addressed by Articles VI:5(b) and VII:5 GATS and thus come under its scope in this regard.

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[85] See supra "International Standard Within the Meaning of the TBT Agreement" on the principle of openness in the context of the TBT Agreement and the conclusions derived by the Appellate Body on the basis of this principle.

[86] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), paras. 49–50.

[87] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 26.

[88] A measure means any measure by a member, whether in the form of a law, regulation, procedure, decision, administrative action, or any other form, pursuant to Article XXVIII (a) GATS.

[89] See WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 15.

In light of the above considerations, it may be preliminarily concluded that any standard developed by the EU and the US within the TTIP framework would not amount to an *international* standard in the sense of the GATS: TTIP is not an international (intergovernmental) organisation for purposes of the GATS, in particular its Articles VI:5(b) and VII:5, given that membership in the TTIP is *a priori* limited to the EU and the US. This conclusion does not prevent the EU and the US from cooperating and coordinating their work in international standardising bodies with a view to contributing to the development of (truly) international standards, possibly by taking pertinent transatlantic standards as a reference point, as envisaged by the first pattern of the regulatory agenda under discussion in the TTIP negotiations.

Application of International Standards in Relation to Regulatory Measures

Pending the outcome of the negotiations of WTO members regarding disciplines for the domestic regulation of services trade,[90] Art. VI:5(a) GATS imposes a *stand-still* obligation on WTO members regarding the application of certain regulatory measures by mandating, *inter alia*, that such measures not be applied in a manner that could not reasonably have been expected at the time the specific commitments were made.[91] In determining whether a WTO member complies with this stand-still obligation, "account shall be taken of international standards of relevant international organizations applied by that Member," pursuant to Article VI:5(b) GATS.

Article VI:5(b) GATS refers to international standards applied by a WTO member but does not require WTO members to make use of international standards in relation to the regulatory measures covered by this provision.[92] This implies that WTO members enjoy discretion as regards the application of international standards. However, should they choose to apply international standards, this has to be taken into account in determining whether the WTO member in question complies with the stand-still obligation set forth by Article VI:5(a) GATS. In other words, the application of international standards is not determinative of whether the WTO member in question complies with the stand-still obligation, but it may be said to weigh in favour of a finding that the latter obligation is being complied with.[93] This presupposes, of course, that the international standards applied by the WTO member in question are relevant to the (application of the) regulatory measure at issue.

[90] On the state of play in these negotiations, see WTO, Working Party in Domestic Regulation, Disciplines on Domestic Regulation Pursuant to GATS Article VI:4, Chairman's Progress Report, S/WPDR/W/45 (14 April 2011).

[91] Nicolaïdis and Trachtman (2000), p. 241 (259); Trachtman (2003), p. 57 (67).

[92] Krajewski (2003), p. 152.

[93] This does not amount to a (rebuttable) presumption; see WTO, Council for Trade in Services, Article VI:4 of the GATS: Disciplines on Domestic Regulation Applicable to all Services, Note by the Secretariat, S/C/W/96 (1 March 1999), para. 35.

This would be the case if the international standards concerned specify criteria or rules that are "incorporated" in the licensing or qualification requirements or the technical standards whose application is at stake.

Article VI:5(b) GATS has an impact on the second pattern of the regulatory agenda of the TTIP negotiations, i.e. the use of international standards as a basis for regulatory action. To the extent that the TTIP parties agree on new regulatory measures in the sense of Article VI:5(a) GATS and base them on relevant international standards, this would have to be taken into account as a positive factor in determining whether the regulatory measures concerned are in conformity with the stand-still obligation imposed by Article VI:5(a) GATS.

Developing International Standards for Recognition

Article VII:1 GATS provides that WTO members "may recognize the education or experience obtained, requirements met, or licences or certifications granted in a particular country," thereby leaving it entirely to WTO members whether they wish to provide such recognition.[94] If WTO members proceed in this regard, recognition "should be based on multilaterally agreed criteria."[95] Again, no obligation is imposed on WTO members.[96] However, Article VII:5 GATS directs WTO members to work in cooperation with relevant intergovernmental and nongovernmental organisations "towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions." Hence, this is an obligation to engage in the process of international standardising activity, but the obligation only arises "in appropriate cases."[97] WTO members thus enjoy a certain degree of discretion in this respect.

Article VII:5 GATS differentiates two types of international standards: on the one hand, international standards for recognition and, on the other, international standards for the practice of relevant services trades and professions.[98] Both types of international standards have to be "common." Given that international standards, by definition, represent a common understanding of a particular characteristic or process shared by those involved in the standardisation process, the word "common" must mean something different in order for it not to be redundant. Arguably, by qualifying international standards as common, Article VII:5 GATS seeks to avoid a situation where *divergent* international standards for recognition or the practice of services trades and professions would emerge, depending on the international body involved in the standardising activity. Article VII:5 GATS thus

[94] Marchetti and Mavroidis (2012), p. 415 (421).

[95] Article VII:5, first sentence, GATS.

[96] Marchetti and Mavroidis (2012), p. 415 (422).

[97] Krajewski (2008), para. 12.

[98] Krajewski (2008).

requires WTO members to strive for consistency in the international standardising process relevant to recognition and the practice of services trades and professions.

International standards for recognition would be standards that specify criteria for the recognition of the education or experience obtained, requirements met, licenses or certifications granted in a particular country.[99] Since each service sector has its own specificities,[100] the criteria for recognition have to be different for each sector so as to reflect its specificities. While each service sector has a number of common characteristics, the practices in a given sector may nonetheless differ from country to country. This is why Article VII:5 GATS also refers to international standards for the *practice* of relevant services trades and professions. Such standards would specify criteria for the manner in which the services concerned would have to be performed.[101]

The aforementioned requirement under Article VII:5 GATS impacts on the first pattern of the regulatory agenda contemplated by the TTIP parties whereby they intend to cooperate within international standardising bodies. As per the said requirement, the TTIP parties would have to cooperate with relevant international bodies with a view to establishing and adopting international standards of the abovementioned types, although this obligation would arise in appropriate cases only. In assessing whether a given situation constitutes an appropriate case within the meaning of Article VII:5 GATS, the TTIP parties would enjoy some discretion. The fact that the TTIP parties envisage to coordinate their standpoints within relevant international bodies would not run counter to the aforementioned obligation; rather, it would further the objective of developing international standards.

Conclusions

A "regulatory agenda" is at the core of the TTIP negotiations. This regulatory agenda focuses on the ways and means to make the regulation of economic activity on both sides of the Atlantic more compatible, including through an increased cooperation between their respective regulatory bodies. The underlying idea is that this sort of regulatory convergence offers by far the highest potential for raising the economic welfare of both the EU and the US. However, the negotiating parties' vision goes beyond creating a transatlantic marketplace based on an aligned regulatory framework. Rather, they also seek to make an impact on the global level by influencing the international standard setting through the creation of transatlantic standards as an inherent part of their regulatory alignment.

[99] Krajewski (2008).

[100] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 86(e).

[101] WTO, Working Party on Domestic Regulation, Technical Standards in Services, Note by the Secretariat, S/WPDR/W/49 (13 September 2012), para. 86(c).

As regards the latter aspect, three patterns are discernible at this stage of the TTIP negotiations: the first pattern would consist of an increased cooperation of the TTIP parties' regulatory bodies within international standardising bodies. The second pattern would involve the use of international standards as a basis for regulatory action within the TTIP framework. While these two patterns relate, directly or indirectly, to the international standardising process, the third pattern is of an entirely different nature. This last pattern is characterised by the expectation of the TTIP parties that third countries would adhere to, or even adopt, the transatlantic standards developed within the TTIP framework, thereby *de facto* elevating these standards to the status of international standards. The expectation embodied by this last pattern is worrisome as it displays a willingness of the EU and the US to rely on their economic power in shaping international trading relationships beyond the TTIP.

When comparing the aforementioned patterns with relevant rules of the TBT Agreement (with respect to goods trade) and the GATS (with respect to services trade), it becomes clear that the pertinent rules of these two multilateral trade agreements of the WTO concerning international standards are somewhat different. However, the starting point under both agreements is the same: a standard is *de iure* international in nature only if it has been developed by an international standardising body that requires the openness of the body in question to the relevant bodies of at least all WTO members on a nondiscriminatory basis. It follows that any standard developed within the TTIP framework will not constitute an international standard for purposes of either the TBT Agreement or the GATS because TTIP is *a priori* limited to the EU and the US. This has a clear implication for the aforementioned third pattern: even if transatlantic standards were followed by third countries, this would not somehow transform these standards into international standards in the sense of the TBT Agreement or the GATS. For this to be the case, transatlantic standards would have to go through the "vetting" process undertaken by international standardising bodies.

Next, both the TBT Agreement and the GATS impose on WTO members an obligation to participate in the work of international standardising bodies, although both agreements condition this obligation somewhat. These conditions have different implications: the TBT Agreement makes a reservation as regards the limits of WTO members' resources, which is, however, irrelevant to the EU and the US. Accordingly, the EU and the US are required to participate in the standardising activity of appropriate international standardising bodies for products for which they will adopt technical regulations, or intend to do so, within the TTIP framework. Their expectation that transatlantic standards would be followed by third countries will not relieve them of this legal duty. TTIP parties will remain free, of course, to present their transatlantic standards as blueprints for international standards to be developed by the appropriate international standardising bodies. The situation is less clear-cut under the GATS. In principle, the same legal duty as under the TBT Agreement applies here, but it is mitigated since it arises "in appropriate cases" only, thereby leaving a margin of discretion to WTO members. Moreover, the scope of the obligation under the GATS is more limited than its counterpart

under the TBT Agreement. This is because it is concerned with the development of international standards for recognition and the practice of relevant services trades and professions; the obligation thus does not cover the whole realm of international standardising activities for services trade.

Further, both the TBT Agreement and the GATS confer a role on international standards in the domestic regulatory sphere but in rather distinct ways. The TBT Agreement mandates WTO members to base their technical regulations on relevant international standards unless the latter were ineffective or inappropriate in achieving the (legitimate) policy objectives pursued or the level of protection sought. The second pattern under the envisaged regulatory agenda of TTIP correlates to said requirement, although TTIP parties retain some discretion in determining whether existing international standards are relevant, effective, and appropriate. In marked contrast to the TBT Agreement, the GATS does not oblige WTO members to base their domestic regulatory measures addressed by Article VI GATS (namely, licensing and qualification requirements and procedures, as well as technical standards) on international standards. But if they do, they stand a better chance of being considered in compliance with the disciplines under Article VI:5(a) GATS.

The foregoing observations show that the first and second patterns contemplated by the EU and the US in the TTIP negotiations as regards the future participation of their regulatory bodies in the process of standard setting by international standardising bodies as well as the use of international standards as a basis for their future regulations of both goods and services correspond to requirements set forth by the TBT Agreement and the GATS, respectively. In contrast, the third pattern envisaged under the prospective regulatory agenda of TTIP appears to undermine the requirements of those two multilateral trade agreements. Admittedly, WTO members retain some discretion in deciding whether international standards are relevant, effective, and appropriate (in the case of the TBT Agreement) or whether it is appropriate to contribute to the standard-setting work of relevant international standardising bodies (in the case of the GATS). Nonetheless, in the first instance, the EU and the US ought to undertake good faith efforts in achieving truly international solutions for regulatory issues before forging ahead on a unilateral basis in the expectation that their economic weight will "persuade" third countries to follow suit. Consequently, the third pattern should remain a measure of last resort.

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Part II
Regional Integration: Trade and Investment Relations Between the EU and East Asia: The Next Frontier?

Economic Partnership Agreements Concluded by Japan

Shotaro Hamamoto

Introduction

As of April 2015, Japan has concluded 15 "Economic Partnership Agreements" (EPAs) (see Fig. 1), the term favored by Japan instead of free trade agreements (FTAs), as explained in the section "Distinctive Features of Japan's EPAs." The counterparties are chronologically as follows: Singapore (signed in 2002), Mexico (2004), Malaysia (2005), Philippines (2006), Chile (2007), Thailand (2007), Brunei (2007), Indonesia (2007), ASEAN (2008), Vietnam (2008), Switzerland (2009), India (2011), Peru (2011), Australia (2014) and Mongolia (2015, not yet in force). Japan is also negotiating EPAs with China and Korea (a trilateral agreement), Turkey, Canada, Colombia and the European Union and is involved in multilateral negotiations for the Trans-Pacific Partnership (TPP) as well as the Regional Comprehensive Economic Partnership (RCEP).

Since the details of each of these treaties are aptly explained in readily available official publications[1] and on websites,[2] the present paper purports to depict the general historical development (section "Historical Development") and to analyse distinctive features of Japan's EPAs (section "Distinctive Features of Japan's EPAs").

[1] Most importantly, see "Part III: FTA/EPA and BIT" of the annual Report on Compliance by Major Trading Partners with Trade Agreements, published by the Ministry of Economy, Trade and Industry, available at: http://www.meti.go.jp/english/report/index_report.html.

[2] Ministry of Foreign Affairs of Japan, Economic Diplomacy, Free Trade Agreement (FTA) and Economic Partnership Agreement (EPA), available at: http://www.mofa.go.jp/policy/economy/fta/index.html; Ministry of Economy, Trade and Industry, available at: http://www.meti.go.jp/policy/trade_policy/epa/english.html.

S. Hamamoto (✉)
Graduate School of Law, Kyoto University, Sakyo, Yoshida Honmachi, Kyoto 606-8501, Japan
e-mail: hamamoto@law.kyoto-u.ac.jp

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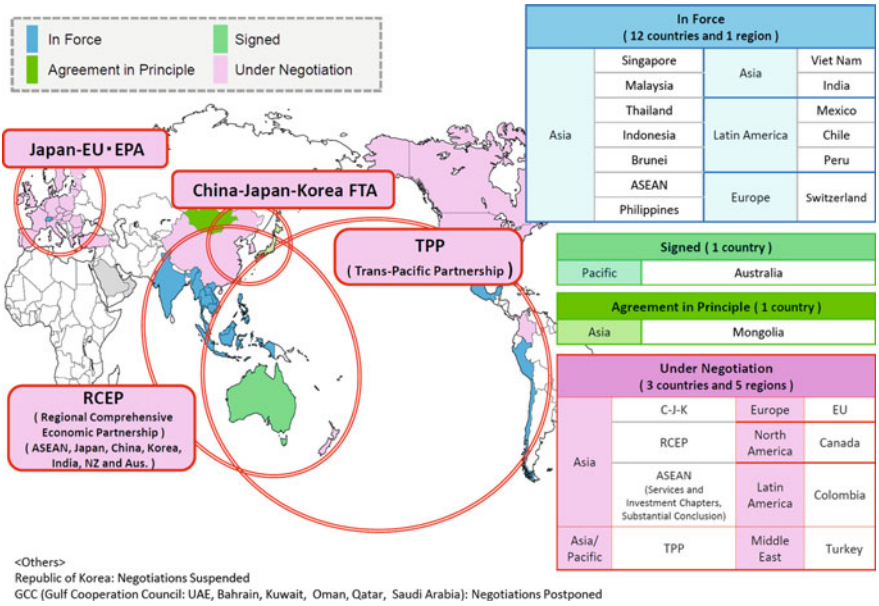

Fig. 1 Development of Japan's EPA/FTA Networks. *Source*: Ministry of Economy, Trade and Industry (available at: http://www.meti.go.jp/policy/trade_policy/epa/file/epa_Japan-English.pdf)

Historical Development

As the present author explained elsewhere, Japan traditionally relied heavily on multilateral frameworks as regards international economic regulation, for example the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO), the Organisation for Economic Co-operation and Development (OECD), the World Bank and the International Monetary Fund (IMF).[3] In 1989, Japan submitted a paper on GATT Article XXIV to the Negotiating Group on GATT Articles in the Uruguay Round negotiations. It reads:

> Today, the regional arrangements have covered a significant proportion of world trade. In other words, a large part of world trade today is not being transacted upon the principle of most-favoured-nation treatment.
>
> A procedure for an entry into force of such regional arrangements is basically stipulated in Article XXIV:7 [. . .]. However, not one single recommendation has been made based on this Article [. . .].
>
> [I]t is desirable for contracting parties to agree on establishing the principles for regional arrangements that they should:
>
> (i) avoid any adverse effects on the non-member contracting parties to the greatest degree possible, and

[3] Hamamoto (2011), p. 53 (54–55).

(ii) contribute on the whole to the increased liberalization of world trade and to creating further trade.[4]

Japan was not only critical of FTAs in which it did not participate but also sceptical of bilateral or regional frameworks themselves. In the *Diplomatic Bluebook 1995*,[5] the Ministry of Foreign Affairs (MOFA) restated its scepticism towards FTAs[6] and referred to bilateral talks in which Japan was involved as follows:

> In addition to these multilateral policy adjustments, active bilateral discussions have also been taking place, including the Japan-U.S. Framework Talks. Bilateral consultations may raise suspicions that they lack transparency and that they are designed to conclude in ways that adversely affect third-party countries. In order to avoid such situations and to ensure that the results of bilateral discussions are firmly linked to the prosperity of the entire world, *it is necessary to ensure that the results of such discussions be applied to third-party countries as well on the basis of the most-favored nation principle*.[7]

Less than a decade later, Japan concluded its first EPA with Singapore and MOFA issued *Japan's FTA Strategy*, which declared that "entering into FTAs is a highly useful way of broadening the scope of Japan's economic relationships with other countries."[8] What led Japan to make this about-turn at the turn of the millennium has been a subject of a number of studies,[9] which generally point out the following economic and political considerations.

Economic Considerations The Plaza Accord in September 1985 and its consequent 60 % appreciation of the Japanese yen led a number of Japanese firms to transfer many of their operations to other Asian economies, which resulted in growing regional production networks and supply chains in East Asia[10] (see Fig. 2). FTAs were considered to be necessary to stabilise and further develop

[4] Multilateral Trade Negotiations—The Uruguay Round, Negotiating Group on GATT Articles, Article XXIV, Submission by Japan, MTN.GNG/NG7/W/66 (22 December 1989).

[5] Ministry of Foreign Affairs of Japan, Diplomatic Bluebook 1995, available at: http://www.mofa.go.jp/policy/other/bluebook/1995/index.html.

[6] Ministry of Foreign Affairs of Japan, Diplomatic Bluebook 1995, Chapter II, Part 2: The International Economy; (1) Ensuring Sustainable Growth of the World Economy and Japan's Role; (d) Regional Integration and Regional Cooperation Movements.

[7] Ministry of Foreign Affairs of Japan, Diplomatic Bluebook 1995, Chapter II, Part 2 (1) (e) Bilateral Consultations (emphasis added).

[8] Ministry of Foreign Affairs of Japan, Japan's FTA Strategy (Summary), October 2002, available at: http://www.mofa.go.jp/policy/economy/fta/strategy0210.html. The full text of the *Strategy* is available only in Japanese at http://www.mofa.go.jp/mofaj/gaiko/fta/senryaku.html.

[9] Krauss (2003), p. 307; Munakata (2006), pp. 102–114; Ravenhill (2008), p. 78 (81–84); Webster (2008), p. 301; Pekkanen (2008); Solís (2009), p. 198; Thorbecke and Salike (2013); there also exists an enormous number of studies in Japanese. To quote only those from which the present author benefited most: Watanabe (2014), p. 211; Terada (2012), p. 11.

[10] The term "East Asia" in the context of FTAs/EPAs usually designates ASEAN+3. See, e.g., Ministry of Economy, Trade and Industry, White Paper on International Trade 2003, Chapter 4, Section 2, p. 302, available at: http://www.meti.go.jp/english/report/data/gIT03maine.html.

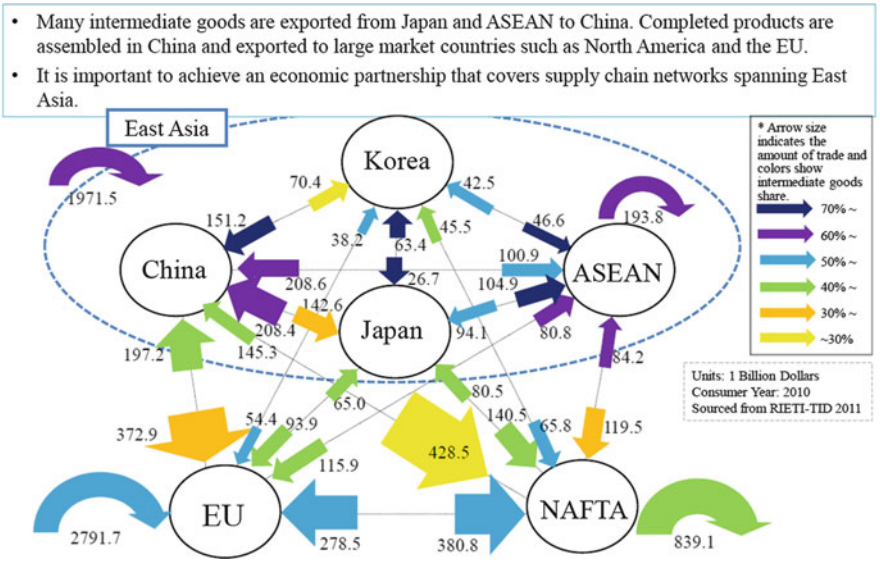

Fig. 2 Actual supply chain in East Asia. *Source*: METI, *White Paper on International Economy and Trade 2013* (Ministry of Economy, Trade and Industry, White Paper on International Economy and Trade 2013, Part II, Chapter 1, p. 4, available at: http://www.meti.go.jp/english/report/data/gWT2013fe.html)

such networks and chains.[11] Furthermore, the growth of FTAs in other parts of the world started to arouse considerable anxiety about their trade diversion effect that could place Japanese firms at a disadvantage.[12]

[11] "[T]here is a growing trend of Japanese companies collaborating with those in East Asian countries to form international frameworks for the division of labor and mutually complementary systems in processes such as research and development, design and assembly. [. . .] It is our firm belief that creating common business infrastructures in East Asia and thereby linking related business networks would lead to an increase in the competitiveness of the entire East Asia region in addition to maintaining and increasing the competitive advantage of Japanese companies." Keidanren (2001), III. 3.(1). Keidanren or Japan Business Federation is a private organization with a membership comprised of more than a thousand representative companies of Japan.

"Japanese companies' activities are moving their focus of activities largely to East Asia, and as a source of profit also, East Asia is growing in significance. In order to ensure these sources of profit and strengthen them accordingly, it would be effective to systemize cooperative relations in East Asia." Ministry of Economy, Trade and Industry, White Paper on International Trade 2003, available at: http://www.meti.go.jp/english/report/data/gIT03maine.html, Chapter 4, Section 2, p. 299.

[12] "In the 1990s, FTAs mushroomed worldwide on an unparalleled scale and with unprecedented speed [. . .]. Japan, however, has yet to undertake a single free trade agreement. As a result, Japanese companies are losing out on business opportunities in the international arena, and also finding themselves placed at a competitive disadvantage in doing business with countries that have already concluded FTAs elsewhere." Keidanren (2000), 1; Keidanren (2006a).

Political Considerations In face of the rise of China, FTAs were considered to be important tools to maintain and strengthen Japan's global diplomatic influence and interests.[13] The experience in the EU and the NAFTA suggested that regional integration could promote universal liberalization of economic relations.[14] In addition, it was expected that FTAs would assist the government to carry out regulatory and structural reforms, which constituted one of the important political agendas in Japan in this period.[15] It is also to be noted as a background that Japan and East Asian States accumulated considerable experience of multilateral cooperation in the 1990s, particularly after the financial crisis in 1997.[16] Last but not least, following the failure of the Multilateral Agreement on Investment negotiations in 1998 and the stalemate in the Doha Round, Japan's "multilateral belief" was bound to falter.

East Asian States were thus obvious targets for FTA negotiations. Japan concluded its first EPA with Singapore in 2002[17] and subsequently many of the East

[13] Ministry of Foreign Affairs of Japan, Japan's FTA Strategy (Summary), October 2002, point 1 (1), available at: http://www.mofa.go.jp/policy/economy/fta/strategy0210.html.

[14] "Bilateral free trade agreements are also important, because [. . .] they have the potential to strengthen Japan's negotiating power in, for example, the upcoming WTO negotiations." Keidanren (1999), 3.(1).

[15] "FTAs liberalize trade and investment and harmonize the regulatory systems of the countries concerned. In Japan's case, this would encourage the elimination or relaxation of various regulations, the redressing of high-cost factors, and other such structural reforms." Keidanren (2000), 2.2.c.

The Council on Economic and Fiscal Policy stated in 2002 that "relevant ministries shall promote and strengthen economic partnership including FTAs and make necessary efforts to overcome obstacles" and that "relevant ministries shall improve the climate, starting from financial year 2002, for the creation of an 'East Asia Free Business Zone,' where regimes will be harmonized and unified." Council on Economic Fiscal Policy, Basic Policies for Economic and Fiscal Policy Management and Structural Reform 2002, 21 June 2002, available (in Japanese) at: http://www.kantei.go.jp/jp/singi/keizai/tousin/020621f.html. The English summary, which does not include these sentences, is available at: http://japan.kantei.go.jp/policy/2002/0621kouzoukaikaku_e.html.

[16] The ASEAN Plus Three (China, Japan, Republic of Korea) Cooperation began in 1997; see http://www.asean.org/asean/external-relations/asean-3/item/asean-plus-three-cooperation. The Chiang Mai Initiative was agreed in 2000; see Ministry of Finance Japan, Japan's Financial Cooperation in Asia, available at: http://www.mof.go.jp/english/international_policy/financial_cooperation_in_asia/index.html. See also Sussangkarn (2010).

[17] Ministry of Foreign Affairs Japan, Japan–Singapore Economic Partnership Agreement, available at: http://www.mofa.go.jp/policy/economy/fta/singapore.html; see also Ministry of Economy, Trade and Industry, Japan–Singapore EPA, available at: http://www.meti.go.jp/policy/trade_policy/epa/epa_en/sg/. For the negotiation process, see Terada (2006).

Asian States, as we have seen in the Introduction.[18] Mexico, where the trade diversion effect caused by NAFTA and the EU–Mexico FTA was strongly felt by Japanese companies,[19] was the second partner, with which Japan concluded an EPA in 2004.[20] Following the ratification of the EPA with Mexico in November 2004, Japanese ministers responsible for economic partnership adopted a "Basic Policy towards further promotion of Economic Partnership Agreements," in which they laid down "Criteria on Identifying Countries/Regions to negotiate with on the FTAs/EPAs," according to which:

> In identifying countries or regions to negotiate with, the Government shall take the following perspectives into comprehensive consideration:
> [. . .]
> 1–1 Whether or not it will facilitate the efforts towards community building and stability and prosperity in East Asia. [. . .]
> 1–3 Whether or not it will reinforce Japan's position at multilateral negotiations, including the WTO talks, through partnership and cooperation with the related countries/regions. [. . .]
> 2–2 Whether or not it is indispensable to eliminate economic disadvantages caused by absence of EPA/FTA. [. . .]
> 2–4 Whether or not it will promote Japan's economic and social structural reforms, thereby making economic activities efficient and vibrant.[21]

[18] "In identifying countries or regions to negotiate with, the Government shall take the following perspectives into comprehensive consideration:

1. Creation of international environment beneficial to our country

1–1 Whether or not it will facilitate the efforts towards community building and stability and prosperity in East Asia." Ministry of Foreign Affairs Japan, Basic Policy towards further promotion of Economic Partnership Agreements (EPAs), approved by the Council of Ministers on the Promotion of Economic Partnership on 21 December 2004, available at: http://www.mofa.go.jp/policy/economy/fta/policy0412.html.

[19] "Mexico has concluded free trade agreements with more than 30 countries. Since Japan has not concluded such an agreement with Mexico, Japanese companies must pay tariffs averaging 16 percent, and they are placed in an uncompetitive position relative to European and U.S. companies regarding government procurements and investment. This situation is causing real losses for Japanese companies. Annual losses resulting from the lack of an FTA are estimated at 400 billion Japanese yen," Keidanren (2003). See also Japan Foreign Trade Council, Toward the Japan–Mexico Free Trade Agreement, 12 September 2002, available at: http://www.jftc.or.jp/english/news/2001_02/2001_02_1.htm. The Japan Foreign Trade Council is a private organization in which companies engaged in international trade participate.

[20] Ministry of Foreign Affairs Japan, Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership, available at: http://www.mofa.go.jp/policy/economy/fta/mexico.html; see also Ministry of Economy, Trade and Industry, Japan–Mexico EPA, available at: http://www.meti.go.jp/policy/trade_policy/epa/epa_en/mx/.

[21] Council of Ministers on the Promotion of Economic Partnership, Basic Policy towards further promotion of Economic Partnership Agreements (EPAs), 21 December 2004, available at: http://japan.kantei.go.jp/policy/index/keizairenkei/041221kettei_e.html.

On the basis of these criteria, Japan has concluded EPAs with Chile,[22] Switzerland,[23] Peru,[24] and Australia,[25] as well as many East Asian States and Mexico.

Having concluded a number of bilateral agreements, Japan has gradually been shifting its focus to multilateral or so-called mega agreements. First, it concluded an EPA with ASEAN Member States in 2008.[26] Although Japan had already signed six EPAs (Singapore, Malaysia, Philippines, Thailand, Brunei and Indonesia) and was negotiating one (Vietnam) with seven of the ASEAN Member States, a separate EPA[27] with all the ASEAN Member States was considered necessary to fully cover production networks and supply chains.[28] When negotiations for an EPA with

[22] Ministry of Foreign Affairs Japan, Agreement between Japan and the Republic of Chile for a Strategic Economic Partnership, available at: http://www.mofa.go.jp/policy/economy/fta/chile.html; see also Ministry of Economy, Trade and Industry, Japan–Chile EPA, available at: http://www.meti.go.jp/policy/trade_policy/epa/epa_en/cl/. METI's report states that "Chile has already entered into FTAs with approximately 50 countries, including the United States, Canada, the EU, EFTA, Korea and China, and it was thus important for Japan to resolve the economic disadvantage with Chile due to the non-existence of an EPA/FTA with it." Ministry of Economy, Trade and Industry, 2013 Report on Compliance by Major Trading Partners with Trade Agreements, Part III, Overview, p. 787, available at: http://www.meti.go.jp/english/report/data/gCT13_1coe.html.

[23] Ministry of Foreign Affairs Japan, Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation, available at: http://www.mofa.go.jp/policy/economy/fta/switzerland.html; see also Ministry of Economy, Trade and Industry, Japan–Switzerland EPA, available at: http://www.meti.go.jp/policy/trade_policy/epa/epa_en/ch/. METI's website maintains that "The contents of the Japan-Switzerland EPA as Japan's first EPA with a developed Western country attained a high level, thus making it possible to serve as an EPA model between advanced countries." See also Keidanren (2007).

[24] Ministry of Foreign Affairs Japan, Agreement between Japan and the Republic of Peru for an Economic Partnership, available at: http://www.mofa.go.jp/policy/economy/fta/peru.html; see also Ministry of Economy, Trade and Industry, Japan–Peru EPA, available at: http://www.meti.go.jp/policy/trade_policy/epa/epa_en/pe/.

[25] Ministry of Foreign Affairs Japan, Agreement between Japan and Australia for an Economic Partnership, available at: http://www.mofa.go.jp/policy/economy/fta/australia.html; see also Ministry of Economy, Trade and Industry, Japan–Australia EPA, available at: http://www.meti.go.jp/policy/trade_policy/epa/epa_en/au/. See also Keidanren (2006b).

[26] Ministry of Foreign Affairs Japan, Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations, available at: http://www.mofa.go.jp/mofaj/gaiko/fta/j_asean/index.html; see also Ministry of Economy, Trade and Industry, ASEAN–Japan EPA, available at: http://www.meti.go.jp/policy/trade_policy/epa/epa_en/asean/.

[27] Article 10(1) provides: "Each Party reaffirms its rights and obligations vis-à-vis another Party under the WTO Agreement and/or other agreements to which these Parties are parties."

[28] METI explains as follows: "an EPA with ASEAN as a whole would facilitate harmonization over a wide region, which would be difficult to achieve through bilateral EPAs between Japan and the ASEAN member countries, and would contribute to strengthen industrial competitiveness in a form fitting into the actual pattern of economic activities conducted broadly between Japan and the ASEAN. For example, while bilateral EPAs might not necessarily be useful where final products exported within the region are processed within ASEAN using high value-added parts manufactured in Japan, the AJCEP [Japan-ASEAN EPA] offers opportunities to enjoy preferential treatment, as cumulative rules of origin are applied in Japan and within ASEAN countries."

ASEAN Member States were being conducted, METI adopted a "Global Economic Strategy," in which it called for "an East Asia EPA," which would be an ASEAN+6 (Japan, China, Republic of Korea, India, Australia and New Zealand) agreement.[29] This proposal finally resulted in the launch of negotiations for a Regional Comprehensive Economic Partnership (RCEP) in 2012.[30] Japan, China and the Republic of Korea have also been negotiating a trilateral FTA since 2012.[31]

RCEP and the Japan–China–Korea trilateral FTA are often called mega-FTAs because of their potential economic dimensions. Japan is negotiating two other mega-FTAs: the Trans-Pacific Partnership (TPP) and the Japan–EU EPA.

Distinctive Features of Japan's EPAs

Japan distinguishes EPAs from FTAs. According to the 2013 Report on Compliance, "[i]f the narrowly defined FTAs (Free Trade Agreements) abolish goods taxes and liberalize services within the region, an EPA (Economic Partnership Agreement) covers a wider area, and is a concept that indicates the inclusion of the implementation of investment environments, strengthening of intellectual property rights, technological cooperation, and expansion of human exchanges.[32] For example, the 2011 India–Japan EPA[33] has the following chapters: (1) General Provisions; (2) Trade in Goods; (3) Rules of Origin; (4) Customs Procedures;

Ministry of Economy, Trade and Industry, 2013 Report on Compliance by Major Trading Partners with Trade Agreements, Part III, Overview, p. 782, available at: http://www.meti.go.jp/english/report/index_report.html. See also Keidanren et al. (2005).

[29] Ministry of Economy, Trade and Industry, Global Economic Strategy (Summary), April 2006, pp. 12–14, available at: http://www.meti.go.jp/english/topic/downloadfiles/GlobalEconomicStrategy%28Summary%29.pdf.

[30] Ministry of Foreign Affairs Japan, Press Release, Announcement of the Launch of Negotiations for the Regional Comprehensive Economic Partnership (RCEP), 20 November 2012, available at: http://www.mofa.go.jp/announce/announce/2012/11/1120_03.html. For the process up to the launch of negotiations, see Ministry of Economy, Trade and Industry, 2013 Report on Compliance by Major Trading Partners with Trade Agreements, III, Overview, pp. 763–765, available at: http://www.meti.go.jp/english/report/index_report.html.

[31] Ministry of Foreign Affairs Japan, Japan–China–Republic of Korea Free Trade Agreement, available at: http://www.mofa.go.jp/ecm/ep/page23e_000337.html.

[32] Ministry of Economy, Trade and Industry, 2013 Report on Compliance by Major Trading Partners with Trade Agreements, III., Overview, p. 749, available at: http://www.meti.go.jp/english/report/index_report.html. The *Report* recognizes that "[i]n recent years some FTAs include elements of EPAs such as improvement of the investment environment (i.e., United States–Korea Free Trade Agreement), therefore the distinction between EPAs and FTAs is not necessarily strict."

[33] Ministry of Foreign Affairs Japan, Comprehensive Economic Partnership Agreement between Japan and the Republic of India, available at: http://www.mofa.go.jp/policy/economy/fta/india.html; see also Ministry of Economy, Trade and Industry, Japan–India EPA, available at: http://www.meti.go.jp/policy/trade_policy/epa/epa_en/in/.

(5) Technical Regulations, Standards and Conformity Assessment Procedures, and Sanitary and Phytosanitary Measures; (6) Trade in Services; (7) Movement of Natural Persons; (8) Investment; (9) Intellectual Property; (10) Government Procurement; (11) Competition; (12) Improvement of Business Environment; (13) Cooperation; (14) Dispute Settlement; (15) Final Provisions.

"WTO Plus" Elements in Japan's EPAs

Since all of Japan's EPA partners are members of the World Trade Organization (WTO), concluding EPAs would be meaningless unless they contain "WTO plus" elements. Besides matters relating to investment,[34] which are covered by WTO agreements (GATS and TRIMs) only to a very limited extent, Japan's EPAs contain following "WTO plus" elements.[35]

Trade in Goods

Elimination of Customs Duties All of Japan's EPAs provide for elimination or reduction of customs duties with respect to products listed in an annex to the treaty. Liberalisation rates of the EPAs concluded by Japan are notoriously low in comparison to those of the FTAs concluded by other developed States (see Fig. 3).

As the WTO's *Trade Policy Review – Japan* points out, tariff liberalisation rates under Japan's EPAs are quite low because agricultural products tend to be excluded from liberalisation or subject to restricted liberalisation through tariff rate quotas.[36] These low rates are considered to be major factors of the lagging of Japan's initiatives in negotiations.[37] It is also reported that the phase-out tariff schedules by which tariffs are eliminated gradually over 10 years make the impact of EPAs small, dampening the motivation for enterprises to use EPAs.[38]

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[34] For rules relating to investment contained in Japan's EPAs, see Hamamoto and Nottage (2013), p. 347; Hamamoto (2012), p. 445; Hamamoto (2011); Hamamoto and Nottage (2011), p. 1.

[35] Nakagawa argues that there exists a "legal rivalry" in East Asia and Asia-Pacific among the legalistic approach taken by the United States, Singapore and Korea; the medium legalism taken by Japan; and the modest legalism taken by ASEAN countries (except Singapore) and China; see Nakagawa (2009), p. 74 (83–84).

[36] WTO, Trade Policy Review, Report of the Secretariat, Japan, WT/TPR/S/276 (15 January 2013), p. 15.

[37] Ministry of Economy, Trade and Industry, White Paper on International Economy and Trade 2012, Chapter 4, Section 1, p. 640, available at: http://www.meti.go.jp/english/report/data/gWT2012fe.html.

[38] Hiratsuka et al. (2011), p. 77 (103).

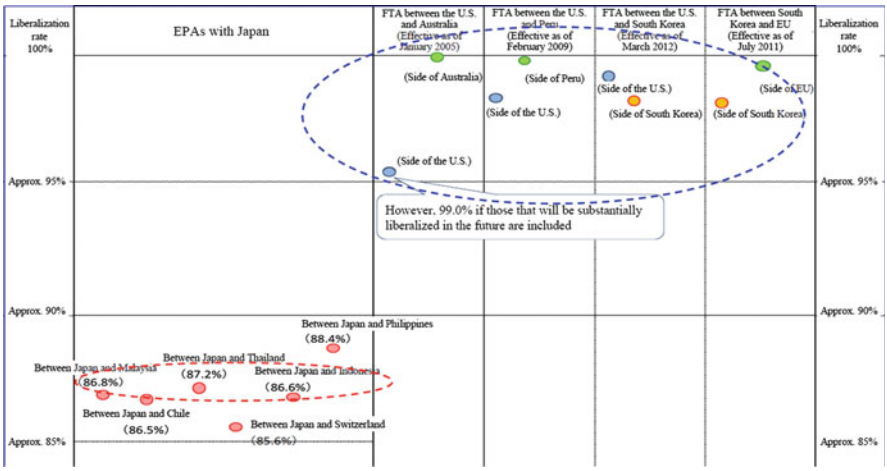

Fig. 3 Liberalisation rates in terms of trade items. *Source*: METI, *White Paper on International Economy and Trade 2012* (Chapter 4, Section 1, p. 641, available at: http://www.meti.go.jp/english/report/data/gWT2012fe.html)

Anti-dumping Measures While most of Japan's EPAs simply confirm the rights and obligations under Article VI of GATT and the Anti-dumping Agreement,[39] the Japan–India EPA sets forth an additional procedural obligation.[40] Japan and its counterpart often issue a joint statement urging restraint in imposing antidumping measures and confirming cooperation in improving and strengthening rules governing anti-dumping measures in the framework of the WTO.[41]

Technical Standards Some of Japan's EPAs contain elements going beyond the reaffirmation of rights and obligations based on WTO agreements.[42] The most

[39] E.g., Article 14(5)(b), Japan–Singapore EPA.

[40] "When the authority of a Party competent for initiating investigation under Article 5 of the Agreement on Anti-Dumping received a written application by or on behalf of its domestic industry for the initiation of the investigation in respect of a good from the other Party, the former Party shall, at least 10 working days in advance of the initiation of such investigation, notify the other Party, and provide it with the full text, of such application." Article 24 of the Japan–India EPA.

[41] E.g., Joint Statement on the occasion of the Signing of the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership, 17 September 2004, para. 12, available at: http://www.mofa.go.jp/region/latin/mexico/agreement/joint.html. Similar statements have been issued with Singapore, Chile, Thailand, Indonesia and Switzerland.

[42] Besides the Japan–Chile EPA, see EPAs with Mexico, Malaysia, Chile, ASEAN, Switzerland, Vietnam and Australia.

notable example is the Japan–Chile EPA, which provides detailed rules on transparency.[43]

Mutual Recognition of Standards Some of Japan's EPAs contain provisions on mutual recognition of standards. The Japan–Singapore EPA provides that the results of conformity assessments conducted by a body designated by the government of the exporting State in conformity with the criteria and procedures of the importing State shall be accepted by the latter.[44] The Japan–Philippines EPA and the Japan–Thailand EPA set forth a somewhat different system: they provide for the mutual acceptance of the direct accreditation and supervision of conformity assessment body in the exporting State by the government of the importing State.[45]

Trade in Services

Market Access EPAs with ASEAN Member States adopt rules similar to those contained in the General Agreement on Trade in Services (GATS),[46] but the Parties to the EPAs extend their commitments to sectors not covered by their commitments undertaken under GATS.[47] The Japan–Switzerland EPA (Articles 43 and 46), the Japan–Peru EPA (Articles 101 and 106) and the Japan–Australia EPA (Articles 9.1 and 9.3) adopt the negative-list approach and contain a provision on market

[43] Article 97: Transparency

1. Each Party shall notify electronically to the other Party's enquiry point, established under Article 10 of the TBT Agreement, at the same time it submits its notification to the WTO Secretariat in accordance with the TBT Agreement:

   (a) its proposed technical regulations and conformity assessment procedures; and
   (b) its technical regulations and conformity assessment procedures adopted to address urgent problems of safety, health, environmental protection or national security arising or threatening to arise.

[. . .]

3. The Parties shall endeavor to allow a period of at least 60 days following the notification of proposed technical regulations and conformity assessment procedures for the public and the other Party to provide written comments, except where urgent problems of safety, health, environmental protection or national security arise or threaten to arise. A Party shall give positive consideration to a reasonable request for extending the comment period.

[44] Chapter 6: Mutual Recognition (especially Article 46), Japan–Singapore EPA.

[45] Chapter 6: Mutual Recognition (especially Article 62), Japan–Thailand EPA; Chapter 6: Mutual Recognition (especially Article 60), Japan–Philippines EPA. This system applies to electronical products. See Annex 4, Japan–Thailand EPA; Annex 4, Japan–Philippines EPA.

[46] It is, however, to be noted that these EPAs provide for national treatment on the establishment of investments. See, e.g., Articles 58(g) and 59, Japan–Indonesia EPA.

[47] See, e.g., Annex 6, Japan–Philippines EPA.

access.[48] The Japan–Peru EPA includes specific provisions on telecommunication services (Chapter 8 of the EPA).

Transparency Japan's EPAs often provide for transparency obligations going beyond GATS Article III. The Japan–Brunei EPA (Article 82(2)) thus provides that each Party shall prepare, forward to the other Party and make public a list providing all existing measures inconsistent with the market access and national treatment obligations, regardless of whether the relevant sector is covered by a special commitment.[49] The Japan–Indonesia EPA (Article 85) sets forth an obligation incumbent upon each Party to promptly respond to specific questions from, and provide information to, *service suppliers* with respect to its laws and regulations.[50]

Movement of Natural Persons

Under GATS and the Annex on Movement on Natural Persons, Japan has undertaken the following horizontal commitments for three categories under Mode 4: (1) intracorporate transferees, (2) self-employed service providers and (3) business visitors.[51] All of Japan's EPAs provide for additional commitments with respect to investors[52] and natural persons of the other Party who engage in work on the basis of a personal contract with public or private organisations in its territory. Other additional commitments are made with respect to cooks,[53] instructors[54] and, most importantly, nurses and care workers.[55]

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[48] The Japan–Mexico EPA and the Japan–Chile EPA also adopt the negative-list approach (Article 97 (Mexico); Article 106 (Chile)) but contain no provision on market access. They also provide for national treatment on the establishment of investments (Article 58 (Mexico); Articles 73, 105 (i) (Chile)).

[49] See also Japan–Philippines EPA (Article 79); Japan–Thailand EPA (Article 82); Japan–India EPA (Article 66, providing for an obligation "to endeavour").

[50] See also Japan–Brunei EPA (Article 82); Japan–Philippines EPA (Article 79).

[51] See World Trade Organization and World Bank, I-TIP Services, available at: https://i-tip.wto.org/services/.

[52] With respect to Vietnam and Peru, provisions on the movement of investors are included in respective bilateral investment treaties (Article 8, Japan–Vietnam BIT; Article 11, Japan–Peru BIT), which form part of respective EPAs (Article 9(4), Japan–Vietnam EPA; Article 2(3), Japan–Peru EPA).

[53] Section 5(1)(c), Annex 7, Japan–Thailand EPA: Section 5(1)(c), Annex 7, Japan–India EPA; Section 5(1)(c), Annex 8, Japan–Peru EPA.

[54] Section 6, Annex 7, Japan–Thailand EPA (Thai classical dance, music, cuisine, boxing, language, spa service); Section 7, Annex 7, Japan–India EPA (Yoga, cuisine, Indian classical music, English language).

[55] Article 110(1)(f), Japan–Philippines EPA; Section 6, Annex 10, Japan–Indonesia EPA; Section 5, Annex 7, Japan–Vietnam EPA; Exchange of Notes between Japan and Vietnam on 17 April 2012, available at: http://www.mofa.go.jp/mofaj/gaiko/fta/j_asean/vietnam/pdfs/kango_en.pdf. Training programmes for foreign nurses and care workers based on these provisions have been the subject of heated political, social and legal debate. See, e.g., Takahashi (2012), p. 517;

Intellectual Property Rights

All of Japan's EPAs but the Japan–Mexico EPA[56] and the Japan–Brunei EPA[57] contain a chapter on intellectual property rights, which provides for "TRIPs Plus" elements. Many of them include provisions facilitating the processes for the acquisition of intellectual property rights.[58] Some EPAs protect substantive rights not covered by TRIPs, such as trademarks well known in either Party to the EPA.[59] Certain enforcement measures that are not obligatory under TRIPs are made obligatory, such as criminal procedures and penalties to be applied in some other cases than those of willful trademark counterfeiting and copyright piracy (Article 61, TRIPs).[60]

Competition

Japan's EPAs do not contain substantive regulatory provisions on competition but set forth certain procedural obligations. All of the EPAs but the Japan–Brunei EPA, which has no provision on competition, provides that each Party shall, in accordance with its laws and regulations, take measures that it considers appropriate against anticompetitive activities.[61] The Japan–Switzerland EPA stipulates most

Kanaya et al. (2012), p. 48; Ohno (2012), p. 541; Hirano et al. (2012), p. 594; Kawaguchi et al. (2012), p. 643.

[56] Article 144 of the Japan–Mexico EPA provides that the Parties "shall develop their cooperation" in the field of intellectual property.

[57] Article 97 of the Japan–Brunei EPA sets forth an obligation for either Party to "endeavour to improve its intellectual property protection system."

[58] For example, Article 11 of the Implementing Agreement between the Government of Japan and the Government of the Republic of Singapore pursuant to Article 7 of the Agreement between Japan and the Republic of Singapore for a New-age Economic Partnership provides that the Government of Singapore shall designate the Japan Patent Office as a prescribed patent office stipulated in the Patents Act of Singapore. See also Article 116, Japan–Malaysia EPA; Article 120, Japan–Philippines EPA; Article 126, Japan–Thailand EPA; Article 109, Japan–Indonesia EPA; Article 159, Japan–Chile EPA; Article 83, Japan–Vietnam EPA; Article 103, Japan–India EPA; Article 170, Japan–Peru EPA.

[59] "Each Country shall refuse or cancel the registration of a trademark, which is identical or similar to a trademark well-known in either Country as indicating the goods or services of the owner of the well-known trademark, if use of that trademark is for unfair intentions, *inter alia*, intention to gain an unfair profit or intention to cause damage to the owner of the well-known trademark whether or not such use would result in a likelihood of confusion." Article 121(2), Japan–Malaysia EPA. See also Article 114(2), Japan–Indonesia EPA; Article 106(1), Japan–India EPA. Article 132(2) of the Japan–Thailand EPA also protects trademarks well known "in any non-Party."

[60] Article 129(3), Japan–Philippines EPA (infringement of right relating to new varieties of plants, patents, utility models, industrial designs or layout-designs of integrated circuits); Article 140(1), Japan–Thailand EPA (*idem.*); Article 125(1), Japan–Switzerland EPA (*idem.* and unfair competition).

[61] E.g., Article 126, Japan–Indonesia EPA.

detailed obligations,[62] while the Japan–Vietnam EPA has only general obligations.[63]

Government Procurement

Among Japan's EPA partners, Singapore and Switzerland are parties to the Agreement on Government Procurement. It follows that any provisions on government procurement contained in EPAs concluded with other States constitute "WTO Plus" elements. Some provide substantive rules on government procurement.[64] Others impose no substantive obligation but contain some rules on government procurement such as information exchange.[65] Two EPAs are silent about government procurement.[66]

Dispute Settlement

Arbitration

All of Japan's EPAs set forth a compulsory and binding dispute settlement procedure, which is available to settle disputes between the Parties concerning the interpretation or application of the applicable EPA.[67] Specific categories of disputes are often excluded from the scope of the dispute settlement procedure. For example, the Japan–Philippines EPA provides that the dispute settlement procedure set forth in its Chapter 15 shall not apply to matters relating to cooperation in intellectual property protection (Article 119(4)), competition (Article 137), improvement of business environment (Article 143) or cooperation (Article 148). Where the EPA provides essentially identical rules to those included in relevant WTO agreements,

[62] See Articles 9 to 21 of the Implementing Agreement between the Government of Japan and the Swiss Federal Council pursuant to Article 10 of the Agreement on Free Trade and Economic Partnership between Japan and the Swiss Confederation. For example, Article 13 provides detailed obligations on the coordination of enforcement activities between Japanese and Swiss authorities.

[63] "Each Party shall, in accordance with its laws and regulations, promote competition by addressing anti-competitive activities in order to facilitate the efficient functioning of its market. Any measure taken for such purposes shall be taken in conformity with the principles of transparency, non-discrimination, and procedural fairness." Article 99, Japan–Vietnam EPA.

[64] Chapter 11, Japan–Mexico EPA; Chapter 12, Japan–Chile EPA; Article 111 - (non-discrimination), Japan–India EPA; Chapter 10, Japan–Peru EPA; Chapter 17, Japan–Australia EPA.

[65] Chapter 11, Japan–Philippines EPA; Chapter 11, Japan–Thailand EPA; Chapter 10, Japan–Indonesia EPA; Article 98, Japan–Brunei EPA; Article 106, Japan–Vietnam EPA.

[66] Japan–Malaysia EPA, Japan–ASEAN EPA.

[67] E.g., Article 107, Japan–Brunei EPA.

the dispute settlement procedure provided in the EPA is usually not applicable, presumably so as to avoid useless duplication of dispute settlement procedures.[68]

The complaining Party is required to request consultations and is entitled to institute arbitration only after a certain period of time.[69] Arbitral awards are final and binding.[70] If the complaining Party considers that the Party complained against has failed to comply with the award within the specified period of time, it may refer the matter to another arbitral tribunal. If the arbitral tribunal confirms that the Party complained against has failed to comply with the award, the complaining Party may suspend the application of concessions or other obligations under the EPA.[71]

All of Japan's EPAs provide that nothing provided in the dispute settlement provisions of the EPA shall prejudice any rights of the Parties to have recourse to dispute settlement procedures available under any other international agreement to which both Parties are parties (e.g., the WTO dispute settlement procedure).[72] Many of them have a fork-in-the-road provision, according to which once a dispute settlement procedure has been initiated under the EPA or under any other international agreement to which both Parties are parties, that procedure shall be used to the exclusion of any other procedure for that particular dispute.[73] Some EPAs provide, however, that different procedures can be used at the same time if the Parties expressly agree to do so in respect of a particular dispute.[74]

Except the Japan–Philippines EPA and the Japan-Australia EPA, Japan's EPAs set forth investor-State arbitration.[75]

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[68] Articles 67 (TBT) and 72 (SPS), Japan–Malaysia EPA; Articles 66 (SPS) and 71 (TBT), Japan–Chile EPA; Articles 42 (SPS) and 49 (TBT), Japan–ASEAN EPA; Articles 36 (SPS) and 42 (TBT), Japan–Switzerland EPA; Article 204(2) (SPS and TBT), Japan–Peru EPA; Articles 5.6 (SPS) and 6.11 (TBT), Japan–Australia EPA.

[69] E.g., Articles 150, 152 and 153, Japan–Philippines EPA.

[70] E.g., Article 150(10), Japan–Malaysia EPA.

[71] E.g., Article 146(4), (5) and (6), Japan–Indonesia EPA.

[72] E.g., Article 138(2), Japan–Switzerland EPA.

[73] E.g., Article 116(3), Japan–Vietnam EPA. Article 19.3(2)(c) of the Japan–Australia EPA provides that other dispute settlement procedures may be used where the complaining Party terminates the dispute settlement procedure that has been initiated prior to the issuance of any award.

[74] Article 139(4), Japan–Singapore EPA; Article 149(4), Japan–Philippines EPA; Article 159(4), Japan–Thailand EPA.

[75] See Hamamoto and Nottage (2013), p. 347; Hamamoto (2012), p. 445; Hamamoto (2011); Hamamoto and Nottage (2011), p. 1. Article 107(1), Japan-Singapore EPA provides that "[t]he Parties shall enter into negotiations after the entry into force of this Agreement to establish a mechanism for the settlement of an investment dispute between a Party and an investor of the other Party." No such negotiation has reportedly been held so far. The Japan-Australia EPA has a similar provision (Article 14.19(1)) but also provides that "[t]he Parties shall also conduct such a review if, following the entry into force of this Agreement, Australia enters into any multilateral or bilateral international agreement providing for a mechanism for the settlement of an investment dispute between Australia and an investor of another or the other party to that agreement, with a view to establishing an equivalent mechanism under this Agreement."

Joint Committee and Business Environment Improvement Subcommittee

Although these are not dispute settlement organs *stricto sensu*, they play important roles in settling disputes. The Joint Committee, composed of representatives of the governments of the Parties, reviews the implementation and operation of the EPA and has the power to adopt an interpretation of specified provisions.[76]

In addition to this mechanism for intergovernmental meetings, Japan's EPAs (except the Japan–Singapore EPA) establish a business environment improvement subcommittee, in which the private sector and government representatives participate.[77] Concrete issues that may turn into (or may have turned into) disputes between private actors and a Party are often discussed in the subcommittee.[78]

Conclusion: Toward Mega-FTAs

As of December 2014, Japan is simultaneously negotiating four "mega-FTAs": TPP,[79] RCEP,[80] Japan–EU EPA[81] and a Japan–China–Republic of Korea FTA.[82] In 2010, Japanese ministers responsible for economic partnership adopted a Basic Policy on Comprehensive Economic Partnerships, in which the ministers declared that the government of Japan "will take major steps forward from its present posture and promote high-level economic partnerships with major trading powers that will withstand comparison with the trend of other such relationships."[83] Japan's proactive policy on economic partnerships with other States has been reaffirmed in the

[76] E.g., Article 165, Japan–Mexico EPA. Under the Japan–Singapore EPA, a joint committee is established in each chapter. See, e.g., Article 114 (Joint Committee on ICT) or Article 117 (Joint Committee on Science and Technology), Japan–Singapore EPA.

[77] E.g., Articles 15(1)(j) and 132, Japan–Indonesia EPA.

[78] "Main Improvement Requests Made by Japan at Business Environment Improvement Subcommittee Meetings and the Outcomes Thereof", Ministry of Economy, Trade and Industry, 2013 Report on Compliance by Major Trading Partners with Trade Agreements, Part III, Chapter 8, pp. 1148–1152, available at: http://www.meti.go.jp/english/report/data/gCT13_1coe.html.

[79] Ministry of Economy, Trade and Industry, 2013 Report on Compliance by Major Trading Partners with Trade Agreements, Part III, Overview, pp. 767–771, available at: http://www.meti.go.jp/english/report/data/gCT13_1coe.html.

[80] See Ministry of Foreign Affairs Japan, Regional Comprehensive Economic Partnership (RCEP), available at: http://www.mofa.go.jp/policy/economy/page2e_000001.html.

[81] Ministry of Foreign Affairs Japan, Japan–EU Economic Partnership Agreement, available at: http://www.mofa.go.jp/policy/economy/page6e_000013.html.

[82] Ministry of Foreign Affairs Japan, Japan–China–Republic of Korea Free Trade Agreement, available at: http://www.mofa.go.jp/ecm/ep/page23e_000337.html.

[83] Ministry of Foreign Affairs Japan, Ministerial Committee on Comprehensive Economic Partnerships, Basic Policy on Comprehensive Economic Partnership, 6 November 2010, available at: http://www.mofa.go.jp/policy/economy/fta/policy20101106.html.

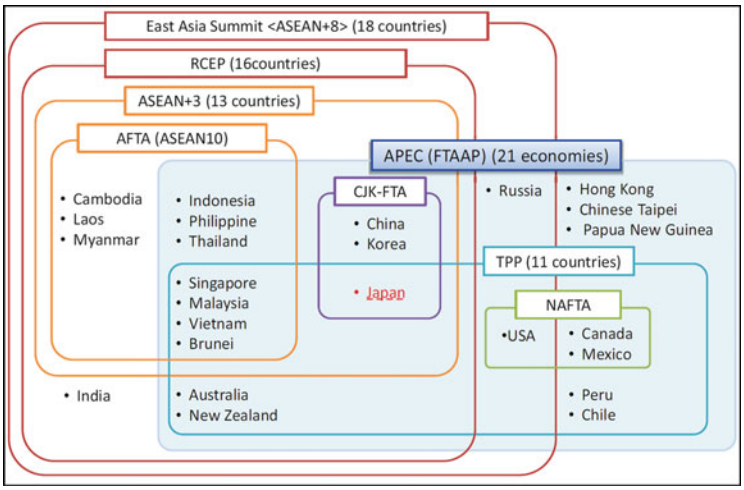

Fig. 4 Stratified Framework in Asia Pacific. *Source*: *Report on Compliance*, 2013 (Ministry of Economy, Trade and Industry, 2013 Report on Compliance by Major Trading Partners with Trade Agreements, Part III, Overview, p. 767, available at: http://www.meti.go.jp/english/report/data/gCT13_1coe.html)

Japan Revitalization Strategy (2013)[84] and its revision (2014),[85] encouraged by the business community.[86] Multilateral and multistrata negotiations for FTAs are thus taking place now in East Asia (see Fig. 4).

It is of little use to predict future courses of these negotiations here.[87] However, if these negotiations are successfully concluded, we will have to face serious problems with respect to the WTO. Possible overlapping of dispute settlement procedures have already been mentioned in the section "Dispute Settlement" above. If the dispute settlement procedures set forth in these "mega-FTAs" start to be widely utilised, will they not undermine the WTO dispute settlement system,[88] which is now becoming almost the sole *raison d'être* of this universal trade organisation in face of the mushrooming of FTAs? Furthermore, FTAs/EPAs are not universal almost by definition. What to do, then, with States that do not—or cannot—take part in these networks?[89] FTAs/EPAs may provide more problems than they settle.

[84] Japan Revitalization Strategy, adopted by the Cabinet on 14 June 2013, p. 24 and 128, available at: http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/en_saikou_jpn_hon.pdf.

[85] Japan Revitalization Strategy, revised in 2014, adopted by the Cabinet on 24 June 2014, p. 7, available at: http://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/honbunEN.pdf.

[86] Keidanren et al. (2014); Joint Statement by BUSINESSEUROPE and Keidanren (2013). Keidanren issued a similar statement on RCEP and the Japan–China–Republic of Korea FTA on 7 May 2013, available (in Japanese) at: http://www.keidanren.or.jp/policy/2013/039.html.

[87] For TPP negotiations, see Lim et al. (2012); Voon (2013).

[88] Kawase (2007).

[89] Nakagawa (2014), p. 1 (3–4) (in Japanese).

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Aggressive Regionalism with the First Partner in the Far East: The Korea-EU FTA and Its Implications for the Future

Won-Mog Choi

Backgrounds of the Korea-EU FTA

Certain supra-national factors have encouraged deeper EU-Korea relations. In Korea, the effective collapse in the 1990s of North Korea as a credible competitor and increasing economic ties with the Chinese economy empowered a wave of anti-Americanism.[1] No longer a Cold War frontline State adjoining a hostile China, Soviet Union, and North Korea, South Korea could entertain new autonomy from the United States, and relations with the EU served this purpose. Europe, too, could look further afield as the collapse of the Union of Soviet Socialist Republics also relaxed its dependence on the US power.[2] Asia's rapid growth, with Korea as one of its leading economies, created new possibilities for at least a deeper trading relationship. This thinking, throughout Asia, culminated in the establishment of ASEM (Asia Europe Meeting) in 1996.[3] It is obvious that the EU cannot achieve an ASEM FTA because of Asian intransigence; it has begun to seek individual partners in Asia.[4] In this general environment, both the EU and Korea have recently turned to FTAs as a centerpiece of foreign policy.

The word "regionalism" (as opposed to "multilateralism") in this paper is used to indicate a policy orientation of pursuing active FTA negotiations.

[1] Hwang (2003), p. 60.

[2] Rosato (2011), p. 45.

[3] Connors et al. (2004), p. 71, ch. 7.

[4] Kelly (2012), pp. 101 (106).

W.-M. Choi (✉)
Ewha Womans University Law School, 52, Ewhayeodae-gil, Seodaemun-gu, Seoul 120-750, South Korea
e-mail: wmchoi@ewha.ac.kr

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The EU's decision to launch negotiations on such FTAs with Asian economies is based on solid economic criteria with the objective of enhancing market access for European companies in the highly dynamic and competitive markets of Asia.[5] In late 2006, Peter Mandelson, the EU trade commissioner, announced a new EU policy on free trade agreements. This is contained in the European Commission's Global Europe Communication.[6] The core of this new chapter in EU trade policy is planned with FTAs with three Asian partners, India, ASEAN and Korea. The Commission secured a mandate for new negotiations from the EU Council in April 2007.[7] These FTAs will also represent the EU's new FTA policy, centered on negotiations with three Asian partners, that is supposed to export the "EU regulatory model", especially on non-trade issues.[8] Korea was designated a priority FTA partner for the EU in this trade policy strategy because Korea had shown a keen interest in having high-level FTA negotiations and Korea had concluded an FTA with the United States.[9] Also, an FTA with Korea could be considered a stepping-stone to one with Japan.

From the EU's perspective, an FTA with Korea should be desirable. Despite strong EU-Korea trade relations, a structural EU deficit has been present since the late 1990s. To an extent this can be attributed to the difficulties EU companies and products have in entering and operating in the Korean market, as the Korean requirements for products and services are often different from those of the EU, thus creating barriers to trade. So it is in the interests of the EU to facilitate bilateral trade by engaging in strong expert level co-operation to remove the existing trade barriers—especially with regard to the application and adoption of EU standards to this rapidly emerging market.[10] The EU also stands to benefit from having a more open Korean market, especially if it can persuade Korea to agree to its Eco labelling and CE standards, since some EU exporters complain about problems in the Korean market in relation to these issues.[11]

Korea too has sought FTAs, beginning first with small economies such as Chile and Singapore, and moving now toward its larger "strategic partners", the United States and EU. The European Union is Korea's second-largest goods trading partner, with a total of two-way goods trade in 2008 reaching $98.4 billion. EU exports to Korea reached nearly $40 billion (approximately $1.6 billion more than the United States exported to Korea), while it imported $58.4 billion worth of goods from Korea. Korea is the EU's fourth largest non-European trade partner while the

[5] European Commission (Trade) (2011), p. 3.

[6] European Commission, Communication from the Commission to the Council, the European Parliament, and the Committee of the Regions Global Europe: competing in the world: a contribution to the EU's growth and jobs strategy. COM(2006)567 final; Commission Staff Working Document, Annex to the Communication of the Commission, SEC/2006/1230.

[7] Sally (2007), p. 5.

[8] Sally (2007), p. 2.

[9] Song (2011).

[10] Kim (2005).

[11] Kim (2005).

EU is Korea's second largest trade partner next to China. The EU is also the largest foreign investor in Korea with $40.4 billion invested as of the end of 2006. If implemented, the free trade pact would be the largest for Korea, surpassing the agreement signed with the US that is then still under legislative review.[12] A free trade agreement with the EU could provide Asia's third-largest economy with a commercial bridge to Europe.

These observations give a clear indication that future expansion of trade between the two partners would benefit them greatly since they already have such large markets for each other's products. The main Korean exports to the EU included ITA equipment, transport material, shipbuilding, and power generating machinery. The primary EU exports to Korea included power generating machinery, chemicals, transport material and ITA equipment. The two partners have a rather complementary industrial structure than a competitive one, which should have increased bilateral trade volume much more than the realised level of trade.[13] High fluctuations in the annual trade volumes between Korea and the EU and heavy dependency on a few major items may support the situation of the undertraded, as well.[14] Thus, there is a great scope for furthering trade between the two partners. An FTA that allows major concessions on Korean exports to the EU would increase domestic production. Also, under an FTA, the EU enlargement means a bigger market for Korea's exports.[15]

To Korea, the Free Trade Agreement between Korea and the EU (Korea-EU FTA[16]) means not only increasing access to the European market. On top of this economic value of the FTA, the Korea-EU FTA had a clear political value to Korean politicians and bureaucrats who were struggling with the task of ratifying the Korea-US FTA.[17] It was expected that the Korea-EU FTA negotiations will be

[12] Song (2011).

[13] Kim (2005).

[14] Kim (2005).

[15] Kim (2005).

[16] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, [2011] OJ L 127/1. After the negotiation was launched in May 2007, eight formal rounds of talks were held before the agreement was signed on 6 October 2010. The agreement has been provisionally applied since 1 July 2011.

[17] The Korea-US FTA was lengthy to negotiate and ratify. It was signed in June 2007, when Korea-EU FTA negotiations commenced. However, it underwent modifications to ensure US Congressional support (mainly regarding environmental and labor provisions and safeguards on automobile exports) and was ratified in October 2011. The Korea-EU FTA also experienced a lengthy ratification process. It was signed in late 2009 and after clarification of a safeguard clause (also on Korean car exports), and delays in the European Parliament, it was ratified in February 2011 and provisionally implemented in July. Unsurprisingly, given that the EU and US use FTAs to further the liberalisation the coverage of Korea-EU and Korea-US FTA is similar. Differences of trade in goods lie in the better access for foodstuffs (processed foods) gained by the EU, and access for vegetables and meat negotiated by the US, which is explained by the larger respective trade volume in exports of these products. Song (2011).

able to be progressed much faster than the Korea-US FTA negotiations if the negotiation starts. This is mainly because Korea already signed an FTA with the EFTA member States and because the EU also does not want to open its agricultural market too much. By putting into force a competing FTA with Europe, Seoul wanted to exercise pressure to Capitol Hill as well as Korean Congress towards ratification of the Korea-US FTA. That is, to Korea, successful conclusion of the FTA with Brussels at that juncture would enable Seoul to exercise certain political pressure on Washington that if their congress fails in giving approval to the Korea-US FTA, their opponent in Brussels will have better access to the Korean and eventually the Northeast Asian market, which will give Europe the upper hand in the global trading bloc game. This is also one of the reasons why the Korean government allowed the language of the Korea-EU FTA to be modelled on the Korea-US FTA that was then under negotiation. The Korea-EU FTA follows on the establishment of the Korea-EU "strategic partnership" in 2009 and the "Framework Agreement" in 2010.[18]

Korea-EU FTA: Main Features and Novel Elements

Bilateral trade between Korea and the EU has posed many problems. Both countries dealt with most of those issues when they negotiated their FTA, which comprises 15 chapters,[19] 3 protocols, and 8 annexes. Major challenges they faced included how to deal with automobile trade imbalance, non-tariff barriers, problems of trade in pharmaceutical and medical devices, the protection of geographical indications, outward processing exception for the Kaesung Industrial Complex project,[20] and how to develop a long-term strategic partnership between the two sides linking trade relationship with other areas such as environment, labour, competition, and cultural exchanges.

Market Access Problem

The Korea-EU FTA liberalises several large markets for each player—high-end automobiles, chemicals, and precision machine tools for the EU, and mid-range autos, electronics, and ships for Korea. Unsurprisingly, agriculture remains broadly protected, and services remain less open than goods (especially for sensitive

[18] European Union (2010).

[19] These include chapters on trade in goods/services/IPRs, agriculture, textiles, pharmaceutical products, rules of origin, customs administration, SPS, TBT, trade remedies, investment, electronic commerce, competition, government procurement, labour, environment, and transparency.

[20] See on the project infra fn. 46.

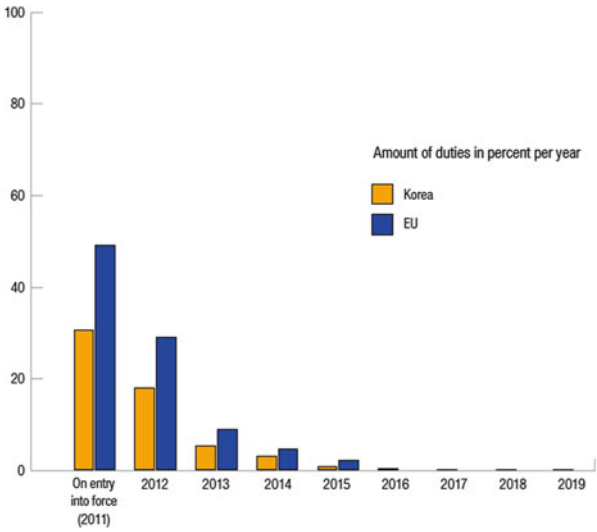

Fig. 1 Tariff reduction and elimination schedule of the Korea-EU FTA

cultural products such as film). The majority of customs duties on goods were removed when the Korea-EU FTA entered into force. Practically all customs duties on industrial goods are scheduled to be fully removed within the first 5 years of application of the FTA (see Fig. 1). For both industrial and agricultural products, Korea and the EU will eliminate 98.7 % of duties in trade value within 5 years of the entry into force of the FTA. For a limited number of highly sensitive agricultural and fisheries products the transitional periods will be longer than 7 years. Rice and certain other agricultural products, of which the EU is not a significant exporter, are excluded from Korea's tariff elimination commitment of the Agreement.

To EU, machinery and appliances represent the largest sector for duty saving. 70 % of those duties were removed as of the day of entry into force of the Agreement. The chemical sector is the second largest beneficiary.

Imbalance in Automobile Trade

The largest problem in market access between Korea and the EU involved an imbalance in automobile trade. Before the FTA negotiations, Korea exported approximately 700,000 automobiles to the EU, and the EU exported approximately 20,000 automobiles to Korea.[21] Tariff barriers were not a cause of this imbalance, given the higher tariff rate (10 %) imposed by the EU on imported passenger cars compared to the lower rate (8 %) imposed by Korea. Therefore, it was not difficult

[21] In 2006, Korea exported 741,740 vehicles (US$9.1 billion) to the EU while the export volume of the EU to Korea was only 23,629 (US$ 2 billion) vehicles. Autodaily, Impact of Korea-EU FTA on Automobile Industry, 9 May 2007.

for the two sides to agree to eliminate their tariffs in equal format: They agreed to eliminate tariffs in 3 (for passenger cars above 1,500 cc) or 5 years (for cars below 1,500 cc), depending on engine size. With respect to trucks, Korea committed to eliminate its 10 % tariffs on most trucks immediately, and the EU committed to eliminate its 22 % truck tariffs over 3 or 5 years, depending on the specific type.

Non-tariff issues, on the other hand, posed one of the hottest debates throughout the process of negotiation. It was because the automobile tax system and technical regulations on the side of Korea were allegedly contributing to this trade imbalance. Tax rates of Korea's Special Consumption Tax and Annual Vehicle Tax imposed on sales of cars were set disproportionately in 3 and 5 stages respectively based on engine size. This cascading set of taxes disproportionately affected some European automakers who exported larger-sized engines to Korea, not to mention US automakers exporting large vehicles.

Concerning technical regulations in automobile trade, the EU has been demanding Korea to accept 102 out of a list of 120 European car safety standards. Basically, Brussels wanted Seoul to cut regulations for European carmakers by applying international standards instead of different domestic rules. But Seoul has reiterated its stance that it cannot accept the EU demand. Seoul's latest proposal for the issue includes a quota and a grace period for cars imported from the European carmakers. The negotiations moved at a snail's pace as both sides remained reluctant to accept each other's demand on auto trade and auto-related technical standards.

To deal with this deal-breaking problem, both Parties managed to invent a relatively simple legislative solution which is to accord to the products originating in each other's territories "no less favourable treatment than that accorded to the like products originating in any non-party to the FTA".[22] This means that all of tax and emission-related commitments that Korea has made toward the US in the preceding Korea-US FTA negotiation are equally accorded to EU carmakers through this MFN treatment clause in the Korea-EU FTA.

In the Korea-US FTA negotiation, Korea committed to eliminate many aspects of the discriminatory effect of its current automotive tax system. Korea agreed to amend its Special Consumption Tax and Annual Vehicle Tax and reduce the Special Consumption Tax from 3 to 2 stages and the Annual Vehicle Tax from 5 to 3 stages.[23] The Korean government also agreed not to adopt any new taxes based on vehicle engine displacement or modify an existing tax to increase the disparity in tax rates between categories of vehicles,[24] and it stated that it would provide an 80 % refund on its Subway Bond Tax for purchasers of new automobiles, which was another tax considered to be a barrier to automobile imports.[25] To implement these reforms, Korea had to amend several of its key tax laws.

[22] Article 5, Annex 2-C Korea-EU FTA.

[23] Article 2.12.1 and 2.12.2 of Korea-US FTA. The signed text of the Korea-US FTA is available at: http://www.fta.go.kr.

[24] Article 2.12.3 Korea-US FTA.

[25] Article 2.12.4 Korea-US FTA.

Concerning technical regulations for vehicles, Korea also made several commitments during the Korea-US FTA negotiation. In particular, the Korean government agreed not to apply emission standards that were higher than the standards used by California and agreed to use lower standards than the California standards for small-volume manufacturers. Manufacturers who sell fewer than 4,500 vehicles a year in Korea will be exempt from any of these emission standards.[26] Most of the benefit arising from this exemption will fall upon US car makers who have been selling their cars below the 4,500 threshold in the Korean market. Now, this benefit is equally applicable for EU cars on an MFN basis as long as they satisfy the threshold.

In addition to this Korea-US FTA benchmarking approach, addressing the issue of unique Korean automotive safety standards, the Korea-EU FTA contains provisions committing Korea to harmonise over time some of its standards to the UN ECE (Economic Commission for Europe) Regulations, an international and European standard set by a relevant international standard-setting body.[27] In comparison, in the Korea-US FTA the United States obtained an exemption that allows each US automaker to sell up to 6,500 vehicles a year in Korea built to US safety standards (and which do not need to be modified for Korea).

The Korea-EU FTA also established a Working Group on Motor Vehicles and Parts to address regulatory issues that may arise and review potential new regulations affecting auto manufacturers in each economy. In this provision, both countries must also be involved in discussing progress in the implementation of the harmonisation process.[28]

In short, the Korea-EU FTA (together with the Korea-US FTA) has stronger and more comprehensive provisions related to the automotive sector in the areas of taxes, tariffs, standards, and technical barriers than any other trade agreement. Compliance with these FTA provisions is guaranteed by fast-track dispute settlement mechanism that reduces times for consultation, the issuance of a panel report, and implementation of the panel ruling to a substantial degree.[29]

Unethical Business Practices in Pharmaceutical Products and Medical Devices

The Korea-EU FTA negotiations about pharmaceutical issues are another example of these two sides attempting to solve mutual problems that may touch on even deeper sovereign issues. Taking the so-called equivalence approach to the Korea-US FTA, both sides agreed to adopt in the Korea-EU FTA the outcome of a series of

[26] Confirming Letter of Specific Autos Regulatory Issues, Korea-US FTA.

[27] Article 2 Annex 2-C, Korea-EU FTA.

[28] Article 9 Annex 2-C, Korea-EU FTA.

[29] Article 10 Annex 2-C, Korea-EU FTA.

tough negotiations between Korea and the United States produced in the Korea-US FTA negotiations.

As a consequence, both sides agreed to take measures to prohibit unethical business practices in the trade of pharmaceuticals and medical devices. Western multinational pharmaceutical companies were allegedly troubled by the close business relationship between Korean pharmaceutical companies and medical facilities/people, such as hospitals and doctors. This relationship is often misused as a tool for improper inducements for purchasing and prescribing local drugs or medical devices. Rebates and bribery created unfair competitive edge for local pharmaceuticals and medical devices against imported ones. On the other hand, Korean drug companies claimed that foreign multinational manufacturers were lobbying Korean medical people in countries such as China, where EU anti-trust laws are not effective.[30] As a result of a successful compromise, Korea and EU agreed to prohibit unethical business practices nationally and globally in their FTA as follows[31]:

1. Each Party shall adopt or maintain appropriate measures to prohibit improper inducements by manufacturers and suppliers of pharmaceutical products or medical devices to health care professionals or institutions for the listing, purchasing, or prescribing of pharmaceutical products and medical devices eligible for reimbursement under health care programs.
2. Each Party shall adopt or maintain appropriate penalties and procedures to enforce the measures that it adopts or maintains in conformity with paragraph 1.
3. Each Party shall bring to the other Party's attention any improper inducements conducted by its manufacturers of pharmaceutical products or medical devices.[32]

Protection of IPRs

The protection of intellectual property rights (IPRs) was another challenge faced during the Korea-EU FTA negotiations. To form a strategic partnership in the twenty-first century, Korea and the EU need to converge their systems of protecting intellectual property rights. Because Korea was less developed in its IPR protection level than the EU, Korea was required to introduce several key elements of the European IPR protection system into its own legal system.

First, the minimum term of protection of copyrighted works was agreed to be 70 years (from 50 years under the TRIPs) after the author's death.[33] The term of

[30] See Choi (2009), p. 595, (part II.B).

[31] See Article 1(e) of Annex 2-D Korea-EU FTA ("the Parties confirm their shared principles with respect to the importance of [. . .] ethical practices by manufacturers and suppliers of pharmaceutical products and medical devices and by health care providers on a global basis in order to achieve open, transparent, accountable, and non-discriminatory health care decision-making").

[32] Annex 2-D Korea-EU FTA, Article 4.

[33] Article 10.6 Korea-EU FTA.

copyright protection of broadcasting organisations was extended to 50 years (from 20 years under the TRIPs) after the first transmission of a broadcast on the condition that this extension is subject to 2 years of a transitional period of implementation.[34]

Second, traditionally, the scope of protection of copyrights in Korea has been confined to those who wrote songs and lyrics. The EU requested Korea to introduce a system in which cafes and restaurants playing phonograms pay royalties to music producers and performers. Accepting this request, Korea extended the scope of protection to performers and producers of phonograms. The Korea-EU FTA provides performers with the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation.[35] Also, according to the FTA, Korea must establish in its legislation that the single equitable remuneration can be claimed from the user by performers or producers of phonograms, or by both.[36] Korea needed to enact legislation that sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration in the absence of an agreement between performers and producers of phonograms.

Third, whether Korea should protect artists' resale right[37] in works of art was much in debate during the FTA negotiation. It was hotly debated in Korea whether or not this new system if introduced will encourage artistic activities and discourage resale business in Korea. No consensus on this matter could be formed inside Korean artist and resellers' societies, and Korea and the EU could only agree to exchange further views and enter into consultations to review the desirability and feasibility of introducing an artists' resale right in Korea within 2 years of the entry into force of the FTA.[38]

Fourth, enhanced protection of geographical indications (GIs) in the Korea-EU FTA offers one of the greatest benefits of the FTA to the European side. Recognising that each other's relevant law meets the elements required to protect legitimate GIs, the Korea-EU FTA attached a list of GIs in annexes. Also, the establishment of a Working Group on Geographical Indications was intended to facilitate procedures to add further GIs to the list. Under the TRIPS Agreement, any protection for GIs is generally conditioned upon "misleading the public" or "unfair competition", and additional protection is accorded to geographical indications for wines and spirits in that such GIs are protected even where the true origin of the goods is indicated or the GI is used in translation or accompanied by expressions

[34] Articles 10.7 and 10.14 Korea-EU FTA.

[35] Article 10.9.2 Korea-EU FTA.

[36] Article 10.9.3 Korea-EU FTA.

[37] It creates a right under European Union law for artists to receive royalties on their works when these are resold. Resellers will collect the resale royalty due to the artists from buyers of lots with a hammer price in excess of certain price. Any purchaser of a lot to which the Artist's Resale Right applies will be charged an amount equal to the applicable resale royalty, which will be added to the relevant invoice.

[38] Article 10.10 Korea-EU FTA.

Table 1 Korea-EU FTA—number of protected GIs listed

	Agricultural products	Wine	Spirit	Total
Korea	63	0	1	64
EU	60	80	22	162

such as "kind", "type", "style", "imitation" or the like.[39] In comparison, the Korea-EU FTA expands this additional protection to any GIs, i.e. not only to GIs for wines and spirits, but also to GIs in general,[40] and as a result, protection of any Korea or EU's GI is accorded even where the true origin of the goods is indicated or the GI is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.

This approach of strengthening GI protections in the Korea-EU FTA extends over the relationship between GIs and trademarks. The FTA clarifies the prevalence of GIs over any conflicting trademarks by prescribing that if an application for registration of a trademark is submitted after the date of application for protection of a GI, the registration of the trademark must be refused or invalidated.[41]

As a matter of fact, such indications as "Champaign" and "Cognac" are used as customary terms indicating kinds of goods in Korea. Nonetheless, because those indications are included in the list of GIs in Korea-EU FTA, Korea is required to prohibit any unauthorised use of such terms as well as use of expressions such as "kind", "type", "style", "imitation" or the like in association with such terms. On top of that, there are listed far more numbers of European GIs than Korean GIs in the annex (see Table 1). It is obvious that GI provisions in Korea-EU FTA give more benefits to the EU side and pose implementation challenges to the Korean side.

Fifth, protection of designs is another aspect in which a strong WTO plus approach is taken in the Korea-EU FTA. Where the TRIPs Agreement protects "industrial" design, the Korea-EU FTA does not limit the scope of protection to only industrial designs as long as they are registered.[42] Also, the scope of protection covers unregistered appearance of a product if the contested use results from copying the unregistered appearance of such product.[43] These designs will be protected not only from illegitimate "making, selling and importing" (as protected under the TRIPs Agreement), but also from "offering for sale", "exporting" and "using" in Korea-EU FTA and the term of protection for registered designs and appearances is 15 (compared to 10 years in TRIPs) and 3 years respectively.[44]

[39] Article 23.1 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), 1869 U.N.T.S. 299.

[40] Article 10.21.1 Korea-EU FTA.

[41] Article 10.23 Korea-EU FTA.

[42] Compare Section 4 of TRIPS with Sub-section D of Chapter 10 of Korea-EU FTA.

[43] Article 10.29, Korea-EU FTA.

[44] Article 10.30, Korea-EU FTA.

Outward Processing Exception for the Kaesung Industrial Complex Problem

The Kaesung Industrial Complex[45] is a symbol of peace-keeping endeavours in the Korean Peninsula because it was built as a result of joint economic cooperation agreements between South and North Korea. How to vitalise the project in the era of FTAs is of great concern to Korea and to the world. One way is for FTA partners of South Korea to recognise certain goods produced in the Complex as goods originating in South Korea. This will certainly help to make the joint project profitable and to induce more investment into the project. How to acquire this recognition from FTA partners always remains as a top priority task to Seoul.

In general, FTAs require signatory parties to produce the originating goods they trade with their partners inside their own territory. Notwithstanding this principle of territoriality, countries can agree to allow production outside a country if the material is exported from that country and the finished product is re-imported into the country. These provisions are called the outward processing exception.

The Korea-Singapore FTA[46] includes this exception. In this provision, this type of production is permitted if the total value of non-originating inputs does not exceed 40 % of the value of the goods and the value of originating materials is not less than 45 % of the value of the final goods.[47]

In the Korea-EFTA FTA,[48] added value caused by outside production must not exceed 40 % of the final product's value, and the value of originating materials must be more than 60 % of the total value of materials used in the production.[49]

These measures enable certain goods produced in Kaesung to acquire tariff exemption benefits under such FTAs. The approach taken in the Korea-US FTA and the Korea-EU FTA is more cautious and even hortatory. As a result of recommendations by the Committee on Outward Processing Zones on the Korean Peninsula, geographical areas will be identified as outward processing zones, and specific criteria for the eligibility and maximum threshold for value addition will be established.[50] Although the Korea-EU FTA does not contain any concrete outward

[45] Construction of the Complex started in June 2003, and in August 2003 after North and South Korea ratified four tax and accountancy agreements to support investment. It is located inside North Korean territory, 10 km (6 miles) north of the Korean Demilitarized Zone, an hour's drive from Seoul, with direct road and rail access to South Korea. The park allows South Korean companies to employ cheap labour that is educated, skilled, and fluent in Korean, whilst providing North Korea with an important source of foreign currency. As of April 2013, 123 South Korean companies were employing approximately 53,000 DPRK workers and 800 ROK staff. Their wages, totalling some $90 million each year, had been paid directly to the North Korean government.

[46] Signed in August 2005, entered into force in March 2006.

[47] Paragraph 1, Article 4.4, Korea-Singapore FTA.

[48] Signed in December 2005, entered into force in September 2006.

[49] Article 13 and Appendix 4, Annex I Korea-EFTA FTA.

[50] Annex 22-B Korea-US FTA; Annex IV, Protocol of Rules of Origin Korea-EU FTA.

processing exception rules (unlike previous FTAs), it does establish a legal basis for further discussions on a regular basis.

Labour and Environment

The Korea-EU FTA reaffirms both sides' commitments to promoting the development of international trade in such a way as to contribute to the objective of sustainable development and it recognises that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development.[51] Recognising the right of each party to establish its own levels of environmental and labour protection, each party must seek to ensure that its laws and policies provide for and encourage high levels of environmental and labour protection, consistent with the internationally recognised standards or agreements.[52] In this light, the Korea-EU FTA obliges its parties to promote and realise ILO fundamental labour rights and to effectively implement the ILO Conventions.[53]

Also, Korea and the EU committed to the effective implementation in their laws and practices of the multilateral environmental agreements to which they are party and if they fail to effectively enforce their respective environmental and labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade or investment between the parties, there will arise an FTA violation. Parties to the FTA also committed to the facilitation and promotion of trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods, including through addressing related non-tariff barriers.[54]

In the case of disputes related to labour and environmental issues in the Korea-EU FTA, the dispute should be resolved firstly by consultation between the governments.[55] If the dispute is still not resolved after the government consultation, a party may request the Panel of Experts[56] to resolve the dispute rather than resorting to the binding dispute settlement mechanism under Chapter 14 of the FTA. A Domestic Advisory Group, although it cannot serve as a dispute settlement mechanism, will be established to encourage the participation of civil society during the implementation

[51] Article 13.1 Korea-EU FTA.

[52] Article 13.3 Korea-EU FTA.

[53] Article 13.4 Korea-EU FTA.

[54] Articles 13.5 and 13.6.2 Korea-EU FTA.

[55] Article 13.12 of the Korea-EU FTA provides for designating contact point and establishing the Committee on Trade and Sustainable Development, which comprises senior officials from within the administration of the Parties.

[56] The decision of the panel of experts is not legally binding: the Parties are required to "make their best efforts to accommodate advice or recommendations of the Panel of Experts." Article 13.15.2 Korea-EU FTA.

process of Chapter 13 of the FTA. Members of Domestic Advisory Groups of each party will meet at a Civil Society Forum to conduct a dialogue encompassing development aspects of trade relations between the parties.[57]

Competition

The Korea-EU FTA dedicates its Chapter 11 to the competition issue and requires Korea and the EU to undertake to apply their respective competition laws to prevent the benefits of the trade liberalisation process in goods, services and establishment from being removed or eliminated by anti-competitive business practices or activities, and to remedy or remove distortions of competition caused by subsidies.[58] Korea and EU committed to apply their respective competition laws in a transparent, timely, and non-discriminatory manner and to make available to the requesting party public information concerning competition law enforcement activities and legislation.[59] Public enterprises and State monopolies are also subject to basic disciplines.[60]

It is noteworthy that the FTA contains enforcement rules that go beyond the "Competition Agreement" between Korea and the European Community of 2009.[61] Accordingly, any questions arising from the interpretation or application of Chapter 11 of the FTA are subject to "prompt discussion" in consultation procedures between Korea and the EU at the request of either party.[62] Furthermore, as far as the competition matter concerns distortions of competition caused by subsidies, transparency and constant monitoring and review mechanism applies and the matter may be referred to the Trade Committee.[63]

Cultural Cooperation

During the Korea-EU FTA negotiations, both sides agreed to endeavour to enhance their cooperation in the field of cultural exchanges by including a Protocol on Cultural Cooperation as an integral part of the Agreement. This protocol aims to

[57] Article 13.1, Korea-EU FTA.

[58] Article 11.1 Korea-EU FTA.

[59] Article 11.3 Korea-EU FTA.

[60] Articles 11.4 and 11.5 Korea-EU FTA.

[61] The Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities signed on 23 May 2009, [2009] OJ L 202/36.

[62] Article 11.7 Korea-EU FTA.

[63] Articles 11.12 and 11.14 Korea-EU FTA.

improve the conditions governing their exchanges of cultural activities, goods and services and redress the structural imbalances and asymmetrical patterns, which may exist in exchanges.[64]

To achieve this goal, the protocol fosters their capacities to determine and develop their cultural policies, developing their cultural industries and enhances exchange opportunities for cultural goods and services of the parties including through entitlement to benefit from schemes for the promotion of local/regional cultural content.[65] In other words, the co-production of audio-visual works between Korea and the EU is encouraged and financially supported by the governments. The protocol elaborates eligibility conditions for the support, sets an initial 3-year period of duration and renewals, and mentions the suspension of the entitlement to benefit upon modification of the relevant legislation.[66]

The protocol also facilitates the entry into and temporary stay of artists, actors, technicians and other cultural professionals and practitioners from the other party, and organises festivals, seminars and similar initiatives. Furthermore, it encourages joint productions in the fields of performing arts, and encourages protection of cultural heritage sites and historic monuments.[67]

As an organisation to monitor these activities, the protocol establishes the Committee on Cultural Co-operation, comprising senior officials from within the administration of each party who have expertise and experience in cultural matters and practices, and a Domestic Advisory Group on cultural cooperation, comprised of cultural and audio-visual representatives, to be consulted on issues related to the implementation of the Protocol. A party may request consultations with the other party in the Committee on Cultural Co-operation regarding any matter of mutual interest arising under the Protocol and that the Committee may seek the advice of Domestic Advisory Groups of both parties.[68]

Considering this special circumstance, the Committee on Cultural Co-operation, which will be established by the Protocol on Cultural Co-operation, will play the role of the Trade Committee for disputes relating to this Protocol. The Korea-EU FTA also stipulates that arbitrators shall be selected among those who have knowledge and experience on the subject matter of this Protocol.[69]

In addition, the so-called “cross-retaliation” is not allowed in case of disputes related to this Protocol. In other words, in selecting obligations to suspend in a dispute arising under this Protocol, the complaining party may only suspend

[64] Article 1.3, Protocol on Cultural Co-operation, Korea-EU FTA.

[65] Article 5, Protocol on Cultural Co-operation, Korea-EU FTA.

[66] Protocol on Cultural Co-operation, Korea-EU FTA.

[67] Articles 4, 6, 8, 10, Protocol on Cultural Co-operation, Korea-EU FTA.

[68] Article 3, Protocol on Cultural Co-operation, Korea-EU FTA.

[69] Article 3 BIS, Protocol on Cultural Co-operation, Korea-EU FTA.

obligations arising from this Protocol, and in selecting obligations to suspend in disputes other than those arising under this Protocol, the complaining party may not suspend obligations arising from this Protocol.[70]

Analysis and Implications

High-Level Liberalisation

The Korea-EU FTA is the most comprehensive and high-level free trade agreement ever negotiated by both parties. Import duties are to be eliminated on nearly all products and there is far-reaching liberalisation of trade in services (including in telecommunications, environmental services, shipping, financial and legal services) covering all modes of supply.[71]

Given that the EU is a more advanced and liberal economy than Korea, the degree of liberalisation of the Korea-EU FTA was largely dependent on Korea's position in the negotiations. Although Korean export industries have been doing well, the Korean economy has stagnated at a 4 % growth rate, and the unemployment rate has increased to 3.7 %.[72] This situation shows that Korea's economic problems have an internal, not an external, source. Korea understood that its economic problems were internal, and it decided to eliminate domestic inefficiencies by forcing its system to compete with such large economies as the EU and the US, the most efficient economies in the world.[73] Although the Korean government claims, for political reasons, that the largest benefit of the Korea-EU FTA comes from increased market access for its automobile and textile exports, it is counting on FTAs, including the Korea-EU FTA, to increase the efficiency of its economy by allowing high-level liberalisation.

In retrospect, some of Korea's FTAs had serious problems in their level of liberalisation and consistency with WTO rules. For example, in the Korea-

[70] Article 3 BIS, Protocol on Cultural Co-operation, Korea-EU FTA.

[71] Both the Korea-US and the Korea-EU FTA afford extensive liberalization of services, especially financial, accounting, telecommunications and legal services. Differences in service coverage lie in the fact that the Korea-EU FTA incorporates environmental services (the Korea-US FTA does not), whilst the Korea-US FTA includes audiovisual services and the Korea-EU FTA does not include health or audiovisual services at the EU's request.

[72] Growth rates of the Korean economy were 4.6 % (2004), 4.0 % (2005), 5.2 % (2006), 5.1 % (2007) and 2.2 % (2008) compared to 7.2 % (2002), 8.5 % (2000), and 9.5 % (1999). Unemployment rates were 3.7 % (2004, 2005), 3.5 % (2006) and 3.2 % (2007, 2008); source: Bank of Korea, Economic Statistics System, available at: http://ecos.bok.or.kr/.

[73] See Choi (2009), p. 595 (part III.A).

Singapore FTA, 91.6 % of products were subject to a tariff elimination schedule within 10 years, and most major agricultural products (including rice, apple, pear, onion, garlic, and beef) and fishery products were excluded from the schedule.

In the FTA with EFTA, only 86–88 % of industrial and fishery products were subject to a tariff elimination schedule. Tariffs on agricultural products were only eliminated for products currently traded between the two sides.

This back-down trend of trade liberalisation is highlighted in the Korea-ASEAN FTA.[74] Most sensitive agricultural products were excluded from the schedule. As *quid pro quo*, ASEAN States excluded Korean cars, car components, electronic machines, metals, and cigarettes, which are major Korean export items, from the FTA. As a result of these exceptions, Thailand refused to sign the FTA as a protest.[75]

In the Korea-US FTA, Korea and the United States agreed to eliminate tariffs on all industrial products and quickly remove 94 % of them (within a 3 year period). Only some agricultural products, such as rice, oranges (produced during harvesting season), soybean/potatoes (for human consumption), milk powder, and honey, were subject to tariffs. The Korea-EU FTA is modelled on this Korea-US FTA approach by eliminating 98.7 % of duties in trade value within 5 years of the entry into force of the FTA. Therefore, Korea's original aim, which was to achieve high-level liberalisation and improve the efficiency of its economy, was accomplished by the completion of high-level Korea-US and Korea-EU FTA projects.[76]

Norm-Setting for a Multi-Polar World and Harmonisation

More significant than its scope of liberalisation is the fact that the Korea-EU FTA is the first of a new generation of FTAs. The FTA is expected to represent stepping stones for future liberalism, tackling such issues as non-tariff barriers, sustainable development, competition and cultural cooperation which are not yet ready for multilateral discussion and going beyond the market opening that can currently be achieved in the multilateral context.

It is obvious that by making an FTA bridge with Korea, a fast developing economy in Asia, the EU intended to create norms for a multi-polar world and to pursue system harmonisation for such a world.

The Framework Agreement in 2010 bears this out. EU FTAs are accompanied by a political pillar in the form of a framework agreement institutionalising the

[74] The Framework Agreement was signed in December 2005, the Agreements on Trade in Goods and Services were signed respectively in August 2006 and November 2007 (and entered into force, respectively, in June 2007 and May 2009), and the negotiation for the Agreement on Investment was concluded in April 2009.

[75] Thailand eventually joined the FTA in February 2009.

[76] See Choi (2009), p. 595 (part III.A).

relationship and cooperation in all areas, including attempting to coordinate positions in international fora (UN, WTO, and climate talks). This is a peculiarity of EU FTAs, and reflects the inherent tension within the EU's trade policy, as a tool of foreign policy to serve other integration policy objectives.[77]

In the case of the Korea-EU FTA, the framework agreement is straightforward as both partners share similar objectives internationally and common values of democracy and respect for human rights. Moreover, the framework agreement has little that is legally binding. Whilst broad in scope, the articles commit the parties to "work towards," "encourage mutual cooperation and information exchange", "endeavour to cooperate", in education, environmental protection, migration issues, fisheries, development policies, combating terrorism and arms trafficking amongst others.[78]

Incorporating these spirits and principles under the framework agreement into legally binding rules, the Korea-EU FTA is pursuing a norm-setting approach at a plurilateral level, going well beyond the WTO rules and incorporating some of the Singapore issues. Comparison with the Korea-US FTA in regard to the automobile sector reveals this unique nature of the Korea-EU FTA. To counter Korean complex ways of setting environmental and safety standards, the US negotiated a higher quota for US cars exported into Korea under US safety standards, so that it includes a number larger than the number of exports to Korea.[79] The EU, for its part, agreed to harmonise car safety standards through international arrangements based on the rules of the UN Committee for Economic Cooperation in Europe, something Korea, which has a mix of US and Korean standards, was not entirely pleased about.[80] In line with its aspirations for a multipolar world guided agreed rules (which is essentially the basis of EU integration itself), the EU adopts a more institutional and negotiated approach. The US approach represents an effective (if not legal) instance of mutual recognition of car safety standards, whilst the EU approach advocates negotiating standards that can be internationalised.[81]

This preference for harmonisation is evident in other areas, including the mutual commitment to the effective implementation of the multilateral environmental agreements to which they are party, and the joint adoption of ILO standards. It is obvious that this aspiration for harmonisation will spread out in facilitating and promoting trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods, including through addressing related non-tariff barriers.

[77] Baldwin (2006), p. 1451.
[78] European Union (2010).
[79] Garcia (2013), pp. 28–29.
[80] Nicolas (2009), p. 23 (39).
[81] Garcia (2013), p. 28.

Addressing unethical business practices in pharmaceuticals and medical equipment also reflects this approach by obliging Korea to comply with international standards with which EU regulations already comply.[82]

Whilst this is more costly at the negotiations, if eventually the EU and Korea, and others, are operating on a common international set of standards the impetus will be for industries throughout the globe to adopt this, affording whoever is already using it a first-mover advantage.[83]

The degree of protection of GIs has been a continuous issue at the WTO where the disparity between the US's trademark-based approach and the EU's GI priority approach has not been resolved.[84] The EU hoped to gain legally-binding international recognition of its list of protected GIs. Having failed multilaterally, it has incorporated this into its FTAs, although the length of the list varies from FTA to FTA. In the case of Korea-EU FTA a list with only 162 items was included.[85] Having succeeded in affording enhanced protection for key GIs and making them prevail over conflicting trademarks under the Korea-EU FTA, the EU will continue to pursue this "export of its rules approach" by adding more GIs to the list through the Working Group procedures.[86]

The Case of Aggressive Regionalism

The Korea-EU FTA is a result of a paradigm shift from traditional regionalism, which deals mostly with customs-border issues, to aggressive regionalism that codifies a whole-scale problem-solving process. The policy of aggressive legalism,[87] based on "a conscious strategy where a substantive set of international legal rules can be made to serve as both 'shield' and 'sword' in trade disputes among sovereign states",[88] is reflected in the growth of regionalism in this era of

[82] Erixon and Lee-Makiyama (2010).

[83] Garcia (2013), pp. 28–29.

[84] El Benni (2009).

[85] The full register includes 29997 GIs for wines and 1289 for other products. Whilst most are EU GIS the register also covers non-EU products that have been added through FTAs and other partial agreements. E-BACCHUS and DOOR GI registers can be accessed at http://ec.europa.eu/agriculture/quality/index_en.htm; Garcia (2013), p. 30.

[86] The Commission defended this at the European Parliament arguing that "in some negotiations full protection of the entire EU register list is not possible from the outset", and that the reduced list approach is "conditioned on the facilitation of the recognition and protection of the remaining names as a result of the agreement" and the ongoing cooperation ensuing from it. European Parliament (2010).

[87] Several authors use the term *aggressive legalism* to describe a WTO country's use of WTO's substantive rules to counter what it considers the unreasonable acts, requests, and practices of a major trading partner. See Pekkanen (2001), p. 707. See also Gao (2005), p. 315; and Araki (2004), p. 149.

[88] See Pekkanen (2001), pp. 707 (708).

proliferating FTAs. Countries negotiating an FTA plan to use treaty rules as a whole-scale problem-solving process. That is, they intend to use regional trade agreements to counter any unreasonable acts, requests, and practices of their trading partners and to insert into them stepping stones for various social values as linked with trade mechanism. As a result, they want to include internal measures and cooperative arrangements in FTAs that are not usually covered in international treaties. This new trend may be called *aggressive regionalism,*[89] and the Korea-EU FTA offers a good example of this aggressive use of problem solving mechanisms.

By addressing a series of age-old bilateral trade disputes, such as the automobile trade imbalance, unethical business practices in pharmaceuticals and medical devices, enhanced protection of intellectual property rights, and new global or regional issues, such as trade and environment and labour, competition and South and North Korea's economic cooperation, the Korea-EU FTA establishes a single set of stable, permanent principles and binding rules for the resolution of problems between Korea and the EU.

Using these rules in actuality to address unethical business practices in the pharmaceutical goods sector will pose great challenges. The strengthened protection of GIs and designs will also be a challenging task to implement. The principle of outward processing exception as prescribed as a built-in agenda under the Korea-EU FTA is directly related to the rules about the origin of products produced in the Kaesung Industrial Complex located in North Korea, a symbol of Korea's engagement policy towards the North. This issue will be a high priority in Korea's subsequent negotiations with the EU. To activate this principle, both sides need to hammer out beneficiary product sectors and specific exception criteria similar to provisions in the Korea-Singapore or Korea-EFTA FTAs, which include a 40–45 % or 40–60 % formula.[90] To find balance, the EU might request a resolution of another built-in agenda, protection of artists' resale rights.

On the impact of this aggressive regionalism, pessimism might prevail. One might find that deeper engagement between Korea and the EU is unlikely. Most importantly, neither side is relevant to the basic security issues of the other.[91] Specifically, the EU cannot assist Korea in its acute security dilemma, and "sovereigntist" Korea does not share EU preferences for soft power, regionalisation, and multilateral collective security.[92] However, Korea is likely to pursue the relationship for cost-free prestige-taking. And the EU will understand this "Asian bridge" as a success for the promotion of liberal-democratic values in a non-European context.[93] Pro-regionalist elites, most notably the "eureaucracy",

[89] The aggressive regionalism concept is first indicated by the author in the context of analysing the Korea-US FTA. See Choi (2009), p. 595.

[90] Paragraph 1, Article 4.4, Korea-Singapore FTA, Article 13 and Appendix 4, Annex I Korea-EFTA FTA.

[91] Kelly (2012), p. 101.

[92] Kelly (2012), p. 101.

[93] Kelly (2012), p. 101.

may pursue "inter-regional" ties for internal institutional reasons, but deep Korean attachment to the Westphalian State model will likely stymie such efforts.[94]

Notwithstanding this, it appears that this aggressive regionalism approach reflected in the Korea-EU FTA will continue to play an important role in the Korea-EU relationship and the value of this approach will be persistently tested by Korea and the EU. Now that Korea has established high-level trade liberalisation with the most efficient economy in the world, it will not hesitate to use this FTA to resolve domestic or foreign problems. The EU will also make best use of this mechanism to gain prestige-seeking and values-promotion, not to mention economic growth.

Conclusion

Since the entry into force of the Korea-EU FTA, Korea made trade deficit in bilateral trade with the EU for the first time in 15 years. In 2012, Korea's export performance to the EU market was US$ 49.4 billion and import from the EU was US$ 50.4 billion. As a result, trade surplus in the amount of US$ 8.3 billion in 2011 quickly turned into US$ 1 billion deficit.[95] This deficit has increased in 2013.[96] Although this situation seems largely because of the shrinking demand in the midst of economic downturn in Europe, criticisms about unbalanced impact arising from the Korea-EU FTA are raised inside Korea.

Despite this abnormal, short-term impact of the FTA, there is no doubt that efforts to fully implement the Korea-EU FTA will continue to prevail in Korea, not to mention in the EU. Furthermore, it is obvious that in future FTAs, the EU will use this Korea-EU FTA as a template for negotiations. As a consequence, key characteristics of the agreement will spread out in the Euro-Asia relationship as they are comprehensive in scope (with few exclusion of sensitive items), incorporate legally binding arrangements on behind-the-border matters like non-tariff barriers and standards, and include Singapore issues as well as social and environmental matters.

More importantly, the Korea-EU FTA poses a more essential question that the world community must eventually answer: why do we have FTAs, what kinds of FTA do we truly want, and how often do non-trade values have to be sacrificed for trade benefits? The Protocol of Cultural Cooperation in Korea-EU FTA offers one

[94] Kelly (2012), p. 101.

[95] Yonhap News of Korea (2013).

[96] It is known that Korea's export to the EU decreased by 6 % (35.6 billion Euro → 33.5 billion Euro), and import from the EU increased by 6 % (34.1 billion Euro → 36.3 billion Euro) during the period between January and November of 2013 compared to the equivalent period in 2012. Yonhap News (2014).

fine answer. A Korean wave has swept away Southeast Asia and China. In case of China, they limit the volume of importation of foreign movies up to 50 films annually. Hollywood movies take most of the quota. Although Korea had an FTA with ASEAN, it is silent about cultural issues. The 10 % tariff elimination on Korean cars by the EU is a substantial benefit, but it will disappear if other car exporting countries conclude FTAs with the EU. Cultural cooperation is different. It lasts permanent. As a consequence, a big linkage effect with other industries like character industries, tourism industries, brand value of Korea and the EU will be enhanced, not to mention eventual linkages between cultures and people's minds.

As challenging as it is, what is clear is that the global community needs to move from the outdated concept of preserving sovereignty and decide how to allocate power in the international marketplace. Many international efforts have been made to find an optimal way to allocate power among sovereign economies.[97] In this light, the Korea-EU FTA bases the allocation of power or authority on efficiency and mutual understanding among partner economies rather than insisting on the outdated doctrine of non-intervention in domestic affairs. It remains to be seen whether this new allocation will decrease international conflicts by resolving more problems among countries, thereby generating more peace and common values. The march on the aggressive regionalism path has just begun between Europe and Asia towards a genuine strategic partnership in the twenty-first century.

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[97] For the new understanding of sovereignty as an issue of allocating authority, see Jackson (2005), p. 2 (11–13); Jackson (2001), p. 67 (68–70).

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EU-ASEAN Trade and Investment Relations with a Special Focus on Singapore

Locknie Hsu

> Europe's contact with East Asia goes back further than any other region in the world. It could be traced to Marco Polo's historic journey to China 800 years ago. [. . .] East Asia and the EU share a common vision for the future. They want to build a peaceful and prosperous multipolar world. They accept globalization but also want to live in a world of cultural diversity. East Asia and Europe want economic growth, but they also value social equity, a healthy environment and a rich cultural life.—H.E. Ambassador Tommy T.B. Koh, *Europe and East Asia Need to Get Acquainted*, *International Herald Tribune*, 14 April 2000[1]

Introduction

The European Union (EU) and the Association of Southeast Asian Nations (ASEAN) are two dynamic trade and investment blocs, each of which has been working toward regional integration. The long and rich EU integration process has been an interesting model and naturally, many, including ASEAN, study the EU system for lessons to be drawn.[2] Both regions aim for peace and economic development and consist of diverse economic and social memberships.

[1] Republished in Lay Hwee and Latif (2000), pp. 107–109. Among his many other honorable titles, Amb. Koh is currently Ambassador-At-Large at the Ministry of Foreign Affairs, Singapore, and was also Ambassador to the US (1984–1990), founding Executive Director of the Asia-Europe Foundation, and Singapore's Chief Negotiator for the US-Singapore Free Trade Agreement (2000–2003).

[2] It is beyond the scope of this article to chronicle the long history and extensive integration initiatives of the EU which have been examined in a great deal of academic literature; see for

L. Hsu (✉)
Professor, School of Law, Singapore Management University, 60 Stamford Road, Level 4, Singapore 178900, Singapore
e-mail: lockniehsu@smu.edu.sg

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ASEAN was formed in 1967 by five founding States, Indonesia, Malaysia, the Philippines, Singapore, and Thailand, with a view to promoting regional peace and stability.[3] The economic integration impetus began about two decades afterward, beginning with plans for an ASEAN Free Trade Area to promote trade and investment liberalisation, including the elimination of tariff and non-tariff barriers to intra-ASEAN trade.[4] The formal treaty process to realise these objectives took place in 1992 with the introduction of a *Common Effective Preferential Tariff* (CEPT) system for the then members.[5] Plans for an ASEAN Investment Area were established in 1998.[6] In 2009, ASEAN members signed a landmark *ASEAN Comprehensive Investment Agreement* (ACIA).[7] In 2008, aiming to strengthen the legal architecture of the Association, ASEAN members adopted the *ASEAN Charter*, setting out the Association's purpose, objectives, the legal framework of its institutions, and provisions for dispute settlement.[8]

ASEAN integration has proceeded in developing three pillars, giving rise to the ASEAN Economic Community (AEC), ASEAN Socio-Cultural Community (ASCC) and the ASEAN Political-Security Community (APSC).[9] In recent years, ASEAN has accelerated economic integration to establish the ASEAN Economic

example, Jones et al. (2012); Dedman (2010); Dosenrode (2012). For a quick overview, see http://europa.eu/about-eu/eu-history/index_en.htm. For information on the EU's global policy, see generally: http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146941.pdf.

[3] The founding document is the ASEAN Declaration, also known as the Bangkok Declaration, signed 8 August 1967, available at: http://www.asean.org/news/item/the-asean-declaration-bangkok-declaration.

[4] See Framework Agreement on Enhancing ASEAN Economic Cooperation, signed on 28 January 1992, and Framework Agreement on the ASEAN Investment Area, signed on 7 October 1998; texts of these and other related agreements and protocols are available at: http://www.asean.org/communities/asean-economic-community/category/asean-trade-in-goods-agreement and http://www.asean.org/communities/asean-economic-community/category/overview-14. See also generally ASEAN website at: http://www.asean.org/communities/asean-economic-community/category/asean-free-trade-area-afta-council.

[5] The members in 1992 were Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand. Cambodia, Lao PDR, Myanmar and Vietnam subsequently joined ASEAN in 1999, 1997, 1997 and 1995, respectively.

[6] Framework Agreement. See also generally the information at the Singapore Government website, at: http://www.fta.gov.sg/afta/9basean_investment_area.pdf.

[7] The text of the ACIA is available at: http://www.asean.org/images/archive/documents/FINAL-SIGNED-ACIA.pdf; the treaty came into force on 29 March 2012. It superseded two earlier, more limited, investment treaties. See generally: http://www.asean.org/communities/asean-economic-community/category/asean-investment-area-aia-council.

[8] See Charter of the Association of Southeast Asian Nations, available at: http://www.asean.org/asean/asean-charter/asean-charter.

[9] See Roadmap for an ASEAN Community 2009–2015, ASEAN, available at: http://www.asean.org/resources/publications/asean-publications/item/roadmap-for-an-asean-community-2009-2015.

Community (AEC) by 2015 pursuant to the ASEAN Economic Community Blueprint, to establish ASEAN as a single market and production base.[10]

In tandem with these developments, members of ASEAN also engaged in bilateral and regional trade liberalisation and integration initiatives, by way of free trade agreements (FTAs) and bilateral investment agreements (BITs). Among ASEAN members, Singapore was an early participant in FTAs, with its first FTA being signed with New Zealand in 2000.[11] She has, over the past 15 years, pursued a "dual-track" approach to trade negotiations at the multilateral and bilateral/regional levels.[12]

As the number of bilateral FTAs was growing, ASEAN members also began to engage in FTAs with external partners, namely Australia, New Zealand, China, India, Korea and Japan.[13] Presently, ASEAN is negotiating a Regional Comprehensive Economic Partnership (RCEP) agreement with these six partners.[14]

EU-ASEAN Trade and Investment and Singapore's Role

After the US and China, ASEAN as a whole is the EU's third largest trade partner, with trade in goods and services exceeding €206 billion in 2011.[15] Conversely, after China, the EU is ASEAN's second largest trade partner. In investment, the EU has invested an average of €9.1 billion in ASEAN over the period of 2000–2009.[16]

Within ASEAN, Singapore, a trade and investment hub, is the largest trading partner of the EU in the ASEAN bloc, accounting for one-third of EU-ASEAN trade.[17] At the end of 2011, Europe and Asia were the top two sources of FDI in Singapore. Between the end of 2001 and the end of 2011, EU FDI in Singapore tripled from S$85b to S$252b.[18] Among EU members, the top FDI investors in Singapore were, between 2001 and 2011, the Netherlands and the United

[10] The original target for the AEC was 2020; the members decided in January 2007 at the 12th ASEAN Summit in Cebu, Philippines, to accelerate this date to 2015. The Blueprint (2008) is available at: www.asean.org/archive/5187-10.pdf.

[11] See Singapore Ministry of Trade & Industry website: http://www.fta.gov.sg/fta_anzscep.asp?hl=9.

[12] For information on the Singapore Government's policy on this, see the Ministry of Foreign Affairs website at: http://www.mfa.gov.sg/content/mfa/international_organisation_initiatives/ftas.html. For information on Singapore's FTAs that are in force, see generally www.fta.gov.sg.

[13] For the FTAs in force in ASEAN, see generally the Singapore Ministry of Trade & Industry website at: http://www.fta.gov.sg/sg_fta.asp.

[14] See information sheet of the Singapore Government on the RCEP, 2012, available at: http://www.fta.gov.sg/press_release%5CFACTSHEET%20ON%20RCEP_final.pdf.

[15] See European Commission (Trade), Association of Southeast Asian Nations (ASEAN), available at: http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean.

[16] European Commission (Trade), Association of Southeast Asian Nations (ASEAN), available at: http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean.

[17] See European Commission (2013a), p. 16.

[18] Ying and Tan (2001–2011), p. 2, available at: http://www.singstat.gov.sg/publications/publications_and_papers/investment/ssnsep13-pg1-9.pdf.

Kingdom.[19] On the other hand, Singapore invested 14 % of her outward FDI stock in Europe, with the major destinations being the United Kingdom, the Netherlands and Switzerland.[20]

Given that the EU is the largest investor in ASEAN,[21] it has a natural interest in ensuring a conducive trade and investment environment and appropriate legal protection for its investors.

Efforts were initially made to negotiate a region-to-region EU-ASEAN FTA, with seven ASEAN members but these have not led to an agreement.[22] Consequently, the EU re-launched negotiations with individual ASEAN members.[23] The first of these members has been Singapore. As the EU Trade Commissioner, Karel de Gucht, said: "The launch of FTA negotiations with Singapore, for us, marks the beginning of a deeper engagement with Asia, and in particular our relations with the ASEAN region."[24]

The EU and Investment Negotiations, Post-Lisbon Treaty

Through the Lisbon Treaty, the EU now has exclusive competence regarding its Common Commercial Policy which includes FDI. [25] This means that the EU is able to negotiate investment agreements with third party states. This watershed

[19] Ying and Tan (2001–2011), p. 3, Table 2, available at: http://www.singstat.gov.sg/publications/publications_and_papers/investment/ssnsep13-pg1-9.pdf.

[20] Ying and Tan (2001–2011), pp. 6–7, Table 8, available at: http://www.singstat.gov.sg/publications/publications_and_papers/investment/ssnsep13-pg1-9.pdf.

[21] European Commission (Trade), Association of Southeast Asian Nations (ASEAN), available at: http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean.

[22] According to the EU's Progress Report on the Global Policy 2006–2010, 2010, p. 8, the reasons were as follows:

> Following Member States' authorisation to negotiate, "region-to-region", FTA negotiations with a group of seven (out of ten) ASEAN countries were launched in 2007. Until March 2009, nine negotiation rounds had been held. However, progress in these region-to-region negotiations was slow, and both sides agreed to put negotiations on hold in March 2009. One difficulty in the region-to-region negotiations arose from significant structural differences within ASEAN, which meant that existing levels of liberalisation and negotiation objectives differed widely among countries in the group.

[23] EU's Progress Report on the Global Policy 2006–2010, 2010, p. 23.

[24] EU Trade Commissioner (2010).

[25] See Article 2 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, [2007] OJ C 306/1, adding a new Article 2B to The Treaty establishing the European Community—the new Art. 2B(1)(e) attributes exclusive competence over to the Union over the common commercial policy. Article 207 of the Treaty on the Functioning of the European Union (TFEU), [2012] OJ C 326/1, in turn, includes FDI matters within the scope of the common commercial policy; and Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020 final, p. 11. See also the Regulation (EU) No

development has unlocked new opportunities for engagement in trade and investment matters with ASEAN/Asian States. As described in the EU document, *Towards a Comprehensive European International Investment Policy*, investment is a "new frontier" for the EU's Common Commercial Policy.[26]

The EU's Recent Negotiations in Asia: A Brief Overview

As the twentieth century came to a close, it was clear that the EU was becoming increasingly interested in developing stronger trade and investment relations with Asia. The European Commission's September 2001 Communication, *Europe and Asia, a Strategic Framework for Enhanced Partnerships*, laid the foundation of renewed EU-Asian ties at the beginning of the twenty-first century.[27] This was followed not long after, by a more specific Communication, *A New Partnership with Southeast Asia*, issued in 2003.[28] This latter document spelt out six "strategic priorities" for such enhanced ties, including the injection of a "new dynamism" into regional trade and investment relations.[29] This included establishment of a "trade action plan" known as the *Trans-Regional EU-ASEAN Trade Initiative* (TREATI).

At about roughly the same time, by way of the broader context, the US and Singapore were negotiating a landmark FTA; the first by the US with an ASEAN member, as part of the Asian trade and investment agenda of then President George W. Bush.[30] By 2004, Singapore had signed the United States-Singapore FTA (USSFTA). No doubt, these developments were being watched with keen interest by EU policy makers.

1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, [2012] OJ L 351/40, governing transitional matters on members' BITs.

[26] European Commission, Communication, Towards a Comprehensive European International Investment Policy, COM(2010)343 final, p. 4. For an overview of EU investment policy, see European Commission (Trade), Investment, available at: http://ec.europa.eu/trade/policy/accessing-markets/investment/.

[27] European Commission, Communication, Europe and Asia: A Strategic Framework for enhanced Partnership, COM(2001)469 final.

[28] European Commission, Communication, A new partnership with South East Asia, COM (2003) 399/4.

[29] European Commission, Communication, A new partnership with South East Asia, COM (2003) 399/4, pp. 3–4.

[30] See United States Trade Representative, The President's 2008 Trade Policy Agenda, pp. 9–10, available at: http://www.ustr.gov/archive/assets/Document_Library/Reports_Publications/2008/2008_Trade_Policy_Agenda/asset_upload_file490_14556.pdf. For a Singapore perspective, see also Koh and Lin (2004). The US signed a *US-ASEAN Trade and Investment Framework Agreement* in 2006, available at: http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file932_9760.pdf.

In April 2007, the EU adopted a mandate for FTA negotiations with ASEAN. However, attempts to negotiate an FTA with ASEAN as a whole met with difficulties[31] and the EU subsequently decided to adopt a more limited approach with individual countries of ASEAN.[32] In 2009, the Commission was therefore further authorised to negotiate FTAs with individual ASEAN members.[33] Plans for an EU-ASEAN FTA have been in abeyance but the EU's position is that an EU-ASEAN FTA remains the ultimate goal.[34] With ASEAN members busy preparing for the AEC deadline of 2015, it was recently reported that ASEAN will resume negotiations with the EU *after* the establishment of the AEC.[35]

In March 2010, negotiations for an EU-Singapore Free Trade Agreement (EUSFTA) were launched. The EU's negotiating mandate was modified in 2011 to permit investment negotiations for the EUSFTA.[36] By December 2013, the EU had completed negotiations for this, its first-ever FTA with an ASEAN country. This is also its first FTA with an Asian State that will contain an *investment* chapter. Before this, the EU had completed negotiations with Canada and Korea.[37] It presently has ongoing negotiations with China,[38] India,[39] Japan,[40]

[31] The signalling of the start of talks for an EU-ASEAN FTA was made in the Joint Ministerial Statement of the ASEAN Economic Ministers and the European Union Trade Commissioner on the Launch of the Negotiations of the ASEAN-EU Free Trade Agreement (FTA), 4 May 2007, see www.asean.org/archive/ASEAN-EU-FTA.pdf. According to this *Joint Statement*, the parties intended for the negotiating process to "be based on a region-to-region approach" and would consider "the different levels of development and capacity of individual ASEAN Member countries", para. 3.

[32] See European Commission (Trade), Singapore, available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/.

[33] See European Commission, Memo, EU investment negotiations with China and ASEAN, available at: http://europa.eu/rapid/press-release_MEMO-13-913_en.htm.

[34] See European Commission (Trade) (2006).

[35] See Pratruangkrai (2014).

[36] European Commission, Memo, EU investment negotiations with China and ASEAN, available at: http://europa.eu/rapid/press-release_MEMO-13-913_en.htm.

[37] Although the EU had earlier concluded a FTA with Korea, that FTA does not include an investment chapter, as the new EU role in investment negotiations was still in gestation. The Lisbon Treaty, discussed below, was signed on 13 December 2007, *after* the EU-Korea FTA negotiations had been launched in May 2007. For the detailed timeline of the negotiations of the FTA, see the Korea Ministry of Foreign Affairs website at: http://www.mofa.go.kr/ENG/policy/fta/status/effect/eu/index.jsp?menu=m_20_80_10&tabmenu=t_2&submenu=s_6. The EU-Canada FTA (CETA) does, however, include an investment chapter.

[38] EU-China negotiations commenced in January 2014. See European Commission (Trade), EU and China begin investment talks, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1013; European Commission, Memo 13/913, EU investment negotiations with China and ASEAN, available at: http://europa.eu/rapid/press-release_MEMO-13-913_en.htm; and European Commission (Trade) (2006).

[39] Negotiations with India began in 2007 and 11 rounds have been held to date. Current meetings appear to comprise smaller cluster groups; see European Commission (Trade) (2006).

[40] Negotiations between the EU and Japan were launched in March 2013; see European Commission (Trade), Japan, available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/.

Malaysia,[41] Thailand[42] and Vietnam.[43] Explaining part of the thinking behind these negotiations, the EU stated recently:

> . . . the EU's global competitors are currently negotiating preferences for their own companies, in the contexts of the *Trans-Pacific Partnership* and the *Regional Comprehensive Economic Partnership*. The EU, by negotiating preferential market access of its own, can protect EU exporters against a loss of competitiveness in many Asian markets resulting from the FTAs concluded by others.[44]

It is noteworthy too, that Singapore views the TPP and RCEP as possible pathways to a larger Asia-Pacific free trade area.[45]

EU-Myanmar

Over the last two years, because of a number of domestic reforms in Myanmar, trade and investment relations between the EU and Myanmar have thawed, and taken on a certain momentum.

The Council of the European Union approved in July 2013 a framework of policy for Myanmar, which envisages establishment of a "trade and investment partnership", including reinstatement of Myanmar's GSP preferences and negotiation of an Investment Agreement.[46] In 2013, the EU repealed legislation suspending Myanmar's benefits under its GSP programme. Myanmar became a beneficiary of the EU's *Everything But Arms* (EBA; duty-free quota-free access except for arms) programme as of 1 January 2014.[47]

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[41] See European Commission (Trade), Malaysia, available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/malaysia/.

[42] Negotiations with Thailand began in 2013; see European Union, External Action, Thailand, available at: http://eeas.europa.eu/thailand/ and European Commission (Trade), Thailand, available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/thailand and European Commission (Trade) (2006).

[43] See European Commission (Trade), Vietnam, available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/. For an overview of the EU's FTAs, negotiations and launch dates, see generally European Commission, Enterprise and Industry, Free Trade Agreements, available at: http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/ and European Commission (Trade) (2006).

[44] Fact Sheet on the EU-Singapore FTA, European Commission, Memo 13/805, The EU-Singapore Free Trade Agreement, p. 3, available at: http://europa.eu/rapid/press-release_IP-13-849_en.htm.

[45] Information sheet of the Singapore Government on the RCEP, 2012, p. 3, available at: http://www.fta.gov.sg/press_release%5CFACTSHEET%20ON%20RCEP_final.pdf.

[46] See Council of the European Union (2013b), p. 4; see also Council of the European Union (2013a).

[47] See Regulation (EU) No 607/2013 of the European Parliament and of the Council of 12 June 2013 repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to generalised tariff preferences from Myanmar/Burma, [2013] OJ L 181/13 and European Commission (Trade) (2014d).

While the EU has concluded other FTAs, the focus in this article is on the EUSFTA, and in particular, its investment obligations.

The EU-Korea FTA: The EU's First FTA with an Asian State

The EU-Korea FTA, which entered into force in July 2011, is the first FTA that the EU has signed with an Asian state but as its negotiations commenced before the conclusion of the Lisbon Treaty (which confers exclusive investment negotiation competence on the EU) it contains no investment chapter.[48]

CETA: The EU's First Post-Lisbon FTA Containing Investment Provisions

The EU-Canada Comprehensive and Economic Trade Agreement (CETA), concluded on 18 October 2013, is the first post-Lisbon FTA with investment rules.[49] Before the release of the Investment Chapter of CETA, the EU published a *Fact Sheet* explaining key contents of this chapter.[50] The text of the Chapter was released in September 2014 as part of the consolidated text of the treaty.[51] More will be said about these provisions below.

The EU-Singapore FTA: The EU's First Post-Lisbon FTA with an ASEAN/Asian State Containing Investment Provisions

According to a study of the economic benefits of the EUSFTA released on 24 September 2013, the EU views FTAs with individual ASEAN members, such as the EUSFTA, are "stepping-stones" or "building blocks" for an EU-ASEAN

[48] See European Commission (Trade), South Korea, available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/. See also generally, Pollet-Fort (2011), EU Centre in Singapore, available at: http://www.eucentre.sg/wp-content/uploads/2013/06/BackgroundBrief-The-EU-Korea-FTA-and-its-Implications-for-the-Future-EU-Singapore-FTA.pdf.

[49] The text is available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=973. For a recent critical analysis of the CETA's provisions as released to date, see Bernasconi-Osterwalder (2013).

[50] European Commission (2013c).

[51] See European Commission (Trade) (2014a).

FTA.[52] The EUSFTA is thus viewed as a trailblazer, set to spur further FTAs with other ASEAN member states.[53]

Negotiations for the EUSFTA were launched in March 2010 and were completed by December 2012. An initialled text was released on 20 September 2013. The text of the Investment Chapter was released in October 2014.[54]

The EUSFTA may be viewed as the EU's continuing process of investment rule-setting as it is likely to reflect many of the investment provisions that are in the CETA. Concerning investment protection with Asian (and other) partners will be explained in greater detail below. First, one must appreciate the current, broader EU investment treaty negotiating agenda, as explained in the next section.

A New Generation of EU Trade and Investment Agreements

General Philosophy

Certain themes and ideas are discernible in the EU's negotiating objectives for new FTAs.

First, the EU is mindful that non-EU partners are of diverse economic and developmental standing. Consequently, it has stated that it would be open to adapting negotiations to consider this. Specifically, in the Commission's Communication, *Towards a Comprehensive European International Investment Policy*, 2010, it was stated:

> . . . a one-size-fits-all model for investment agreements with 3rd countries would necessarily be neither feasible nor desirable. The Union will have to take into account each specific negotiating context. The interests of our stakeholders as well as the level of development of our partners should guide inter alia the standards the Union sets in a specific investment negotiation. . . .
>
> The Union should go where its investors would like to go, just like it should pave their way abroad, through the liberalisation of investment flows. Markets with significant economic growth or growth prospects present a particular opportunity in the current increasingly competitive environment. It is important that EU investors have access to these markets and that amid the changes that these economies might be undergoing, benefit from the availability of sufficient guarantees for fair and predictable treatment. The EU's interests in investment negotiations would also be determined inter alia by the political, institutional and economic climate of our partner countries. *The 'robustness' of investor protection through either host country or international arbitration would be important determinants in defining priority countries for EU investment negotiations. In particular, the capacity and the practice of our partners in upholding the rule of law, in a manner that provides a certain and sound environment to investors, are key*

[52] European Commission (2013a), pp. 9 and 12.

[53] The view has been expressed as follows: "The EUSFTA thus paves the way for comprehensive FTAs with other ASEAN countries, and ultimately an agreement with the entire region. [. . .] Singapore [. . .] regional trendsetter [. . .]"; European Commission (2013a), p. 3.

[54] European Commission (Trade) (2014b).

> *determinants for assessing the value of investment protection negotiations.*[55] (Italic emphasis added.)

Secondly, in respect of dispute settlement, the EU seeks certainty and consistency under its FTAs:

> The **atomisation of disputes and interpretations**. Consistency and predictability are key issues and the use of quasi-permanent arbitrators (as in the EU's FTA practice) and/or appellate mechanisms, where there is a likelihood of many claims under a particular agreement, should be considered; [. . .][56]

The lack of consistency between investor-State arbitral tribunals and the resulting uncertainty in the interpretation of core investment provisions (such as MFN clauses, for one) has led to a great deal of debate and calls for reforming the whole investor-state dispute settlement system that exists today.[57]

While it appears from the above statements that the EU generally expects to include investor-State dispute settlement mechanisms (ISDS) in its treaties, it appears that there could be limited exceptions. In January 2014, the EU Trade Commissioner announced that the EU would hold consultations on its investment treaty dispute settlement provisions in the period leading up to the next negotiating round (in March 2014) for the Trans-Atlantic Trade and Investment Partnership (TTIP) with the US,[58] in light of several objections to ISDS being included.[59]

Thirdly, the EU aims to have *a balance* between the right to regulate and the need to protect investors.[60] This is an important precept, particularly for the Asian states that are negotiating with the EU. Fourthly, the EU has outlined the scope and standards it seeks in ISDS in FTAs.[61]

Specific Guarantees Sought

Before the EUSFTA investment chapter was released to the public,[62] and beyond the general contours sketched out in the Communication, the EU had made available a Fact Sheet on *Investment Protection and Investor-to-State Dispute Settlement*

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[55] European Commission (2013a), pp. 6–7.

[56] European Commission (2013a), p. 10.

[57] See for example, this author's previous discussions in Hsu (2011), p. 827 and in Hsu (2014).

[58] See European Commission, Press Release 14/56, Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement, available at: http://europa.eu/rapid/press-release_IP-14-56_en.htm.

[59] There have been calls to exclude any ISDS mechanism in the TTIP: see for example Financial Times, EU and US Pressed to Drop Dispute-settlement Rule from Trade Deal, 10 March 2014. See also Ikenson (2014).

[60] European Commission (2013b), p. 3.

[61] European Commission, Communication, Towards a Comprehensive European International Investment Policy, COM(2010)343 final, p. 8.

[62] See Voskamp (2013).

in EU Agreements of November 2013[63] which provided important and useful indications of the chapter's likely contents.

With regard to treatment, the EU has spelt out the **four key guarantees for inclusion**: most favoured nation, national treatment, fair and equitable treatment, transfer of capital, expropriation provisions.[64] These will be buttressed by inclusion of an investor-State dispute mechanism.

With regard to the obligations relating to indirect expropriation and fair and equitable treatment (FET), the EU texts with both Canada and Singapore provide more detailed guidance on both these notions than before.[65] In several FTAs indirect expropriation is not defined, and it is only in some recent agreements that limitations on this obligation have begun to be included.[66]

In the context of addressing indirect expropriation claims, the CETA and the EUSFTA, include provisions to safeguard a State's right to regulate and pursue legitimate public policy objectives.[67] Where that regulatory action is non-discriminatory and taken to protect the public interest, "the right of the state to regulate should prevail over the economic impact of those measures to the investor".[68] It remains to be seen as to what the actual treaty text will look like.

The CETA provides that a breach of the FET obligation arises in the following cases:

- Denial of justice in criminal, civil or administrative proceedings;
- Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
- Manifest arbitrariness;
- Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- Abusive treatment of investors, such as coercion, duress and harassment.[69]

By comparison, the "scoping list" of the FET provision in the EUSFTA differs, stating the following:[70]

> 2. To comply with the obligation to provide fair and equitable treatment set out in paragraph 1, neither Party shall adopt measures that constitute:
>
> (a) Denial of justice12 in criminal, civil and administrative proceedings;
> (b) A fundamental breach of due process;

[63] European Commission (2013b).

[64] European Commission (2013b), p. 4.

[65] European Commission (2013b), pp. 7–10.

[66] European Commission (2013c).

[67] Annex X.11, CETA and Annex 9A, EUSFTA.

[68] European Commission (2013c), p. 7.

[69] European Commission (2013c); according to the Fact Sheet, this will "avoid too wide interpretations and provide clear guidelines to tribunals".

[70] Art. 9.4.2, EUSFTA. (Other differences in the FET provisions of the two agreements exist and can be appreciated only by reading both sets of provisions in full.)

(c) Manifestly arbitrary conduct;
(d) Harassment, coercion, abuse of power or similar bad faith conduct; or
(e) A breach of the legitimate expectations of an investor arising from specific or unambiguous representations[13] from a Party to induce the investment and which are reasonably relied upon by the investor.

[13] For greater certainty, representations made to induce the investments include the representations made to convince the investor to continue with, not to liquidate or to make subsequent investments.

This list of guiding factors comes as no surprise, as they have been adopted by various arbitral tribunals in the past.[71] In a way, this is a kind of "codification" of such tribunals' reasoning of the FET standard. The language of the final text, however, and its exact scope, again, remain to be seen.

The negotiated text of the Investment Chapter of the EUSFTA was made publicly available in October 2014. The text, with other chapters, awaits "legal scrubbing" at this time of writing, and thereafter, ratification by the EU and implementing legislation in Singapore. The Chapter includes provisions addressing, *inter alia*, the following matters in relation to investor-State disputes:[72]

- Prevention of claims by investors that are "manifestly without merit" and "unfounded as a matter of law"[73];
- Transparency in dispute proceedings; while the *UNCITRAL Rules on Transparency in Treaty-Based Arbitration* that came into effect in 2014[74] are explicitly made applicable in the CETA text, the EUSFTA incorporates its own, modified transparency provisions[75];
- A Code of Conduct for arbitrators and mediators;
- The possibility to consider in certain cases, an appellate mechanism[76];
- Provisions on the role of a Trade Committee to adopt interpretations of provisions in the EUSFTA.[77]

Article 9.4 reflects the EU approach mentioned above, and relates fair and equitable treatment with some of the factors mentioned in the EU fact sheets, such as denial of justice in criminal, civil and administrative proceedings, a fundamental breach of due process and manifestly arbitrary conduct.

Art. 9.4.5 sets out a relatively specific provision on frustration or undermining of specific commitments made in written contractual agreements:

[71] For useful overviews and case examples, see UNCTAD (2012); and OECD (2004), for examples.

[72] EUSFTA (2013), pp. 8–9.

[73] Art. 9.23 and 9.24 of the EUSFTA Investment Chapter.

[74] UNCITRAL, Rules on Transparency in Treaty-Based Investor-State Arbitration, available at: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

[75] See CETA, Art. X.33 and EUSFTA Art. 9.25 and Art. Annex 9.C.

[76] Art. 9.33.1 of the EUSFTA.

[77] Art. 9.33.2(b) and Art. 9.22.3 of the EUSFTA.

5. Where a Party, itself or through any entity mentioned in article 1 paragraph 5, had given any specific and clearly spelt out commitment in a contractual written obligation[14] towards an investor of the other Party with respect to the investor's investment or towards such an investment, that Party shall not frustrate or undermine the said commitment through the exercise of its governmental authority[15] either:

(a) deliberately; or
(b) in a way which substantially alters the balance of rights and obligation in the contractual written obligation unless the Party provides reasonable compensation to restore the investor or investment to a position which it would have been in had the frustration or undermining not occurred.

[14] For the purposes of this paragraph, a "contractual written obligation" means an agreement in writing, entered into by both parties, whether in a single instrument or multiple instruments, that creates an exchange of rights and obligations, binding both parties.

[15] For the purposes of this article, a Party frustrates or undermines a commitment through the exercise of its governmental authority when it frustrates or undermines the said commitment through the adoption, maintenance or non-adoption of measures mandatory or enforceable under domestic laws.

While this provision is not crafted in the form of a conventional, broadly-worded "umbrella clause", it does create a separate treaty obligation that could be violated in the manner set out in (a) and (b) in relation to contractual obligations between a State and an investor.

Notably, a provision in the CETA on expropriation and intellectual property rights (and an accompanying Declaration by the Parties) has not been included in the EUSFTA.[78]

However, the EUSFTA Investment Chapter Annex provides as follows:

Annex 9-C *to the Investment Protection Section*
EXPROPRIATION AND INTELLECTUAL PROPERTY RIGHTS
For greater certainty, the revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with TRIPS Agreement and Chapter 11 (Intellectual Property) of this Agreement, do not constitute expropriation. Moreover, a determination that these measures are inconsistent with the TRIPS Agreement and Chapter 11 (Intellectual Property) of this Agreement does not establish that there has been an expropriation.

Dispute Settlement

Apart from the above observations, which relate to interpretation under ISDS, the following are other features of ISDS under the EUSFTA.

[78] Art.X.11.6 of the CETA provides as follows: 6. For greater certainty, the revocation, limitation or creation of intellectual property rights to the extent that these measures are consistent with TRIPS and Chapter X (Intellectual Property) of this Agreement, do not constitute expropriation. Moreover, a determination that these actions are inconsistent with the TRIPS Agreement or Chapter X (Intellectual Property) of this Agreement does not establish that there has been an expropriation. The related Declaration is found at p. 185 of the CETA Consolidated Text, available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

To permit and encourage parties to consider the use of alternative dispute resolution methods, Chapter 16 of the EUSFTA provides for a *Mediation Mechanism*.[79] As not all ISDS provisions are accompanied by such explicit processes, the parties here appear to place emphasis on the availability and use of such means to settle disputes. Such a stance would be consistent with the general interest in the EU and in Singapore to promote the use of mediation.

Arbitration hearings will be open to the public, unless the two States decide otherwise.[80] This is not new for Singapore, as the USSFTA, which came into force much earlier, had already envisaged open hearings.[81]

The EUSFTA includes provisions on the remuneration of arbitrators, linking these to ICSID Regulation standards.[82] In contrast, the CETA contains more control mechanisms.[83] These provisions reflect the EU thinking that the remuneration and expenses of arbitrators would be "based on standards of comparable international dispute resolution mechanisms in bilateral or multilateral agreements." As explained by the EU, the aim of such provisions is to take "action against spiraling costs through effective limits to the costs of arbitration", such action being described as a "first in an ISDS mechanism".[84]

Finally, the EUSFTA will also include provisions governing the conduct of arbitrators, to deal with matters such as conflicts of interest.[85] This has been the subject of some recent challenges in ICSID arbitrations and the provisions are intended to forestall such challenges in an arbitration. While these are important guiding provisions, they do not appear to address with specificity, for example, challenges which are based on an arbitrator who may have, before appointment, expressed a particular view on relevant legal principles in academic or professional

[79] Articles 9.15 of the Investment Chapter also encourages amicable settlements of investor-State disputes, while Art. 9.16 provides for mediation (read with Annex 9A) and alternative dispute resolution.

[80] Article 2, Annex 9.C EUSFTA.

[81] Art. 15.20, USSFTA; entry into force on 1 January 2004—the text and background information are available at: http://www.fta.gov.sg/fta_ussfta.asp?hl=13.

[82] Art. 9.29 EUSFTA.

[83] Para. 9, Annex 1, Rules of Procedure and Code of Conduct, CETA provides: 9. Unless the Parties agree otherwise, they shall meet the arbitration panel within seven working days of its establishment in order to determine such matters that the Parties or the arbitration panel deem appropriate, including the remuneration and expenses to be paid to the arbitrators, which shall be in accordance with WTO standards. Remuneration for each arbitrator's assistant shall not exceed 50 % of the total remuneration of that arbitrator. Members of the arbitration panel and representatives of the Parties may take part in this meeting via telephone or video conference;

Art. 9.29 of the EUSFTA provides: The fees and expenses of the arbitrators shall be those determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the initiation of the arbitration.

[84] European Commission (2013c), p. 3.

[85] Annex 9-B, Code of Conduct for Arbitrators and Mediators. On such challenges generally, see Daele (2012).

journals or is in a law firm whose other members may be involved in advising related entities.[86]

Other Aspects Related to Investment: Intellectual Property and Medicines

TRIPS-plus FTA provisions,[87] especially as they pertain to regulation of patenting and sale of pharmaceutical products, have been a source of global debate.[88] Such provisions provide investors who hold patents and other legal rights in the FTA States to gain legal protection via the FTA's provisions governing IP rights and pharmaceutical product approval licensing, and on ISDS. In many FTAs, IP rights (such as pharmaceutical patents) fall within definitions of protected "investments" under investment provisions, with the result that challenges under ISDS may be brought if a violation of rights related to such investments are claimed.

Under the USSFTA Singapore had already agreed to certain TRIPS-plus commitments. The EUSFTA text of Chapter 11 on *Intellectual Property Rights* appears to impose far fewer TRIPS-plus requirements for these products. However, Chapter 2, *Annex 2-C Pharmaceutical Products and Medical Devices* does impose a number of new disciplines for Singapore relating to, *inter alia*, listing, pricing and reimbursement of pharmaceutical products.[89]

Other ASEAN TPP countries, that the EU is in FTA negotiations with, are Malaysia and Vietnam. The EU FTA negotiators will no doubt be monitoring the IP negotiations of the TPP to assess what these two countries might agree to. By way of general note, it was reported recently that incoming Chilean TPP negotiators have "drawn a red line" (or ceiling) at the US-Chile FTA level of pharmaceutical IP rights protection.[90]

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[86] See for example ICSID, ARB/12/20, *Blue Bank International & Trust (Barbados) Ltd v Venezuela*.

[87] These refer to FTA provisions which impose intellectual property protection standards that exceed those required under the WTO's *Trade-Related Intellectual Property Rights Agreement* (TRIPS), Annex 1C of the Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 299. TRIPS-plus provisions such as those, which affect the patenting and licensing of pharmaceutical products, have been included in a number of FTAs.

[88] See, for example, Lindstrom (2010), p. 917; and Collin-Chase (2008), p. 763.

[89] See Art. 3, *Annex 2-C*; text available at: http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151731.pdf.

[90] Incoming Chilean Officials Convey TPP Red Lines in Meeting with Froman, Inside US Trade 32 (2014) 7, 14 February 2014.

Conclusion

As the EUSFTA negotiations are the EU's first to be completed among those with ASEAN members, negotiators in the other ASEAN negotiating States will no doubt be studying the released text as a matter of reference, comparison and negotiation. These other members may have offensive and defensive negotiating interests that differ from those of Singapore, so that they may seek some variations in specific areas. Examples of such areas are trade in goods (such as agriculture, machinery and transport equipment) trade in services, government procurement and the level of protection of IPRs, including those relating to pharmaceutical products and services related to their distribution. It is also not clear if they will accept the insertion of an umbrella clause in their treaties with the EU, given that such clauses have led to somewhat surprising (and costly) challenges elsewhere, as mentioned. The investment provisions, given that ASEAN members have varying reservations in past economic agreements, may be a further area in which negotiations may take more time.[91]

For States that may have GSP preferences that have an imminent expiry date, there could be an added impetus to conclude a FTA with the EU.[92] ASEAN States such as Indonesia, Philippines, Thailand and Vietnam are beneficiaries under the EU's 2014 GSP scheme.[93] As of 2014, Malaysia no longer benefits under the EU's GSP scheme.[94]

The EUSFTA signals a first between the EU and Singapore in several ways, and may well lead to conclusion of further FTAs soon between other ASEAN members and the EU. For the moment, it would appear that an EU-ASEAN agreement will take some time to materialise.[95]

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[92] For example, Thailand's benefits ended in January 2015.

[93] See European Commission (Trade) (2014c). Cambodia, Lao PDR and Myanmar are under its EBA programme for; for information on this scheme, see generally Regulation (EU) No 607/2013 of the European Parliament and of the Council of 12 June 2013 repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to generalised tariff preferences from Myanmar/Burma, [2013] OJ L 181/13.

[94] See European Commission (Trade) (2014d).

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A Mismatch Between Ambition and Reality: The EU's Efforts to Counterbalance China and the US in East Asia

Chien-Huei Wu

> Politically, the agreement with Indonesia will serve as a milestone for PCAs with other countries in the region. The PCA will allow the EU to assume greater responsibility and influence in a region which traditionally tends to be orientated towards and influenced by China and the US. By virtue of the PCA, the EU will promote European values and enhance concrete cooperation in a wide range of areas of mutual interest. Finally, the Agreement will be regarded as a positive example for a partnership of civilizations, given that Indonesia is the third most populous country in Asia and the largest Muslim country in the world.—European Commission, COM (2009) 492 final

Introduction

In 2009, when proposing a Council Decision on the conclusion of the Partnership and Cooperation Agreement between the EU and Indonesia (EU-Indonesia PCA), the European Commission put forward four major contributions the EU-Indonesia PCA would make: economic and political influence, values, and culture. Economically, according to the Commission, PCAs with member countries of the Association of the Southeast Asian Nations (ASEAN) would constitute prerequisite frameworks for negotiations of free trade agreements (FTAs). In terms of political influence, the European Union (the EU) would be able to assume greater responsibility and exert greater influence in a region dominated by China and the United States (the US). The Commission also suggested that the EU would be able to better promote European values and enhance concrete cooperation on matters of mutual interest. Finally, the EU-Indonesia PCA could be seen as an example of an

C.-H. Wu (✉)
Institute of European and American Studies, 128 Academia Road, Section 2, Taipei 115, Nangang, Taiwan
e-mail: wch@sinica.edu.tw

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inter-civilisational partnership given that Indonesia is the world's most populous Muslim country.

The EU's interest on Asia is longstanding. In 1977, following the establishment of the ASEAN, the EU (then, the European Economic Community, EEC) became one of the organisation's first dialogue partners[1]; this dialogue partnership was institutionalised through a formal Cooperation Agreement between the EU and ASEAN in 1980.[2] More recently, the EU has been negotiating PCAs with a number of ASEAN member countries. An FTA between the EU and Singapore has also been inked.[3] The Northeast Asian countries Japan, China and South Korea are all EU strategic partners. The EU has already concluded an FTA with South Korea,[4] and is negotiating an FTA with Japan.[5] Regarding China, the EU and China are currently updating and upgrading the 1985 Cooperation Agreement,[6] and the two sides have launched the negotiations for a stand-alone bilateral investment treaty (BIT).[7] In addition, the Commission has published strategy papers addressing its relations with Asia, including *Toward a New Asia Strategy*,[8] *Europe and Asia: A Strategic Framework for Enhanced Partnerships*,[9] and *A New Partnership with South East Asia*.[10]

In view of the EU's renewed interest in Asia and its high ambition to counterbalance the influence of China and the US in Southeast Asia, this chapter explores whether existent policy tools are sufficient for the EU to achieve its goals. To this end, this chapter firstly maps the image of Asia in the eyes of the EU and investigates EU strategy papers on Asia. This chapter then examines the legal and policy instruments by which the EU weaves its relationship with Asia, and the various fora in which the EU exercises its influence in the region. This chapter then explores the EU's role in Asian geopolitics. This chapter argues that there is a

[1] Yeo (2009), p. 45 (46).

[2] Cooperation Agreement between the European Economic Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand—member countries of the Association of South-East Asian Nations, OJ [1980] L 144/ 2.

[3] Legal text, except the investment chapter, has been made public, available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore.

[4] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ [2011] L 127/6.

[5] European Commission Press Release, A Free Trade Agreement between the EU and Japan, MEMO/13/572, 17 June 2013.

[6] Trade and Economic Cooperation Agreement between the European Economic Community and the People's Republic of China, OJ [1985] L 250/2.

[7] European Commission Press Release, Commission proposes to open negotiations for an investment agreement with China, IP/13/458, 23 May 2013

[8] European Commission, Communication from the Commission to the Council: Toward a New Asia Strategy, COM(94)314 final.

[9] European Commission (2001) Communication from the Commission: Europe and Asia: A Strategic Framework for Enhanced Partnerships, COM(2001)469 final.

[10] European Commission (2003) Communication from the Commission: A New Partnership with South East Asia, COM(2003)399 final.

mismatch between ambition and reality when the EU aims to counterbalance China and the US in (Southeast) Asia. This is especially evident when it comes to high politics. Further, in forging its trade relations with Asian countries, the EU is more a follower of the US than a counterbalancing power. The major role the EU plays in East Asia relates to the provisioning of humanitarian aid, which corresponds to its image of itself as a "civilian power".

Asia in the Eyes of the EU

Asia is a diverse, difficult to define region. When it comes to interregional relations between the EU and Asia, the EU typically thinks of ASEAN plus three (APT, the three being Japan, China and South Korea). However, with the expansion of dialogue partners from the ASEAN (from ASEAN plus three to ASEAN plus six) and the inclusion of participants of the ASEAN Regional Forum (ARF) and Asia-Europe Meeting (ASEM),[11] limiting Asia to APT may run the risk of missing the whole picture. Additionally, concentrating on APT may overlook the geopolitical complexities associated with the Taiwan issue. That said, the vast diversity of Asia makes it difficult to conceptualise and analyse EU-Asia relations. Nevertheless, an operative definition of the region is necessary for the purpose of this chapter. Being fully aware of these limits and constraints, the author delimits the region as constituted by ASEAN and its Northeastern counterparts plus Taiwan. In this chapter, "EU-Asia relations" serves as shorthand for the relationship between the EU and East Asian countries.

Even limiting our exploration of EU-Asia relations to the relationship between the EU and East Asian countries, there is still a vast diversity within East Asia, ranging from economic development, political and social systems, and to religious beliefs. This diversity is also reflected in the region's image in the eyes of the EU. Asia may be seen as a threat to European security and the international legal order, a strategic partner in the international world, a market for European enterprises, and a region receptive to the European integration model.

Asia as a Threat

In the eyes of the EU, Asia may be a potential threat. This threat can be defined in two senses: as a threat to European security and a threat to the existent international legal order. The former relates to the nuclear activities of North Korea, and terrorists and criminals in Southeast Asia; the latter relates to the threat posed by China's rise.

[11] Breslin (2010), p. 1 (3).

The threat to European security posed by nuclear proliferation, terrorism and criminal activities is presented vividly in the European Security Strategy (ESS),[12] adopted by the European Council in 2003. The ESS states that, "in an era of globalisation, distant threats may be as much a concern as those that are near at hand".[13] The ESS highlights the nuclear activities of North Korea, and terrorism and criminal activities in Southeast Asia as activities of concerns to Europe, and which may be a threat to European countries and their citizens.[14]

The threat to the existing international legal order posed by China's rise is a consequence firstly of China's rise as an economic power. In that regard, the main task is to integrate China into the world trading system and subject it to the regulation of the multilateral trade disciplines of the World Trade Organisation (the WTO). The large trade deficit between the EU and China draws the EU's attention to the undervaluation of China's currency, the yuan, and encourages the EU to urge China to revaluate its currency. Further, thanks to its rapid economic growth and accumulation of a huge stockpile of foreign reserves, China has become a major source of international development aid. Given that Chinese delivery of development aid deviates from the existent practices of the Organisation of Economic Cooperation Development (OECD) Development Assistance Committee, and that the Chinese development model differs sharply from those of the western countries, China presents a huge challenge to the international development order.[15] The threats posed by China's rise point to the fundamental divergence between the EU and China in their efforts to shape the international legal order. The Treaty on the European Union (the TEU) dictates that EU actions on the international scene be guided by a commitment to democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[16] It is doubtful such a vision of the international legal order is shared by China.

Asia as a Strategic Partner

When the European Council adopted the ESS, it also raised the idea of developing strategic partnerships with countries that share its goals and values.[17] The ESS

[12] European Security Strategy: A Secure Europe in a Better World (2003) adopted by the European Council, 12 December 2003.

[13] European Security Strategy: A Secure Europe in a Better World (2003) adopted by the European Council, 12 December 2003, p. 6.

[14] European Security Strategy: A Secure Europe in a Better World (2003) adopted by the European Council, 12 December 2003, p. 6

[15] See Wu (2012), p. 106.

[16] Consolidated version of the Treaty on European Union (TEU), [2012] OJ C 326/13, Art. 21(1).

[17] European Security Strategy: A Secure Europe in a Better World (2003) adopted by the European Council, 12 December 2003, p. 15. Since the inception of the strategic partnership in the ESS, what

designated China and Japan, along with Canada and India, as countries with which to develop such strategic partnerships. The list of EU strategic partners gradually expanded, significantly adding South Korea in 2010 during the course of the EU-South Korea FTA negotiations. As of January 2015, the EU has ten strategic partners, of which three are East Asian countries.

Asia as a Market

In Global Europe strategy,[18] wherein the EU lifted its *de facto* moratorium for FTA talks and shifted focus from multilateralism to bilateralism, the European Commission reviewed the pitfalls of existent EU bilateral agreements. According to the Commission, while the existing bilateral agreements support its neighbourhood and development objectives well, its main trade interests are less well served. The European Commission cited Asia as an example for this policy failure. With a view to correcting this deficiency and articulating a trade policy that will help create jobs and drive growth, "economic factors must play a primary role in the choice of future FTAs".[19]

The Commission has put forward two key economic criteria for the selection of new FTA partners: market potential (economic size and growth), and the level of protection in place against EU export interests (tariffs and non-tariff barriers). Particular regard should also be paid to negotiations between the EU's potential partners and competitors. In accordance with these criteria, the Commission identified ASEAN, South Korea, and Mercosur as key priorities. Regarding China, the Commission found that it met many of the criteria, and was careful to highlight the opportunities and risks that China presented.[20] Given these complexities, the European Commission has opted for a cautious approach in including China as one of its FTA negotiating partners. Therefore, as Global Europe strategy shows, Asia—meaning ASEAN, South Korea and China—is viewed as a viable market for the EU to pursue its trade interests and for initiating FTA negotiations.

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this partnership entails is not clearly elaborated. The subsequent practices reveal that this partnership would result in summits, high-level dialogues and sectoral dialogues. However, the EU is not always able to convince its strategic partners to act in concert or with their support. On critique for the strategic partnership, see Renard (2012), p. 1.

[18] Communication from the Commission to the Council (2006) the European Parliament, the European Economic and Social Committee and the Committee of Regions, Global Europe: Competing in the World, COM(2006)567.

[19] Communication from the Commission to the Council (2006) the European Parliament, the European Economic and Social Committee and the Committee of Regions, Global Europe: Competing in the World, COM(2006)567, p. 8.

[20] Communication from the Commission to the Council (2006) the European Parliament, the European Economic and Social Committee and the Committee of Regions, Global Europe: Competing in the World, COM(2006)567, p. 9.

Asia as a Region for Exporting the European Model

Because of its own history and continuous intergovernmental negotiations, the EU is said to be multilateral at its core, and strongly inclined to pursue multilateral solutions to common problems.[21] When it comes to external relations, the EU is keen to promote regional integration based on its own experiences. In engaging with third countries, the EU prefers a region-to-region approach, or interregionalism.[22] ASEAN, or East Asia, is a region targeted for exporting the European integration model and forging interregional relations.[23]

EU Strategy Papers on Asia

In shaping its policy toward Asia, the European Commission has released several policy documents, including strategy papers for individual countries as well as the region as a whole. In *Toward a New Asia Strategy*, the Commission spelled out the EU's overall objective to "strengthen the Union's economic presence in Asia in order to maintain the Union's leading role in the world economy".[24] The Commission firstly recalled the EU's existent policy tools in engaging with Asia, including bilateral and multilateral relations, common commercial policy, generalised systems of preferences (GSP), development and humanitarian aid.[25] In recognition of the inevitable increase of political weight resulting from its economic weight in world economy, the Commission then explored possible new political approaches toward Asia, focusing specifically on arms control and non-proliferation, human rights, and drugs.[26]

In 2001, the Commission published *Europe and Asia: A Strategic Framework for Enhanced Partnerships*, wherein the Commission reiterated the objective of "strengthening the EU's political and economic presence across the region, and raising this to a level commensurate with the growing global weight of an enlarged EU".[27] Since its 1994 Communication, *Toward a New Asia Strategy*, the

[21] TEU, Art. 21(1); see also Cameron (2004), p. 157 (157–158); Jørgensen (2009), p. 1; Jørgensen (2006), p. 30.

[22] See e.g., Aggarwal and Fogarty (2005), p. 533; Söderbaum and Van Langenhove (2005), p. 249.

[23] Gilson (2005), p. 307; Camroux (2008), pp. 3–6.

[24] European Commission, Communication from the Commission to the Council: Toward a New Asia Strategy, COM(94)314 final, p. 3.

[25] European Commission, Communication from the Commission to the Council: Toward a New Asia Strategy, COM(94)314 final, pp. 4–6.

[26] European Commission, Communication from the Commission to the Council: Toward a New Asia Strategy, COM(94)314 final, pp. 11–13.

[27] European Commission (2001) Communication from the Commission: Europe and Asia: A Strategic Framework for Enhanced Partnerships, COM(2001)469 final, p. 3.

Commission has moved beyond a merely economic presence and looked to consolidate a political presence that corresponds with the increased weight of the enlarged Union. The Commission has also focused on the role of ASEAN and ARF in channelling political and security dialogues addressing global security questions and responding to global challenges, such as drugs and transnational crime.[28]

In 2003, the Commission published *A New Partnership with South East Asia*, elaborating on the economic interests driving the enhancement of EU relations with ASEAN, and pointing out that the EU's major economic partners and competitors were forging economic partnerships and alliances with ASEAN, and might thereby challenge the EU's economic interests. Consequently, the Commission proposed both offensive (aiming to improve the EU's position in the ASEAN market) and defensive (aiming to protect its existing economic interests) strategies for dealing with ASEAN trade relations.[29]

Forging EU-Asia Relations: Instruments and Forum

Legal and Policy Instruments for Weaving EU-Asia Relations

In engaging with East Asia, the EU has a number of legal and policy instruments in hand: strategic partnerships, PCAs, FTAs, BITs, GSP and development and humanitarian aid. These instruments differ in nature and serve different objectives, ranging from dialogue to inking international agreements, and cover both political and economic dimensions.

Strategic Partnership

The idea of a strategic partnership was first proposed by the ESS in 2003. However, the ESS does not provide much detail regarding this strategic partnership. As Thomas Renard observes, a strategic partnership may cover two dimensions: a strategic approach to foreign relations, and bilateral relations with other powers.[30] In practice, such a strategic partnership entails summits, high-level official dialogues and sectoral dialogues. The aim of this strategic partnership goes beyond bilateral relations and aims to turn this partnership into a vehicle for solving global challenges.[31]

[28] European Commission (2001) Communication from the Commission: Europe and Asia: A Strategic Framework for Enhanced Partnerships, COM(2001)469 final, p. 21.

[29] Wu (2013), p. 329 (354–356).

[30] Renard (2011), p. 1.

[31] Renard (2011), p. 5.

Early on, the European Council designated Japan and China as strategic partners, and subsequently added South Korea to the list in 2010, and has been building up strategic partnerships with the three Northeast Asian countries. The question thus arises whether there is an imbalance in attention the EU pays to Northeast, and Southeast, Asia. Should EU-ASEAN relations be upgraded to a strategic partnership? As Joergen Ørstrøm Møller observes, ASEAN may be of greater importance than some of the EU's strategic partners.[32] Upgrading the ASEAN to the status of strategic partner may signal two messages to East Asia: firstly, it would convey the message that the EU values equally its relations with Northeast Asian countries and Southeast Asian countries; secondly, it would help to highlight the EU's support for regional economic integration, especially in light of the fact that the ASEAN Economic Community explicitly declares that it takes the EU as a role model.[33]

In 2010, the European Council instructed the EU and its Member States to "act more strategically so as to bring Europe's true weight to bear internationally" in accordance with the Lisbon Treaty that entered into force on 1 December 2009 and in line with the ESS.[34] To that end, the EU and its Member States should identify clearly their strategic interests and objectives at a given moment, and reflect deeply on the best means of pursuing them. Herein, strategic partnerships play a key role in the EU's pursuit of its objectives and interests in the wider world. The European Council has also underlined the importance of the full participation of emerging countries in the international system as an effective means of ensuring that such countries benefit from the system equitably, and assuming their share of responsibilities evenly. In this context, trade with strategic partners constitutes a crucial objective; concrete steps should be taken with a view to finalising an ambitious FTA, gaining market access to these emerging economies, and deepening regulatory cooperation.[35]

Partnership and Cooperation Agreement

PCAs aim to lay down a general framework for cooperation between the EU and third countries, and cover a wide range of subject matter. They may cover political and security issues, economic and development cooperation, and institutional arrangements. PCAs are an important instrument for establishing the broader context governing bilateral relations between the EU and third countries. The EU is currently negotiating a PCA with China to replace the 1985 Cooperation Agreement with a view to establishing a stronger legal basis for further cooperation. In some cases, a PCA is a prerequisite for the negotiation of FTAs—such is the case in the EU-ASEAN relations.

[32] Ørstrøm Møller (2007), p. 465 (469–470).

[33] Wu (2010), p. 331 (355–356).

[34] European Council (2010) Conclusions, 16 September 2010, EUCO 21/1/10 Rev 1, para. 3.

[35] European Council (2010) Conclusions, 16 September 2010, EUCO 21/1/10 Rev 1, para. 4.

PCAs are generally characterised by "essential elements" and "fundamental elements", which generally set out obligations with respect to human rights, democratic principles, and the rule of law.[36] The difference between "essential elements" and "fundamental elements" lies in the possibility of triggering the sanction mechanism should obligations be unfulfilled. These "essential elements" and "fundamental elements" are referred to as human rights conditionality in EU external agreements.[37]

"Essential elements" and "fundamental elements" have been viewed as obstacles to the conclusion of the EU-China PCA negotiations, as China will be far from happy to include human rights and democracy clauses in its bilateral agreement with the EU. It is thus argued that, in view of the deadlock in PCA negotiations, the end result may be two independent agreements: one for trade and economic issues, the other covering political and security dialogue.[38]

By contrast, the PCA negotiations between the EU and ASEAN member countries have yielded the successful inclusion of "essential clauses" in the final legal texts. For example, in the EU-Indonesia PCA, the Parties express their respect for democratic principles and fundamental human rights, as enshrined in the UN Declaration of Human Rights and other international human rights instruments[39]; agree to cooperate and to contribute to countering the proliferation of weapons of mass destruction by ensuring the full, effective implementation of their existent obligations under multilateral disarmament and non-proliferation agreements, and other relevant international legal instruments under the auspice of UN Charter[40]; and commit to cooperate in, and contribute to, the fight against organised economic and financial crimes and corruption, the recovery of assets, and curtailing funding, through strict adherence to, and full implementation of, mutual obligations stemming from existent international legal instruments.[41] These provisions constitute the "essential elements" of the EU-Indonesia PCA. In cases of "a material breach of the agreement" defined as the "repudiation of the agreement not sanctioned by the general rules of international law"[42] or "violation of an essential element of the agreement",[43] appropriate actions may be taken. On 23 July 2014, at the occasion of the 20th anniversary of EU-ASEAN ministerial meeting, the Ministers agreed to work toward a strategic partnership and thus entrusted their senior officials to develop a roadmap for this goal. However, whether and how this roadmap leads to a strategic partner between the EU and ASEAN remains to be seen.

[36] Smith (1998), p. 253 (263–264).

[37] On human rights conditionality, see generally Bartels (2005) Human Rights Conditionality in the EU's International Agreements, 2005; see also Horng (2004), p. 677.

[38] Sautenet (2007), p. 699 (726–728).

[39] EU-Indonesia Partnership and Cooperation Agreement, OJ [2014] L 125/17, Art. 1.1.

[40] EU-Indonesia Partnership and Cooperation Agreement, OJ [2014] L 125/17, Art. 3.2.

[41] EU-Indonesia Partnership and Cooperation Agreement, OJ [2014] L 125/17, Art. 35.

[42] EU-Indonesia Partnership and Cooperation Agreement, OJ [2014] L 125/17, Art. 44.4(i).

[43] EU-Indonesia Partnership and Cooperation Agreement, OJ [2014] L 125/17, Art. 44.4(ii).

Free Trade Agreement

Based on the framework underpinned by the PCAs or cooperation agreements, the EU may pursue greater market access and trade liberalisation through FTA negotiations. The targeted countries identified in Global Europe are South Korea, ASEAN and Mercosur. Since the release of Global Europe, the landscape of international trade and the FTA games have changed a great deal. The EU has successfully concluded an FTA with South Korea, to which the Commission referred to as a "new-generation agreement".[44] Regarding ASEAN, the EU has given up its interregional approach and switched to a bilateral approach targeting individual ASEAN member countries. An FTA with Singapore was concluded while FTA negotiations with other ASEAN member countries, Vietnam and Indonesia, were ongoing. The impossibility of concluding the EU-ASEAN FTA is regarded as a failure of the EU as an international actor.[45] A more important FTA between the EU and Japan is still under negotiation; such a development would have been unimaginable in the GATT era, or even during the 1990s, when the Quad (the US, the EU, Canada, and Japan) accounted for the greater part of international trade.

The concluded EU-South Korea FTA and EU-Singapore FTA represent a template on which the EU will base future FTA negotiations. These two FTAs cover deep regulatory cooperation and a wide range of WTO-plus provisions covering labour rights and sustainable development, cultural cooperation, government procurement, competition policy and investment. Given that foreign direct investments (FDI) constitute part of the common commercial policy and became the exclusive competence of the EU by virtue of the Lisbon Treaty,[46] much attention has been paid to the investment chapter of these two FTAs. However, the EU-South Korea FTA touches upon investment liberalisation only and does not address investment protection. The investment chapter of the EU-Singapore FTA has not been finalized, but given that the EU-Canada FTA is expected to include investor-State arbitration, it is believed that the EU-Singapore FTA will cover investment protection.

Bilateral Investment Treaties

As noted above, following the entry into force of the Lisbon Treaty, the EU enjoys exclusive competence over FDI. The European Commission is keen to include investment policies as a core element of its common commercial policy with a view to strengthening the EU's competitiveness. In *Toward a Comprehensive European*

[44] See Horng (2012), p. 301.

[45] See Robles (2008), p. 541.

[46] On the EU's competence over FDI, see Dimopoulos (2011); Bungenberg (2010), p. 123; Wu (2011), p. 375; Shan and Zhang (2010), p. 1049.

Investment Policy,[47] the Commission maintains that it might be desirable to pursue a stand-alone BIT with China, in which a large proportion of greenfield investments would be covered.[48] To date, the European Commission has requested and been granted, a mandate to open BIT negotiations with China.

The EU appears to be more interested in conducting BIT negotiations than China. At the outset, the EU market is already quite open to foreign investments while the Chinese market remains relatively closed. Besides, whereas EU investors demand better investment protection in China, as the largest recipient of inbound investment, China is not necessarily motivated to meet such demands. Further, owning to the integration of the EU's internal market, Chinese investors may simply identify the most liberal EU Member States in which to invest, and then enter other European markets via the free movement of goods (and perhaps services). Regarding Chinese outbound investments to the EU, a large proportion comes from State-owned enterprises, or from those supported by governments, which may give rise to strategic and security concerns. Worries have been voiced that Chinese investors in the EU may steal the technological know-how of European enterprises instead of bringing about technological improvement in the EU through technological diffusion.[49] Therefore, the EU may have less leverage than does China during BIT negotiations.

Generalised System of Preferences

The GSP is an autonomous policy instrument through which the EU engages with (some) East Asian countries. The GSP finds its legal basis in the Enabling Clause of the GATT/WTO system.[50] The GSP was challenged by India, which argued that it is WTO-incompatible because the inclusion of a special incentive to combat drug trafficking in Pakistan was neither in the interest of developing countries, nor based on objective standards.[51] A reformed GSP links the special incentive mechanism to international agreements and standards on good governance and sustainable development. The latest version of the GSP came into effect on 1 January 2014.[52]

[47] European Commission Communication (2010) Towards a comprehensive European international investment policy, COM(2010)343 final.

[48] European Commission Communication (2010) Towards a comprehensive European international investment policy, COM(2010)343 final, p. 7.

[49] Meunier (2014), p. 996 (1009–1010).

[50] Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, GATT Document L/4903, BISD 26S/203, 28 November 1979.

[51] Report of the Appellate Body, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, paras. 181–183 and 187–188; see also Harrison (2005), p. 1663.

[52] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ [2012] L 303/1.

According to the current GSP, China, Indonesia, Laos, the Philippines, Thailand and Vietnam are eligible for the general scheme; Cambodia and Myanmar/Burma are eligible for the special incentive scheme for least developed countries under the "everything but arms" (EBA) programme. The GSP lays down a procedure for third countries to apply for the special incentive scheme for sustainable development and good governance.

In the EU's engagements with East Asia, the GSP is of particular relevance to Myanmar/Burma. Because of the nature of the political regime, and human rights violations in Myanmar/Burma, the EU long imposed sanctions against the country. These sanctions included denying the country benefits derivative of the GSP.[53] The EU's attitude toward Myanmar/Burma started to change following the remarkable political changes that commenced in that country in 2012. The High Representative of the EU, Catherine Ashton, in her speech before the European Parliament, welcomed efforts made by the current Myanmar/Burma President U Thein Sein.[54] The Council then decided to suspend and to repeal its former decision on restrictive measures against Myanmar/Burma through the adoption of Council Regulation (EU) No 978/2012.[55] Further, the Council decided to reopen the European market to products from Myanmar/Burma under the EBA scheme of the GSP.[56]

With a view to supporting the democratic transition of Myanmar/Burma by bringing together all of the tools and mechanisms available to the EU, both political and economic, an EU-Myanmar Task Force was established. Its first meeting was held 13–15 November 2013.[57]

Development Cooperation and Humanitarian Aid

Development cooperation and humanitarian aid are two different, but connected, policy instruments; the former is aimed at improving the general legal, political and social infrastructure of a partner country, while the latter is aimed at addressing humanitarian needs in case of emergencies. Development cooperation and humanitarian aid play key roles in EU external relations, as they are not much concerned

[53] See Bünte and Portela (2012)

[54] European Commission (2012) Catherine Ashton EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission Speech on Myanmar European Parliament Strasbourg, Speech/12/273, 17 April 2012.

[55] Council Decision 2013/184/CFSP of 22 April 2013 concerning restrictive measures against Myanmar/Burma and repealing Decision 2010/232/CFSP, OJ [2013] L 111/75.

[56] Council Regulation (EU) No 607/2013 of the European Parliament and of the Council and of the Council of 12 June 2013 repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to generalized tariff preferences from Myanmar/Burma, OJ [2013] L 181/13.

[57] European Commission, Press Release, EU-Myanmar Task Force, IP/12/1062, 11 November 2013.

with self-interest and involve no military threat or physical power, and thus fit nicely into the EU's posture as a "civilian power".[58]

During the period from 2006 to 2013, development cooperation with Asian countries was governed mainly by Regulation (EC) No 1905/2006,[59] which put forward geographical programmes and thematic programmes. In cooperating with its Asian partners on development programmes, special emphasis was placed on pursuing Millennium Development Goals in the field of health and education, addressing governance issues, encouraging greater regional integration, controlling epidemics and new diseases leaping the species barrier and promoting sustainable development.[60] The EU has also supported a number of trade related assistance schemes, including the Trans-Regional EU-ASEAN Trade Initiate; ASEAN Regional Integration Support Programme and Enhancing ASEAN FTA Negotiating Capacity Programme.

With respect to humanitarian aid for East Asian countries, one of the most illustrative examples concerns Cyclone Nargis, which hit Myanmar/Burma in 2008. In 2008, the Council called on the authorities in Burma/Myanmar to offer free and unfettered access to international humanitarian experts and to take urgent action to facilitate the flow of aid.[61] The Commissioner for Development and Humanitarian Aid visited Myanmar/Burma with a view to securing access to the affected region. At the same time, leaders of Member States, including France and the United Kingdom (the UK), condemned the Myanmar/Burma Junta for refusing humanitarian aid.[62] The intransigence of the junta contributed to the debate over the "responsibility to protect".[63]

Venues for the EU to Exercise Its Influence in East Asia

There are three major venues through which the EU may exercise influence in East Asia. The first relates to bilateral summits, high-level and sectoral dialogues. Bilateral summits apply to the EU and its strategic partners—in the context of this chapter, Japan, China and South Korea; high-level and sectoral dialogues may also exist in EU-ASEAN relations. The second and third venues relate to ARF and

[58] On "civilian power" and its critique, see e.g., Bull (1982), p. 149.

[59] Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ [2006] L378/41.

[60] Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ [2006] L378/41, Art. 7.

[61] Council of the European Union, General Affairs and External Relations, 9270/08, Press Release 13 May 2008, p. 6.

[62] BBC (2008).

[63] See e.g., Wong (2009), p. 219.

ASEM, which are sometimes referred to as examples of interregionalism. These different venues will be examined below.

Summits, High Level Dialogues, and Sectoral Dialogues

Summits are one of the key features of relations between the EU and its strategic partners. Since the entry into force of the Lisbon Treaty, the European side is represented by the Presidents of the European Council and the European Commission, assisted by the High Representative of the EU for Foreign Affairs and Security Policy/Vice President of the European Commission. The summits cover a wide range of topics, ranging from political and security concerns to economics and trade. Topical issues include the appreciation of Chinese yuan, security in the Korean peninsula, the South China Sea, negotiations of the EU-China PCA, the EU-Japan Strategic Partnership Agreement, and the EU-Japan Economic Partnership Agreement/FTA. However, it should be noted that while EU officials take the lead, the summits are subject to the political climate of the EU and its strategic partners. For example, the EU-China Summit in 2008 was postponed because of tensions arising from the visit of Dalai Lama to France.

In addition to summits, the EU holds regular ministerial meetings with East Asian countries, including ASEAN. For example, the EU and China maintain political and high-level economic and trade dialogues—the political dialogues also cover human rights. There is an annual ASEAN-EU Ministerial Meeting (AEMM), and the EU maintains a number of sectoral dialogues with East Asian countries, on topics including climate change, intellectual property rights, employment, and social affairs.

ASEAN Regional Forum

ARF was initiated at the twenty-sixth ASEAN Ministerial Meeting and Post Ministerial Conference, held in Singapore, 23–25 July 1993. The first inaugural meeting was held in Bangkok 25 July 1994. The objectives of the ARF are to sustain and enhance peace and prosperity. To this end, a three-stage approach was advanced: promotion of confidence-building measures; development of preventive diplomacy mechanisms; development of conflict resolution mechanisms. Since the coming into being of the ARF, the EU has consistently participated in this forum. In addition to the EU, other non-ASEAN actors in the ARF include ASEAN's dialogue partners, North Korea, Mongolia, Pakistan, Timor-Leste, Bangladesh and Sri Lanka.

Writing in 2003, Alfredo C. Robles Jr. cites the cases of North Korea and East Timor as examples of the EU's limited role as a security actor in Southeast Asia through the ARF.[64] Lay Hwee Yeo also observes that the EU's participation in the

[64] Robles (2003), p. 19 (22–28).

ARF is, in fact, lukewarm, and argues that compared to Northeast Asian countries, the EU pays little attention to ASEAN's potential as a strategic partner, and thus undermines the EU's capacity to act as security actor in Southeast Asia.[65]

By contrast, Jürgen Haacke argues that the EU may have a significant role to play in non-traditional security situations, such as disaster relief. The EU has taken up the "shepherd's" role in promoting ARF cooperation, and coordinating implementation of relevant recommendations during ARF meetings.[66] Further, post-11 September 2001 developments, including the Bali Bombing in 2002, have shifted the EU's attention to terrorist activities.[67] In view of this, the EU may have a stronger incentive to invest more in Southeast Asia and the ARF, and to demonstrate its ambition and capacity for acting as a security actor in the region.

Asia Europe Meeting

The ASEM was an informal cooperation and dialogue initiative launched in Bangkok, Thailand, in 1997, with the objective of strengthening relations between Europe and Asia. The original partner countries of the ASEM consisted of the 15 EU Member States and seven ASEAN member countries plus the European Commission, Japan, China and South Korea. The ASEM gradually expanded by virtue of EU and ASEAN enlargement, and the accession of some European and Asian countries to ASEM, including Australia, New Zealand, Norway, Russia, Switzerland, etc. The ASEAN Secretariat also participates in the ASEM process. As of January 2015, the ASEM is composed of 53 partner countries, including the European Commission and ASEAN Secretariat.

Writing in 1997, Christopher Dent argues that the ASEM process represents a new level of partnership between the EU and East Asia. Bilateral relations between the EU and East Asian States may be subsumed into the region-to-region framework if East Asian countries are able to resolve their collective action problem and coordinate their actions. Dent also argues that the ASEM process is significant in that the forum provides an opportunity for the EU to realise its potential to counterbalance the interests of other powers in the region.[68] That position is also shared by Bart Baens, who argues that the role played by the EU in the ASEM process helps to contain the economic dominance of Japan and China in this region. The comparative advantage of the ASEM process lies in its informality and multidimensionality, which allow partner countries to develop mutual understandings in sensitive areas, to promote common interests in global fora, and to identify priorities for concerted actions in pursuit of these interests.[69] In addition to

[65] Yeo (2010), p. 9 (16–17).
[66] Haacke (2009), p. 427 (440).
[67] Yeo (2010), p. 9 (21–22).
[68] Dent (1997–1998), p. 495 (513–515).
[69] Gaens (2008), p. 9 (23–25).

managing global challenges, the ASEM process may also contribute to intra-regional integration and region building in East Asia.[70]

The EU nonetheless faces tremendous challenges in seeking to achieve these goals. The ASEM process involves multiple layers and multiple actors, with States and non-State actors operating at the regional level and state level. Attempts to coordinate between the EU and its Member States are not always successful. This undermines the EU's credentials as a stakeholder in that region and threatens the legitimacy of the EU in upholding its political and economic interests. Conversely, the expectations of Asian countries may differ from those of the EU. The human rights issue is a staring example. While some Asian countries are not willing to see human rights issues included on the agenda, the failure to include them has led some EU Member States to abstain from ASEM meetings. For example, the Danish, Greek, Spanish and Swedish prime ministers did not participate in the 1996 ASEM Meeting.[71]

As to whether or not the EU might coordinate with its Asian counterparts to take concerted actions to advance their common interests, Howard Loewen and Dirk Nabers answer in the negative after surveying the reform of international financial system in the International Monetary Fund (IMF), multilateral dialogues on trade in the WTO and negotiations on investments in the WTO and the OECD. The absence of measurable progress in these three areas illustrates the inability of the ASEM process to produce a mutual understanding of their common interests in the wider world, and the difficulty the ASEM experiences in seeking to play a significant role in global governance.[72]

EU's Role in Asian Geopolitics

In Asian geopolitics, three issues are of pertinent importance: the Korean Peninsula, Taiwan-China relations, and Myanmar/Burma. Overall, the EU has a limited role to play in Asian geopolitics, except for the Myanmar/Burma issue. This is because the Myanmar/Burma issue concerns mostly humanitarian assistance and has few implications for high politics.

Six Party Talk on Korean Peninsula

Nuclear activities in North Korea have been identified as a threat to European security in the ESS. Regardless, the EU, in stark contrast to the situation in Iran, has

[70] Gilson (2005), p. 307 (321–323).
[71] Forster (2000), p. 787 (799–800).
[72] Loewen and Nabers (2008), p. 95 (104–110).

not made any significant contribution to containing North Korea's nuclear activities. With respect to Iran, the key players are Russia, China, the US, the EU, the UK, Germany and France, the so-called E3/EU+3 Iran Talks.[73] The EU, in conjunction with its three most powerful Member States, participates in the Iran Talks along with the other three permanent members of the Security Council of the United Nations. Given that Iran is close to the European continent, European countries do have a lot at stake in the Iran issue, and the EU, in cooperation with the UK, Germany and France, is eager to play a significant role in the talks.

The EU does not seem to have such a stake in the Korean Peninsula. While the ESS recognises that the nuclear activities of North Korea may threat European security, that concern has not been translated into action. Instead, the Korea Peninsula issue is being dealt with mainly through the Six Party Talks, by North Korea, South Korea, China, Japan, Russia, and the US. China is believed to be able to exert the influence over the North Korean leadership, while the US has a great influence on Japan and South Korea. There seems to be no role for the EU, or even the UK and France—the two European permanent members in the Security Council—to play in the Korean Peninsula. While it is argued that the EU can serve as an alternative to the US, as the EU presents a worldview that differs from that of hardliners in Washington, DC,[74] the EU seems to be more successful in its role as a humanitarian aid provider than a non-proliferation enforcer, and will most likely continue to play that role.[75]

Taiwan-China Relations

The second factor in Asian geopolitics is Taiwan-China relations. Since the EU established formal relations with China in 1975, the EU has adopted the "One China policy" and maintained only trade and economic relations with Taiwan. In its engagements with China, two issues repeatedly arise: its arms embargo on China, and market economy status. In the context of Asian geopolitics, the arms embargo is of greater relevance.

The arms embargo was imposed as an immediate response to the Tiananmen Square massacre; ever since, China has repeatedly attempted to persuade the EU to lift its arms embargo. Some Member States, in particular France, have sought to lift the arms embargo because of the lobbying of interest groups. With a view to preventing the EU from lifting its arm embargo, Taiwan has also made great efforts to lobby the European Parliament. In consequence, various symbolic and non-symbolic arguments have been advanced as to whether or not the ban should

[73] On E3/EU+3 Iran Talks and the EU's engagement with Iran, see e.g., Harnischa (2007), p. 1; Dryburgh (2008), p. 253.

[74] Lee (2005), p. 33 (34).

[75] Van der Geest (2006), p. 131 (142–143); Moltz and Quinones (2004), p. 136 (142).

be lifted.[76] In this debate, the US plays a critical role.[77] The US has urged the EU not to lift its arms embargo through a number of channels. In 2005, both the House and Senate passed resolutions urging the EU to maintain its arms embargo on China.[78] Finally, China's adoption of the Anti-Secession Law, obliging Chinese authorities to use force if Taiwan, under whatever name or method, seeks to formalise its separation from China, if a major event occurs that leads to Taiwan's separation from China, or if peaceful unification is impossible, dampened the debates over lifting the arms embargo.

Myanmar/Burma Issue

Myanmar/Burma presents a complex issue for the EU. To begin with, Myanmar/Burma is a test of the effectiveness of EU sanctions. The EU has long suspended preferential trade arrangements for products from Myanmar/Burma. Other sanctions, including visa bans and an arms embargo, are also in place. Secondly, when the EU started to negotiate an FTA with ASEAN, Myanmar/Burma was deemed as an obstacle to the region-to-region approach as the EU would not accept the inclusion of Myanmar/Burma in the negotiation processes. Thirdly, Myanmar/Burma is a major destination of humanitarian aid from the EU, and the intransigence of the Junta following Cyclone Nargis constituted a challenge to the EU in providing aid.

The commencement of political reform in Myanmar/Burma in 2012 nonetheless presented an opportunity and challenge to EU efforts to facilitate the democratisation process in that country. In March 2013, the Presidents of the European Council and European Commission welcomed the visit of the President of Myanmar/Burma U Thein Sein to Brussels. The EU has also lifted its sanctions against Myanmar/Burma, except for the arms embargo, and reopened trade benefits for products from Myanmar/Burma under the GSP. An EU-Myanmar Task Force was also established with a view to providing comprehensive support of the transition in Myanmar/Burma.

Conclusion

This chapter takes its departure point from the EU's ambition to counterbalance China and the US in (South)East Asia, as reflected in the Commission's proposal for the conclusion of an EU-Indonesia PCA. This chapter first explores how Asia

[76] See Vennesson (2007), p. 417 (423–433).
[77] Tang (2005), p. 313 (319); Cabestan (2011), p. 80 (83).
[78] Archick et al. (2005), pp. 33–35.

appears in the eyes of the EU, and finds that Asia is viewed as a threat, a strategic partner, a market, and a region for exporting European model. This chapter then traces various EU policy papers on Asia and finds that the EU's interests in Asian have gradually intensified. In exploring whether the EU's aim to counterbalance China and the US may be achieved, this chapter examines various legal and policy instruments for the EU to weave its relations with East Asia and to exert influence to this region. Those legal and policy instruments include strategic partnerships, PCAs, BITs, FTAs, GSP, development cooperation and humanitarian aid; those fora include Summits, High-Level Dialogues and Sectoral Dialogues, ASEM and ARF. This chapter then examines the EU's role in three major geopolitics issues in East Asia: Korean Peninsula, Taiwan-China relations and Burma/Myanmar.

This chapter finds a mismatch between ambition and reality in the EU's efforts to counterbalance China and the US in East Asia. The EU's failure in translating its ambition into effective action is most evident in issues concerning high politics. The EU plays a limited role on the Korea Peninsula and in Taiwan-China relations, but is rather more successful in providing humanitarian aid to Burma/Myanmar. The reasons for this may be many fold. On the one hand, the EU has not learned to think and act strategically because of its self-image as a "civilian power"; on the other hand, the failure of the EU to act as an international actor in East Asian political and security issues may derive from its lack of competence and policy tools in political and security issues. Most importantly, the EU's interests in Asia are not as serious as its interests in the Balkans, Eastern Europe, and around the Mediterranean basin.

Moving beyond high politics, even in the trade and economic relations, the EU follows the footsteps of the US more often than it acts spontaneously. In concluding FTAs with South Korea and Singapore, the EU efforts are by no means original, but rather occur in response to the free trade agreements concluded by the US with South Korea and Singapore.[79] The biggest challenge for the EU in pursuit of trade and economic relations with East Asian countries comes from the trend towards mega FTAs in that region, for example, the Trans-Pacific Partnership (TPP) and Regional Comprehensive Economic Partnership (RCEP). The former is dominated by the US, while the latter is mainly driven by China. To date, the EU has no grand strategy to respond to the TPP and RCEP. Thus, there is a huge gap between ambition and reality in the EU's efforts to counterbalance China and the US in East Asia.

[79] Similarly, Dür argues that the EU's trade agreements with Mexico and Chile are an immediate response to NAFTA and US-Chile FTA. These two agreements are seen as an instrument to help EU exporters to gain their access to Mexican and Chilean market. Dür (2007), p. 833.

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The European Union's Normative Power in Asia: Endogenous and Exogenous Factors of the Nascent Investment Policy

Julien Chaisse

Introduction

States actively seek to attract foreign investment into their economies because high levels of foreign investment have long been associated with increased economic growth and prosperity.[1] In the international legal sphere, the period since the North America Free Trade Agreement (NAFTA) entered into force has witnessed a literal explosion in the number of international investment agreements (IIAs),[2] in the form of both bilateral investment treaties (BITs) and preferential trade agreements (PTAs) involving all countries which were earlier part of the Soviet Union.[3] It was in the year 2000 that many Asian countries developed and reinforced their network of IIAs thereby making investment a key aspect of their economic pacts with third countries.[4]

[1] Sachs (2005).

[2] If, globally speaking, international investment law and policy have developed in the mid-1990s, it was essentially in North America and Europe. The path-breaking North American Free Trade Agreement (NAFTA) of 1994, whose Chapter 11 (Investment) embedded a full set of investment rules within the ambit of a trade architecture for the very first time.

[3] Investors, however, are free to invest where they choose, and without legal instruments and mechanisms to protect investments abroad, investors may be reluctant to invest their resources in a foreign State. As a consequence of concerns in respect to differences in legal systems and differences in the levels of legal infrastructure, over the past 25 years in particular, states have concluded more than 2,850 BITS to regulate the treatment of foreign investors and investments and to provide a mechanism for the resolution of disputes between foreign investors and host States.

[4] In terms of methodology, it is important to clarify that Asian countries are understood in this paper as being those States geographically located in the Asian region and which are also members

J. Chaisse (✉)
Chinese University of Hong Kong, Office No 523, Sha Tin, New Territories, Hong Kong SAR
e-mail: Julien.chaisse@cuhk.edu.hk

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To put matters into the global context, the United Nations estimates that in 2014 the global inflows of foreign direct investment (FDI) amounted to 1.35 trillion USD ($1,350,000,000,000).[5] That figure represents capital moving from investors based in one State into investments located in another. The European Union (EU) is by far the leading foreign investment power. At the end of 2014, the EU outward stock of FDI in Asia represented EUR574.9 billion, which is equivalent to 14 % of all EU outward stock of FDI and is the amount of FDI affected by the change in FDI competence.[6]

In parallel with the economic significance of foreign investment, the EU is emerging as an international actor in the regulation of foreign investment. The Treaty of Lisbon extended the Common Commercial Policy to FDI in 2009.[7] Albeit subject to unanimity, the EU competence, which will soon be implemented (and affect all third countries), is broad and exclusive,[8] thereby enabling it to conceive what could be the main features of a new model of European investment agreement. The shift from national to supranational level is, in itself, a major legal development. The EU is likely to employ its significant bargaining power when negotiating IIAs to improve, for instance, the standards of investment protection or to develop new forms of all-encompassing agreements.[9] In this regard, current EU investment negotiations with Asian countries are not only relevant for immediate participants but also for third countries.

of the Asian Development Bank. In total, 48 States belong to the Asian regional members category. Apart of North Korea, all states (regardless of their size, population and political regime) are considered in this study and their respective investment treaties are analysed.

[5] UNCTAD (2013), p. 110 http://unctad.org/diae.

[6] Eurostat, European Commission, April 2014. In Asia, the most important destinations for outward stocks of EU-27 FDI were Singapore; Hong Kong, China; and Japan. Together, they accounted for half of the EU-27's positions in Asia in 2010. The relative importance of the PRC as a destination for EU-27 FDI has grown steadily in recent years, and outward FDI stocks in the PRC reached EUR75.1 billion by the end of 2010, which was higher than in the Republic of Korea, India, and Indonesia, which are the next largest partners. Virtually, all these EU FDI in Asia (and FDI currently made) will see their legal protection modified because of current negotiations.

[7] See also Chaisse (2012a), p. 462.

[8] The EU now holds exclusive competence over FDI, which is interpreted to include the classical standards of investment protection. However, the absence of a definition of FDI in the Treaty still leaves scope for disagreement. For further discussion, see Chaisse (2012b), p. 51.

[9] The "negotiation mandate" for EU FTAs with Canada, India, and Singapore was approved by the General Affairs Council on 12 September 2011. This confidential document confirms the trend that the EU will negotiate broad and encompassing FTAs to replace narrow and conventional BITs. Neither the 2008 Economic Partnership Agreement with the Caribbean Forum of African, Caribbean, and Pacific (CARIFORUM) States, nor the 2010 signed agreement with the Republic of Korea addresses the core investment protection issues of minimum standards of treatment, expropriation, and compensation. Nor do they provide recourse to investor–State arbitration procedures. The latter outcome reflects the legal situation prior to December 2009 and the shared competency, or "mixed competence", between Member States and the EU in matters of investment regulation.

As mentioned in the introduction, a major trend of international investment rule-making is the increasing regionalisation of negotiations. If the core of international investment regulations remains based on BITs and bilateral PTAs, it is important to underscore the current negotiations of broader pacts which involve more than two countries and cover a great number of economic areas. For instance, the EU intends to develop broad and encompassing trade and investment agreements which will include areas outside its exclusive competence, such as cultural cooperation[10] or criminal procedures in relation to intellectual property rights (IPR) violations.[11] A good illustration is the 2010 Preferential Trade Agreement (PTA) between the EU and South Korea; this is the first of the new generation of PTAs launched in 2007 as part of the "Global Europe" initiative. This PTA includes a dedicated protocol on cultural cooperation which sets up a framework for engaging in policy dialogue on culture and audiovisual issues.[12] By this, even if the CJEU would adopt a very broad interpretation of the new investment competence in the future, the negotiated trade and investment treaties are most likely to be mixed treaties. In addition to that, even if future EU agreements address only investment protection (*i.e.*, no trade), they will largely be negotiated and signed as mixed agreements for two main reasons: (1) portfolio investment uses various indirect financial mechanisms and falls outside the Article 207 TFEU competence on FDI; and (2) because of Article 345 TFEU which states that the treaties shall in no way prejudice the rules governing Member States' systems of property ownership, some aspects of expropriation will remain within MS competence. For Asian countries, an even more immediate issue is the negotiations of the TPP.[13]

[10] Cultural cooperation elements have to be included in EU trade agreements as a consequence of the UNESCO Convention on Protection and Promotion of the Diversity of Cultural Expressions which the EC and most of its Member States have ratified. The Convention foresees that countries have to promote cultural diversity and this should be also reflected in their international agreements and in the implementation of such international agreements. Without prejudice to the fact that UNESCO guidelines are being elaborated, the EU has drafted a model Protocol on Cultural Cooperation to be included in future trade agreements.

[11] It is not new, because, for instance, Article 61 of the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) requires criminal procedures and penalties in cases of "wilful trademark counterfeiting or copyright piracy on a commercial scale". But modern PTAs have developed this kind of TRIPs plus requirements and increase criminalisation of certain violations. See Lindstrom (2010), p. 917 (942–946).

[12] The protocol also seeks to encourage parties to cooperate in facilitating exchanges regarding cultural activities, notably in the area of performing arts, publications, protection of cultural heritage sites and historical monuments, as well as in the audiovisual sector. It also seeks to ensure a facilitated movement for artists and other cultural professionals and practitioners who are not service providers.

[13] The June 2012 leaked draft of the Trans-Pacific Partnership (TPP) investment chapter (which is largely unchanged as of May 2014) resembles in large measure the more recent US IIAs rather than the 1995 text of NAFTA Chapter 11. In a nutshell, the TPP investment chapter does not provide major innovations in treaty drafting. However, the TPP crystallises most recent innovations since 2001 concerning NAFTA-interpreting notes but also NAFTA case law. The normative quality of the TPP however places the agreement among the most detailed and important

The present study of the evolving international regime for investment in Asia comes at a crucial time for the EU. The Asian regime for investment is not static but on the contrary very dynamic. It continues to grow and change, and it will be affected by various factors in the coming months and years which relate to the rise of some new actors such as the EU, the regionalisation of investment rule-making (illustrated by the Transpacific partnership) and the likely increase of litigation in Asia. The analysis first provides a macro-analysis of Asian rule-making. This section helps to understand the key characteristics of the Asian IIAs (second section). Once the relevant IIAs are identified, the paper will explore the details of these specific Asian IIAs. It will also provide a detailed micro-view of the Asian rule-making in investment (third section). That fundamental analysis will be complemented by a study of the mechanisms that organise the interplay of bilateral Asian IIAs with the rest of the world through regionalisation and the application of the most-favored nation (MFN) treatment clause (fourth section). A holistic analysis of the Asian regime for investment will not be complete without a thorough analysis of international investment litigation involving Asian parties (fifth section). Finally, policy lessons are drawn by way of conclusion in the final section.

The Asian Map of the European Investment Policy

Trade and investment dynamics might be boosted further by the recent reforms in the EU. The Treaty of Lisbon came into force on 1 December 2009, amending the former European Union (EU) and European Community (EC) treaties.

Among key improvements, the Treaty of Lisbon abolished the European Community (EC) and replaced it with the EU, endowing the latter with full legal

investment treaties. In this light, it is possible to return to the question raised in the introduction as to whether the TPP will strengthen or fracture current regimes. As this investment treaty is negotiated in the context of an agreement of great economic significance, doted (what does "doted" mean here?) of a broad MFN provision, if the TPP negotiations proceed successfully, then as a broad preferential trade agreement the TPP will presumably supersede NAFTA and other existing IIAs (where there is overlap). Interestingly, the TPP may be read as a strengthening or a *de facto* renegotiation of NAFTA and many other agreements such as the ASEAN-Australia--New Zealand Free Trade Area (2010). The TPP is even more clearly a strengthening of investment disciplines for some developing countries such as Vietnam or Malaysia which have not so far been bound to the USA. Last but not least, the TPP membership is open to new members willing to sign up to its commitments under the sole condition that it is accepted by the current TPP members. The absence of geographic or economic conditions gives the TPP a significant attractiveness. Japan joined TPP negotiations in the summer of 2013. And the list of prospective member States is long, namely, South Korea, Thailand, Taiwan ROC, Philippines, Laos, Colombia, and Costa Rica. Should all these countries join the TPP and ratify, among others, the investment chapter, there is no doubt that we will have an embryo of a long-awaited multilateral agreement on investment. Last but not least, some other investment treaties illustrate the regionalisation of investment regulation in Asia such as the ACIA, the ongoing negotiations for China-Korea-Japan or some Asian treaties with China and India.

personality.[14] The new EU has the ambition to be a more prominent global actor, with the creation of a new European external relations service with EU delegations around the world, and the EU's High Representative, which is assigned greater importance. The Treaty of Lisbon extends the scope of external trade policy to issues of investment.

For the EU itself and its trading partners, the extension of "trade" policy to include investment is an important development and it will impact the international investment regime. The most important change to benefit EU investors might be the shift from post-establishment to pre- and post-establishment rights granted to foreign investors, which represent the two main approaches to the admission of foreign investment that can be recognised in the BITs.[15] "Entry" provisions erode the host State's control over the admission of foreign investment into its territory.[16] They may affect the capacity of the host state to prioritise certain investments over others, and undermine its negotiating power vis-à-vis incoming investors, which in turn is crucial for negotiating terms and conditions that maximise the investment's contribution to sustainable development.

The Evolving Asian Regime for Investment

Understanding the Asian rule-making in international investment requires knowledge of what are the international treaties (in the form of bilateral investment treaties or preferential trade agreements with investment chapters) that involve at

[14] Prior to the entry into force of the Treaty of Lisbon on 1 December 2009, the EU did not have the legal capacity to sign up to international agreements. Articles 216-218 of the Treaty on the Functioning of the European Union (formerly the EC Treaty) amend this, Treaty of Lisbon, [2008] OJ C 115/1. Before that, "European Union" was the official name. To facilitate the reading we use the name even when disputes occurred before 2009.

[15] As stated by the Commission, "a comprehensive common international investment policy needs to better address investor needs from the planning to the profit stage or from the pre- to the post-admission stage. Thus, our trade policy will seek to integrate investment liberalization and investment protection.", European Commission (2010) Communication, Towards a comprehensive European international investment policy, COM(2010)343 final, p. 5.

[16] In its 2010 communication, the Commission points out that the existing European BITs relate to the treatment of investors "post-entry" or "post-admission" only. This is perfectly true and implies that the Member States' BITs provide no specific binding commitments regarding the conditions of entry, neither from third countries regarding outward investment by companies of our Member States, nor *vice versa*. But the European Commission observes that "[g]radually, the European Union has started filling the gap of entry or admission through both multilateral and bilateral agreements at the EU level covering investment market access and investment liberalization", and illustrates this in a footnote because at the multilateral level the General Agreement on Trade in Services (GATS) provides for a framework for undertaking commitments on the supply of services through a commercial presence (defined as mode 3 in GATS Article I). At the bilateral level, the EU has concluded negotiations with the Republic of Korea on an FTA, which includes provisions on market access for investors and establishments.

least one Asian country. If at least one Asian country has signed such an investment pact, the host economy is likely to be affected by foreign investment, and, in any case its domestic investment policy is subject to the international obligations which are expressed in the investment agreement.

A first methodological challenge lies in the fact that there is no international organisation informed by Asian States of their international treaties. Also, not all Asian governments publish the results of their negotiations. Consequently, one of the contributions of the current paper is to provide a mapping of these Asian practices based on a survey on the main IIAs databases complemented by each national government's source of information.

In substance, Asian investment treaty practice (as with all other national treaty practices in this regard) shows that virtually all treaties listed above which regulate foreign investment matters cover the following nine topics[17]: (1) definitions and scope of application; (2) investment promotion and conditions for the entry of foreign investments and investors; (3) general standards for the treatment of foreign investors and investments; (4) issues of monetary transfers; (5) expropriation (direct or indirect); (6) operational and other conditions; (7) losses from armed conflict or internal disorder; (8) treaty exceptions, modifications, and terminations; and (9) dispute settlement. These diverse provisions are important to reassure foreign investors that they will be able to reap the benefits of their investment, and no trend denies such an approach, although evidence on the extent to which investment decisions are influenced by investment treaties is mixed.[18] The following sections detail each of these provisions in light of Asian IIAs.

The current section looks at the investment agreements concluded by the 48 Asian Development Bank (ADB) members. In total, ADB countries have concluded 1,194 BITS and 61 PTAs with an investment chapter since 1959. As approximately 2,850 BITs have been concluded worldwide over the same period, it means that Asian countries have taken part in no less than 40 % of international rule-making.

To ease the analysis of the huge number of treaties, one can distinguish four main groups of Asian countries which reflects their respective role and importance in Asia investment rule-making.

[17] To review the Asian IIAs' key investment provisions, I will address the key provisions (leaving for the last section the important issue of MFN) following the same methodology: what is the specific definition given in the TPP, what is the meaning and what lessons can be drawn from the IIAs' orientations. The negotiators have to opt for either an admission clause or the pre-establishment rights, the definition of national treatment, the minimum standard of treatment, full protection and security and the indirect expropriation methodology. In another paper, these provisions have been analysed in the context of Asian IIAs. See Chaisse (2014a).

[18] The extent to which BITs actually attract increased flows of foreign direct investment is disputed. According to Salacuse & Sullivan, entering a BIT with the United States of America would nearly double a country's FDI inflows. However, entering BITs with other OECD countries had no significant effect on FDI. See Salacuse and Sullivan (2005), p. 67 (105–111). Another important study concludes that there is "little evidence that BITs have stimulated additional investment". Hallward-Driemeier (2003).

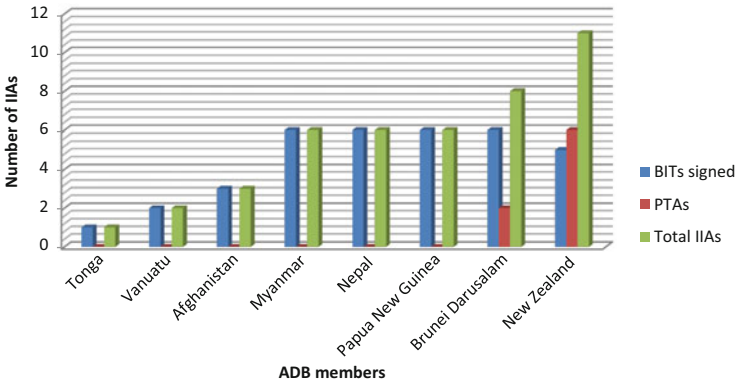

Fig. 1 Asian countries with less than 10 IIAs. *Sources*: Compiled by the author on the basis of United Nations Conference on Trade and Development (*UNCTAD*) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information

Firstly, there is a group of 13 ADB countries which has not concluded a single investment agreement as of April 2013. This means that Bhutan, Cook Islands, Fiji, Kiribati, Maldives, Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Samoa, Solomon Islands, Timor-Leste, and Tuvalu have so far been reluctant to engage in international investment rule-making.

Secondly, a group of eight ADB countries has signed some IIAs, but in a rather limited number. Indeed, Tonga, Vanuatu, Afghanistan, Myanmar, Nepal, Papua New Guinea, Brunei Darusalam, and New Zealand have each signed less than ten IIAs (see Fig. 1).

Thirdly, an intermediate group of 14 ADB members has signed between ten and 40 IIAs. This group of relatively active States is made up of Hong Kong, China, Cambodia, Lao PDR, Turkmenistan, Taipei, China, Japan, Australia, Kyrgyz Republic, Sri Lanka, Bangladesh, Georgia, Tajikistan, Armenia, and the Philippines (see Fig. 2).

Fourthly and finally, a group of ADB countries comprises the frontrunners which are the States that have concluded more than 40 IIAs (see Fig. 3). This group is made of Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia, Malaysia, India, Korea, and China.[19] It is on this group of countries that most of our micro-analysis will be based. Logically, the great number of IIAs which they have concluded reflects a very active investment diplomacy and this also means that there are bound to be a great number of third countries that have granted rights to a great number of foreign investors.

[19] On India, see in particular Chaisse (2014), p. 385.

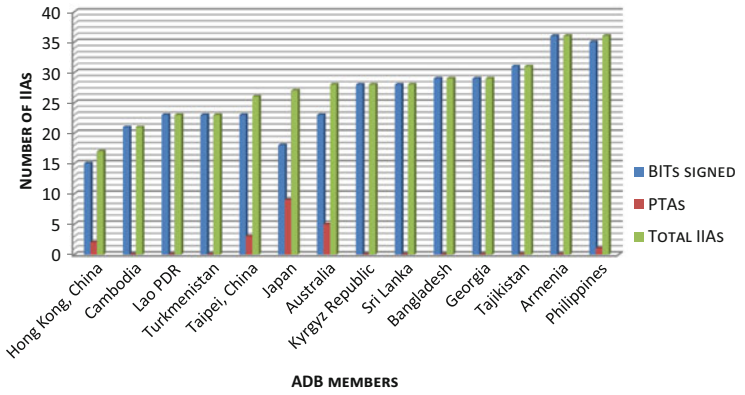

Fig. 2 Asian countries with less than 40 but more than 10 IIAs. *Sources*: Compiled by the author on the basis of United Nations Conference on Trade and Development (*UNCTAD*) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information

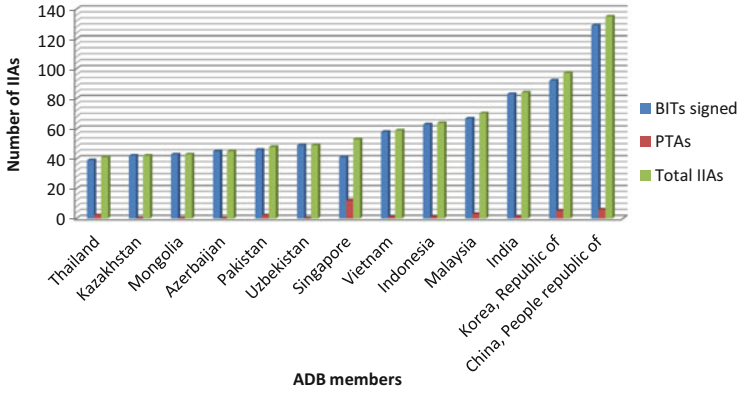

Fig. 3 Asian countries with more than 40 IIAs. *Sources*: Compiled by the author on the basis of United Nations Conference on Trade and Development (*UNCTAD*) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information

The Asian Economies Singled Out by the EU

As part of the triad with North America and East Asia in investment matters,[20] Europe is one of the most relevant sources and destinations for investment. Yet the EU is itself just emerging as a player in investment matters. The EU Member States

[20] See Gugler and Chaisse (2009), p. 1.

have shown a great keenness to retain national control over foreign investment rather than see the same moves into EU competence.[21]

One of the consequences of this is that investment was covered by a plethora of BITs between individual EU Member States and third parties.[22] BITs were considered to be the single most important tool in investment relations between countries.

By proposing in 2006 a "Minimum Platform on Investment" (MPoI) the Commission sent a signal that it wants to acquire all the competences needed to negotiate investment deals.[23] This "MPoI" intended to serve—rather like national Model BITs—as a standardised negotiation proposal for ongoing and future PTA negotiations with third countries.

But the Treaty of Lisbon extends the Common Commercial Policy to the second most important field of international economic relations, namely, foreign direct investment (Articles 206 and 207 TFEU).

As of April 2015, there are eight Asian partners with which the EU was negotiating new trade agreements that will reflect the recent changes in EU FDI competence, namely, India, China, Japan, ASEAN as block but also bilateral discussions with Malaysia, Vietnam, Thailand, and Singapore (see Table 1). Almost all these countries are also involved in other investment negotiations: Malaysia, Singapore, Vietnam and Japan are part of the TPP, while China is leading the Regional Comprehensive Economic Partnership (RCEP) project.

The Endogenous Determinants of the Next Investment Treaties

This section looks at the investment agreements concluded by the 48 ADB developing member economies.[24] To ease the analysis of the huge number of treaties, four main groups of Asian countries are distinguished to reflect their respective role and importance in Asian investment rule-making. This section identifies the Asian

[21] *Inter alia*, this was showcased at the Nice Summit (2000), where EU Member States agreed to amend Article 133 of the Treaty of Rome (which governs the Union's common commercial policy) by extending EU competence to a number of "new" areas. In a few sensitive sectors such as audiovisual services (e.g., "*l'exception culturelle"*) and investment, EU Member States did not agree on handing over "shared" or "mixed" competence to the EC. With the ratification of the Treaty of Nice, investment was one of a few most sensitive issues that remained subject to the rules and procedures of inter-governmentalism, as opposed to the "community approach". See Klamert and Maydell (2008), p. 493 (493–494).

[22] Baert (2003), p. 100 (116).

[23] In November 2006 the Council of the European Union adopted the "Minimum Platform on Investment" for EU PTAs with third countries, Council of the European Union, Minimum Platform on Investment, 15375/06, 27 November 2006 (not public). As explained at that time, the EU was already determined to expand its Common Commercial Policy powers to cover also investment issues. See Maydell (2008), pp. 204–206.

[24] This section partly draws from Chaisse (2014b), p. 75.

Table 1 Current EU negotiations with Asian economies since 2009 to now

Asian country	Negotiating directives	Current status	Next steps
PRC	Announcement made 23 May, 2013	Preparations	Started investment negotiations in January 2014
India	Negotiating authorization and directives of April 2007	Negotiations were launched in June 2007. After 12 full rounds, negotiations reached in 2013 a phase where negotiators met in smaller more targeted clusters (*i.e.*, expert level intersessionals) rather than full rounds, chief negotiator meetings, and meetings at Director General level. Negotiations were suspended in September 2013.	Newly elected Indian government in May 2014 may change the political context of negotiations which are expected to resume by the end of 2014.
Singapore	Based on 2007 ASEAN negotiating directives (see below)	EU Trade Commissioner de Gucht and Singapore's Minister of Trade and Industry Lim, announced the completion of negotiations on 16 December, 2012. The agreement reached is one of the most comprehensive the EU has ever negotiated and it will create new opportunities for companies from Europe and Singapore to do business together. The growing Singaporean market offers export potential for EU, industrial, agricultural and services businesses. An EU–Singapore FTA will be the EU's second ambitious agreement with a key Asian trading partner, after the EU–Republic of Korea FTA, which has been in operation since July 2011.	The FTA draft agreement needs now to be agreed upon by the European Commission and the Council of Ministers, before being ratified by the European Parliament. Investment protection (FTA Chapter 9) is not yet available. Negotiations on investment protection, which are based on a new EU competence under the Lisbon Treaty and started later, are continuing in June 2014.
Malaysia	Based on 2007 ASEAN negotiating directives (see below)	On 10 September, 2010, EU Member States agreed that the commission could start FTA negotiations with Malaysia. The negotiations were officially launched in Brussels on 5 October, 2010. A consultation of stakeholders is completed. The seventh round of	Technical Working Groups discussions.

(continued)

Table 1 (continued)

Asian country	Negotiating directives	Current status	Next steps
		FTA negotiations took place in Brussels in April 2012.	
ASEAN	Negotiating authorization and directives of April 2007	Negotiations with a regional grouping of seven ASEAN member states launched in July 2007. The Joint Committee in March 2009 agreed to take a pause in the regional negotiations.	In December 2009, EU Member States agreed that the Commission will pursue FTA negotiations in a bilateral format with countries of ASEAN. Negotiations with Singapore and Malaysia were launched in 2010, and with Vietnam in June 2012. The Commission continues exploratory informal talks with other individual ASEAN member states with a view to assess the level of ambition at bilateral level.
Vietnam	Based on 2007 ASEAN negotiating directives (see above)	The Foreign Affairs Council (Trade format) on 31 May, 2012 endorsed the launching of negotiations for a FTA with Vietnam. Commissioner De Gucht and Minister Hoang officially launched the FTA negotiations at a ceremony in Brussels on 26 June, 2012. Since then three rounds of negotiations have taken place. The first from 8–12 October in Hanoi, Vietnam, the second round in Brussels from 22–25 January, 2013 and the third in Ho Chi Minh City on 23–26 April, 2013.	Both sides seek a comprehensive agreement covering tariffs, non-tariff barriers as well as commitments on other trade-related aspects, notably procurement, regulatory issues, competition, services, and sustainable development.
Japan	NA	The negotiations with Japan were open in 2012. They will address a number of EU concerns, including non-tariff barriers and the further opening of the public procurement market.	The EU–Japan FTA negotiations have been launched on 25 March, 2013. The first round of negotiations took take place on 15–19 April, 2013 in Brussels. Parties exchanged views and a limited number of texts on all negotiating areas identified during the scoping exercise.

(continued)

Table 1 (continued)

Asian country	Negotiating directives	Current status	Next steps
Thailand	Negotiating directives obtained in April 2009	Negotiations were launched in May 2009 and the content of the CETA (Comprehensive Economic and Trade Agreement) and its general modalities were agreed in June 2009. The first round took place in October 2009. The negotiations are now in their final phase. Commissioner de Gucht and his Canadian counterpart Trade Minister Fast met on 22 November, 2012 and on 6–7 February, 2013 in Ottawa to take stock of the remaining open points. The aim is to conclude the CETA negotiations in the third quarter of 2013.	Negotiation teams are currently meeting twice per month to work out the final deal.

Source: EU, Trade Directorate overview of FTA and other trade negotiations (updated June 10, 2014)

Noodle Bowl of IIA which represents the existing negotiated preferential treatment for investors that the EU will try to neutralise through current negotiations. It then identifies the various roles played by Asian countries and, in particular, by the eight partners already singled out by the EU. Thirdly, the section looks at the quality of some existing Asian IIAs.

Identifying the Asian Noodle Bowl of Investment Treaties

To refine the contribution of ADB countries to international investment rule-making, it is necessary to narrow the analysis to these IIAs which have been concluded between Asian countries only. Indeed, many of the agreements presented above may have been concluded with leading capital exporting countries such as the USA or other Western countries, and this implies that the treaty might rather reflect the interest and bargaining power of the capital exporting countries. Narrowing the analysis to pure Asian IIAs also helps to identify the ADB countries that play a leading role in the development of investment rules in Asia.

The table in Annex represents a wealth of information in Asia's investment treaty practice. In total, 208 IIAs have been concluded between two or more countries which are Asian. This great number of IIAs forms what is the core of the Asian noodle bowl of investment treaties. Out of the 202 IIAs, there are 146 BITs which are currently in force whereas 41 BITs have been signed but have not yet entered into force. To these 187 BITs, one must add 21 PTAs with investment chapters all of which have entered into force.

One can also discern some patterns for each country. For instance, Singapore is a major user of PTAs to regulate investment as it already has seven such instruments. Then come New Zealand and Japan with six PTAs covering investment issues. A majority of Asian countries have so far been reluctant to incorporate investment negotiations in their trade agreements. One can also observe that some countries have had difficulties in ratifying a BIT which was signed earlier. This is the case of Cambodia, Tajikistan, Vietnam and Malaysia, which have six BITs. On the top of this list is Pakistan which has signed eight BITs which are yet to enter into force.

Basically, one key idea is that China has BITs or PTAs with almost all ADB countries except Nepal, and this makes China the Asian leader in investment rule-making. China (30 Asian IIAs) but also India (23 Asian IIAs), Korea (22 Asian IIAs), Vietnam (21 Asian IIAs), Indonesia (20 Asian IIAs) and Malaysia (19 Asian IIAs) are the ADB countries with the greatest number of IIAs in force which are also diverse in their forms (either BITs or PTAs). These are the big players which will be at the core of the substantive analysis in Section 3. These frontrunners' treaty practice is not only important in quantitative and qualitative terms, but it is also crucial in the light of one key IIAs provision, namely, the most-favoured nation treatment. This particular provision plays a role which increases in significance when a country is bound by a great number of investment treaties. The case of China is, in this light, very important as the MFN provision found in China's IIAs may, to some extent, represent an embryo of Asian multilateral agreements on investment.

The Annex which provides an exhaustive view of all IIAs concluded between Asian countries also helps to understand an important feature of Asian investment rule-making which is the rise of PTA to regulate investment matters. In total, 21 Asian PTAs with investment chapters have been concluded since 2001 (see Fig. 4).[25]

Quantitative Ranking

Firstly, there is a group of 13 ADB economies which had not concluded a single investment agreement as of April 2013. Bhutan, Cook Islands, Fiji, Kiribati,

[25] A list of Asian PTAs is as follows: PTA New Zealand-Singapore, 1 January 2001; PTA Japan-Singapore, 30 November 2002; PTA China-Hong Kong, China, 29 June 2003; PTA Singapore-Australia, 28 July 2003; PTA Thailand-Australia, 1 January 2005; PTA India-Singapore, 1 August 2005; PTA Korea, Republic of-Singapore, 2 March, 2006; PTA Trans-Pacific Strategic Economic Partnership, 28 May 2006; PTA Japan-Malaysia, 13 July 2006; PTA Pakistan-China, 1 July 2007; PTA Japan-Thailand, 1 November 2007; PTA Pakistan-Malaysia, 1 January 2008; PTA Brunei Darussalam-Japan, 31 July 2008 ; PTA China-New Zealand, 1 October 2008; PTA Japan-Indonesia, 1 July 2008; PTA Japan-Philippines, 11 December 2008; New Zealand-Malaysia, 1 August 2010; Hong Kong, China-New Zealand, 1 January 2011; Australia-New Zealand (ANZCERTA), 1 January 1989 (investment Protocol 2011); ASEAN Comprehensive Investment Agreement (ACIA), 1 March 2012.

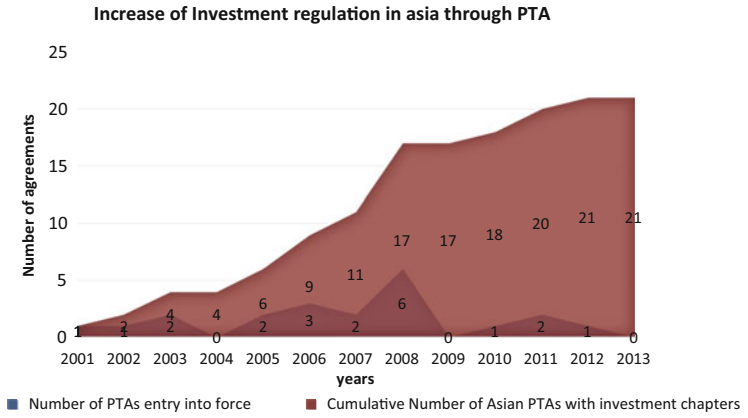

Fig. 4 The rise of Asian PTAs with investment chapters. *Sources*: Compiled by the author on the basis of United Nations Conference on Trade and Development (*UNCTAD*) Database of Investment Agreements, WTO regional trade agreements database and national Ministries of Foreign Affairs public information

Maldives, Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Samoa, Solomon Islands, Timor-Leste, and Tuvalu have so far been reluctant to engage in international investment rule-making. Secondly, a group of eight ADB economies has signed a limited number of IIAs. Indeed, Tonga, Vanuatu, Afghanistan, Myanmar, Nepal, Papua New Guinea, Brunei Darussalam, and New Zealand have each signed less than ten IIAs (see Table 2). Thirdly, a group of 14 ADB member economies has signed between ten 0 and 40 IIAs. This group comprises Hong Kong, China; Cambodia; Lao People's Democratic Republic (Lao PDR); Turkmenistan; Taipei, China; Japan; Australia; Kyrgyz Republic; Sri Lanka; Bangladesh; Georgia; Tajikistan; Armenia; and the Philippines.

Finally, there is a group comprising the frontrunners, which are the economies that have concluded more than 40 IIAs: Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia, Malaysia, India, the Republic of Korea, and, at the forefront, the People's Republic of China (PRC).[26] It is within this last group that most of our micro-analysis will be based. Logically, the great number of IIAs they have concluded reflects a very active investment diplomacy, which also means that there are bound to be a great number of third countries and have granted rights to a great number of foreign investors. In this light, the EU has decided to negotiate investment with Asian partners who are already well experienced as China, India, Malaysia, Vietnam,

[26] Following the policy of opening implemented by the PRC more than 30 years ago and the admission of the PRC into the World Trade Organization, the PRC is now concluding different generations of IIAs, the most recent granting full jurisdiction to the International Centre for Settlement of Investment Disputes (ICSID). See Willems (2011).

Table 2 IIAs signed by ADB member economies

	Total IIAs	BITs	PTAs with investment chapters
China (People's Republic)	135	129	6
Korea, Republic of	97	92	5
India	84	83	3
Malaysia	70	67	3
Indonesia	64	63	1
Vietnam	59	58	1
Uzbekistan	49	49	0
Pakistan	48	46	2
Azerbaijan	45	45	0
Mongolia	43	43	0
Kazakhstan	42	42	0
Singapore	53	41	12
Thailand	41	39	2
Armenia	36	36	0
Philippines	36	35	1
Tajikistan	31	31	0
Bangladesh	29	29	0
Georgia	29	29	0
Kyrgyz Republic	28	28	0
Sri Lanka	28	28	0
Australia	28	23	5
Taiwan (Republic of China)	26	23	4
Lao People's Democratic Republic	23	23	0
Turkmenistan	23	23	0
Cambodia	21	21	0
Japan	27	18	9
Hong Kong, China	17	15	2
New Zealand	11	5	7
Brunei Darussalam	8	6	2
Myanmar	6	6	0
Nepal	6	6	0
Papua New Guinea	6	6	0
Afghanistan	3	3	0
Vanuatu	2	2	0
Tonga	1	1	0

Source: UNCTAD Database of Investment Agreements, WTO regional trade agreements database and National Ministries of Foreign Affairs public information

BIT Bilateral Investment Treaty, *FTA* Free Trade Agreement, *IIA* International Investment Agreement

Singapore and Thailand are all in the Asian tier 1. Only Japan, among the Asian partners negotiating with the EU, counts less than 40 IIAs.

If we limit our analysis to intraregional IIAs, some interesting observations can be made. One is that the PRC is the Asian leader in investment rule-making because it has BITs or FTAs with almost all ADB developing member economies except Nepal. The PRC (30 Asian IIAs), India (23 Asian IIAs), the Republic of Korea (22 Asian IIAs), Vietnam (21 Asian IIAs), Indonesia (20 Asian IIAs), and Malaysia (19 Asian IIAs) have the greatest number of IIAs in force, which are also diverse in their forms. These are the big players that will be at the core of the substantive analysis in this section.

These frontrunners' treaty practice is not only important in quantitative and qualitative terms, but is also crucial in the light of one of the key IIAs provisions, which is MFN treatment. This provision plays a significant role when a country is bound by a great number of investment treaties. The case of the PRC is very important because the MFN provision found in the PRC's IIAs may, to some extent, represent an embryonic Asian multilateral agreement on investment.

One can also discern some patterns for each country in the distinction between BITs and FTAs. For instance, Singapore is a major user of FTAs to regulate investment because it already has seven such instruments. Then come New Zealand and Japan with six FTAs covering investment issues.[27] A majority of Asian countries have so far been reluctant to incorporate investment negotiations into their trade agreements. Virtually, all the FTAs concluded by India and the PRC ignore investment matters.

One can also observe that some countries have had difficulties in ratifying a BIT earlier signed. This is the case of Cambodia, Tajikistan, Vietnam, and Malaysia, each with six BITs that have not yet come into force. On the top of this list is Pakistan, which has signed eight BITs that are yet to enter into force.

Qualitative Ranking

All IIAs enshrine a series of obligations on the parties to ensure a stable and favorable business environment for foreign investors. These obligations pertain to the treatment that foreign investors are to be afforded in the host country by the domestic authorities.

Meanwhile, such "treatment" that encompasses many laws, regulations, and practices from public entities also significantly affect foreign investors or their investments. Thus, analysis of the quality of investment treaties is important to

[27] For Japanese treaty practice, Hamamoto (2011), p. 53.

Table 3 Sampling Asian treaties quality (BITSel quality indicator)

	PRC	Rep. of Korea	India	Indonesia	Malaysia
BITsel number of IIAs	84	77	72	61	61
BITsel quality indicator: average	1.58	1.75	1.82	1.57	1.62
Strongest treaty and coefficient	Germany (1.90)	Vietnam (1.90)	Switzerland, Mauritius (1.90)	Germany (1.90)	Saudi Arabia (1.81)
Weakest treaty and coefficient	Bulgaria, Mexico, Colombia, Costa Rica (1.36)	Indonesia (1.36)	India (1.63)	Denmark (1.27)	Lebanon (1.36)
Coefficient of variation	0.31	0.23	0.20	0.30	0.29

Source: Data from BITSel Index, elaboration by the authors
IIA International Investment Agreement, *PRC* People's Republic of China

provide a clearer view of their likely impacts.[28] Not all investment treaties are drafted similarly as many of their provisions may vary significantly in scope of application and likely economic impact.[29]

The Bilateral Investment Treaties Selection Index (BITSel Index)[30] provides extremely detailed support to understand national treaty practices. In light of the great number of BITs in which different provisions and their different wordings would give birth to a broad kaleidoscope of legal obligations and, hence, regulatory effects, the BITSel Index, which is based on the 11 most important elements found in most existing BITs.[31] The BITSel Index has a scale from 1.0 (restrictive) to 2.0 (liberal). The data for the top five Asian frontrunners—Indonesia, Malaysia, India, the Republic of Korea, and the PRC—have been extracted to shed light on the substance and quality of these respective treaties (see Table 3).

[28] "While the treaties continue to govern the same key aspect of investment, they have morphed over the 40 year period to include different types of clauses. We need to take into account the heterogeneity in order to better understand the motivations of states.", Jandhyala et al. (2010), pp. 31–32. "While it should be recognized that a BIT could be an important commitment device, the nature of the commitment can vary enormously depending on the terms of the BIT. Too much attention has been placed on whether or not a BIT exists, than on the strength of the property rights actually being enshrined in these agreements." Hallward-Driemeier (2003), p. 3.

[29] Chaisse and Bellak (2011), p. 3.

[30] Bilateral Investment Treaties Selection Index, BITSel (2013), Version 4.00, available at: http://www.cuhk.edu.hk/law/proj/BITSel.

[31] These include: (1) the definition of investment; (2) admission for foreign investment; (3) national treatment; (4) most-favoured nation; (5) expropriation and indirect expropriation; (6) fair and equitable treatment; (7) transfer of investment-related funds out of the host State provision; (8) non-economic standards; (9) investor-State dispute mechanism (10) umbrella clause; and (11) temporal scope of application.

The results are stunning because the strongest average quality indicator belongs to India (1.82), which is far more significant than those of countries with relatively weaker investment treaties such as Indonesia (1.57) and the PRC (1.58). Less surprisingly, the Republic of Korea ranks second (1.75) while Malaysia is third (1.62).

These average values are based on a relatively high number of treaties and confirm the significant gap between the top five in rule-making: not all Asian investment treaties are similar. India is inclined to grant quite significant rights to foreign investors, although it has signed fewer treaties than the PRC. Conversely, the PRC has signed more treaties, but their average quality is among the lowest of the top five.

Of course, these averages also depend on the partner countries. Treaties are, by definition, the result of negotiations and they reflect the consensus that the two sides reached after exchanging their goals and visions. In view of this, we can take a closer look at the BITsel and see what treaties for each country in the top five stands at the extreme (most robust or weakest protection) of the national practice.

In the case of the PRC, the treaty with the greatest quality was concluded with Germany (1.90). This confirms the fact that the PRC truly entered a new generation of investment treaties, with greater rights and access to investor–State dispute settlement (ISDS), only after 2005, and thus the treaty with Germany represents a milestone. At the other extreme, the PRC concluded a series of relatively weak treaties with Bulgaria, Mexico, Colombia, and Costa Rica. One can further fine-tune the analysis and note that there is a significant difference between the IIAs concluded before and after 2005. In the wake of the PRC–Germany BIT, the PRC further negotiated treaties which were rather more favourable to foreign investors. This generation provides broader and more substantive obligations with regard to the treatment of foreign investment. Post-establishment national treatment—albeit with sectoral reservations in some cases—and no substantial restrictions on the ability of foreign investors to challenge host country measures in international arbitration are standard in this category. The PRC's "new generation" of BITs concluded since the beginning of this century seems to belong in this company. Consequently, these post-2005 IIAs obtain a score of 1.65, while prior to 2005 the score is only 1.55.

In the case of the Republic of Korea, the treaty with Vietnam is one of the strongest (1.90). At the other extreme, there is the agreement between the Republic of Korea and Indonesia (1.36). India concluded more than a dozen treaties of a rather high quality, for example with Switzerland and Mauritius, giving it a score of 1.90. On the other hand, a relatively weak treaty was concluded between India and Mexico (1.63). Indonesia ranks fourth among Asian countries in the number of investment treaties. However, it has a rather low average quality. In this light, it is interesting to note that the Germany–Indonesia treaty provides a very high level of

protection (1.90), much higher than the Indonesian average. However, on the other hand, the Indonesia–Denmark treaty offers an example of a rather weak treaty (1.27). Last but not least, Malaysia, whose economic policy is deeply intertwined with politics, has concluded a rather strong treaty with Saudi Arabia (1.81). However, the treaty between Malaysia and Lebanon scores poorly (1.36).

The next step is to calculate the coefficient of variation, which is a better measure of heterogeneity. The number itself expresses the relation of the standard deviation (a measure for the dispersion of the data) to their mean. If the coefficient of variation is lower than 0.5, the mean value is a good representation for all data. For Malaysia, it is 0.29. What does it tell us? Returning to our example, the 0.29 average for Malaysia means that the variation in the provisions is 29 %.

Because all the coefficients of variation are well below 0.5 for each BIT, the mean is a good representation for all the single BIT provisions. What does the coefficient of variation say in comparison to other countries? The one for the PRC is 0.31, so the heterogeneity of BITs is slightly larger for Chinese BITs than for Malaysian BITs. While the mean value of each country tells us how investor-friendly its BIT provisions are, the coefficient of variation tells us how heterogeneous they are. The key advantage of the coefficient of variation is that it is directly comparable across countries. If we have a coefficient of variation of country A at 30 % and country B at 60 %, we can say that the heterogeneity of country B is twice as large as that of country A.

At this stage, it is important to mention two lessons. Firstly, there is a significant discrepancy between Asian treaty practices and also between individual treaty practices for a particular country. Secondly, although this paper focuses on the broad analysis of Asian investment treaties, it also underlines the need to look more carefully at the key provisions found in each investment treaty, and this will be addressed in a second paper.

The Exogenous Parameters of the Current Negotiations

The current negotiations on investment between the EU and Asian countries will also be affected by some exogenous parameters. As the future treaties will be subject to existing MFN provisions the meaning and implications of this legal provision must be reviewed. Secondly, the broader context of Asian investment integration through huge treaty negotiations (such as the TPP, RCEP and Triangular treaty) will be discussed. These ambitious pacts oblige the EU to negotiate at least comparable standards to maintain the competitive advantage of EU investors.

The Most-Favoured Nation Treatment Principles in Motion

The principle of national treatment prohibits discrimination on the grounds of nationality[32] and, more generally, any discrimination between investors and investments produced domestically and those from other countries.[33] Together with the most-favoured nation (MFN) obligation, it forms the fundamental principle of non-discrimination in investment law.[34]

In regard to investments, the principle of the MFN treatment seeks to establish equal conditions of competition for all foreign investors, independently of their country of origin.[35] This principle allows investors covered by one IIA to claim equal benefits to those granted to investors from other countries, irrespective of whether those benefits are established in other IIAs, or in the actual regulatory practice of the host country.

While traditionally regarded as a standard clause without major implications, the MFN principle has, to say the least, recently gained attention in the ambit of international investment rule-making in the light of the application of this provision recently made by some arbitral panels.[36] The Impregilo v. Argentina tribunal majority diplomatically noted that the issues remain controversial and that the "predominating jurisprudence which has developed is in no way universally accepted."[37]

Article 12.5 of the June 2012 leaked draft of the Trans-Pacific Partnership (TPP) investment chapter defined the MFN as follows:

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[32] ICSID, ARB/02/9, *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt*, Award, 27 October 2006, paras. 128 and 156.

[33] LCIA, UN3467, *Occidental Exploration and Production Company v. Republic of Ecuador*, Final Award, 1 July, 2004 stated that the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which the particular activity is undertaken, para. 173.

[34] The scope and practical relevance of NT is to a large extent dependent on the reading of the term "like circumstances". Its definition essentially sets the benchmark for national regulatory freedom to treat certain imported products differently from domestically produced ones. Indeed, "[o]ften the definition of national treatment is qualified by the inclusion of the provision that it only applies in "like circumstances" or "similar circumstances". As the situations of foreign and domestic investors are often not identical, this language obviously leaves room open for interpretation.", see Chaisse (2013), p. 332.

[35] Chaisse (2014c), p. 101.

[36] *Tza Yap Sum v. Peru* recognises the need to analyse the specific wording of each provision of a treaty in accordance with the established rules of international law; an *a priori* decision is not appropriate, i.e., it is not possible to decide in general whether MFN clauses are efficacious in some sorts of situation while they are not in others; each MFN clause is a world in itself, which demands an individualised interpretation to determine its scope of application, see ICSID, ARB/07/6, *Tza Yap Shum v. Republic of Peru*, Decision on Jurisdiction and Competence, 19 June 2009, paras. 196–198.

[37] See ICSID, ARB/07/17, *Impregilo S.p.A. v. Argentine Republic*, Award, 21 June 2011, para. 107.

> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
>
> 3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms such as those included in Section B.

The scope of the most Asian IIAs MFN obligation, like any other substantial provision of the treaty, is limited not only by the overall coverage of the IIA, but also by the wording introduced in an IIA clause itself. Several aspects are relevant in this regard, as follows. Usually, whether the obligation applies to investments already established in the country, or whether it also applies to the ability of the investor to claim access to the host country (so-called pre-establishment rights). TPP MFN expressly extends the coverage of the MFN obligation to pre-establishment rights.[38] Usually, the language which allows the comparison between the treatment of investors from different countries may add specific conditions. The TPP MFN refers to the "in like circumstances" which is a typical wording of US treaties and very well known in NAFTA case law.[39] Finally, whether issues pertaining to investor–State dispute settlement procedures are covered by the MFN principle.[40] The TPP MFN clearly excludes in its third paragraph the ISDS clause.

Consequently, the scope of the TPP MFN commitment is rather broad in order not to dilute advances made in negotiations partners would conduct with third countries.[41] One can imagine that TPP may apply to several third-party treaties with the possibility that the claimant may import substantive rights. For instance,

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[38] See Chaisse (2014d)

[39] *Parkerings v. Lithuania* finds that for investors to be in like circumstances, three conditions must be met: the investor must be a foreign investor; they must be in the same economic or business sector; and the two investors must be treated differently, see ICSID, ARB/05/8, *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, 11 September 2007, para. 371.

[40] Following to the arbitral decision in the *Maffezini* case, much attention has been drawn to the debate of whether provisions relating to the disputes settlement procedures enshrined in one IIA can be "imported" into another IIA by virtue of the MFN clause. The question posed by the *Maffezini* decision ultimately addresses the general scope of the MFN principle and how the provision is crafted in each individual agreement. This leads us to last section of this chapter dealing with the TPP investor–State dispute mechanism.

[41] One can first observe that the MFN provisions already existing in older IIAs will bring to them the benefits of TPP new chapter. Indeed, the commitments by TPP countries may have to be extended MFN, for instance, to Thailand (except dispute settlement), and China (except dispute settlement and obligations specific to existing FTA partners).

the Tribunal MTD v. Chile applied an MFN provision to accord an investment the fair and equitable treatment protections of other BITs.[42] The Impregilo v. Argentina Award recorded the claimant's contention that the requirement of "full protection and security" in the Argentina–USA BIT was applicable through the MFN clause in the Argentina–Italy BIT.[43] Also, the White v. India Final Award holds that the BIT's MFN clause, a substantive provision, reaches an "effective means of asserting claims" provision contained in another of the respondent's BITs.[44] Finally, the EDF v. Argentina Award found that the applicable treaty's MFN clause permits recourse to the "umbrella clauses" of third-country treaties.[45]

This should not be surprising. The principle of most-favoured-nation treatment in the TPP is of paramount importance to the international investment regime. Non-existent in customary international law,[46] it constitutes the very foundation of treaty-based international investment regulation. With the national treatment, MFN is constitutive of the system of complex multi-layered governance for investment. Equally important in future litigation, the more IIAs that a country has, the more MFN might play an important future role. Malaysia, Chile and Vietnam are in this regard, the TPP countries that should pay great attention to the TPP MFN as these three have already granted rights to a great number of their party investors and investments.

The increase of Asian FTAs with investment chapters also raises an important issue of connections with existing IIAs. Indeed, the MFN treatment provisions in existing treaties may give rise to the so-called free-rider issue that arises when benefits from customs unions, FTAs, or economic integration organisation agreements are extended to non-members. To avoid this outcome, many IIAs exclude the benefits received by a Contracting State Party to a regional economic integration

[42] ICSID, ARB/01/7, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Award, 25 May 2004, paras. 104 and 197. This was later confirmed by the *Bayindir v. Pakistan* Award which applies an MFN clause to import the fair and equitable treatment standard from another treaty entered into after the treaty in question, ICSID, ARB/03/29, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, 27 August 2009, paras. 153-160; and *ATA v. Jordan* applies an MFN clause to import a fair and equitable treatment and treatment no less favourable than that required by international law clause, ICSID, ARB/08/2, *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan*, Award, 18 May 2010, note 16.

[43] However, the tribunal considers that having found a breach of the FET standard, it was unnecessary to examine whether there had also been a failure to ensure full protection and security, ICSID, ARB/07/17, *Impregilo S.p.A. v. Argentine Republic*, Award, 21 June 2011, para. 334.

[44] UNCITRAL (2011) *White Industries Australia Limited v. The Republic of India*, Final Award, 30 November 2011, para. 11.2.

[45] In doing so, the tribunal notes that it takes no position on the debate over the interaction of MFN clauses with jurisdictional and procedural requirements, ICSID, ARB/03/23, *EDF International S. A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, Award, 11 June 2012, paras. 930-936.

[46] In *Asian Agricultural Products v. Sri Lanka*, Dissenting Opinion of Samuel K.B. Asante, citing various publicists, noted that most-favoured-nation treatment does not derive from customary law, see ICSID, ARB/87/3, *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, Dissenting Opinion of Samuel K.B. Asante, 27 June 1990, para. 40.

Table 4 Non-applicability of the MFN principle to FTAs

France 2006 Model BIT Art. 4	India 2003 Model BIT Art. 4	ASEAN Comprehensive Investment Agreement 2012 Art. 6
This treatment shall not include the privileges granted by one Contracting Party to nationals or companies of a third party State by virtue of its participation or association in a free trade zone, customs union, common market or any other form of regional economic organization.	(3) The provisions of paragraphs (l) and (2) above shall not be construed so as to oblige one Contracting Party to extend to the investors of the other the benefit of any treatment, preference or privilege resulting from: (a) any existing or future customs unions or similar international agreement to which it is or may become a party, or (b) any matter pertaining wholly or mainly to taxation.	3. Paragraphs 1 and 2 shall not be construed so as to oblige a Member State to extend to investors or investments of other Member States the benefit of any treatment, preference or privilege resulting from: (a) any sub-regional arrangements between and among Member States; or (b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement.

Source: Model BITs from national government websites
ASEAN Association of Southeast Asian Nations, *BIT* Bilateral Investment Treaty, *FTA* Free Trade Agreement, *MFN* Most-Favored Nation

organisation (REIO) from the scope of MFN treatment obligations through a REIO exception. Virtually all IIAs include a carve-out from the MFN principle (see Table 4).

A considerable number of existing IIAs cover, at least, specific types of regional integration that are expressly mentioned in the agreement. But some countries extend the scope of the REIO exception to similar arrangements. For instance, the India model agreement[47] refers to "any existing or future customs unions or similar international agreement to which it is or may become a party" (Article 4). The French model agreement refers to a "free trade zone, customs union, common market, or any other form of regional economic organization" (Article 4). Such provisions allow France or India to enter into new FTAs with investment chapters without the obligation to extend the benefits to countries with which they were bound through a BIT. In this regard, one might also assume that some countries may be tempted to negotiate investment agreements in the context of an FTA to isolate the newly negotiated treaty from other BITs. Pakistan, for instance, seems to favour negotiations of investment within FTAs in order not to be subject to full MFN applicability under other BITs.

In this light, the 2012 ASEAN Comprehensive Investment Agreement (ACIA) MFN exception is, logically, more limited. ACIA Article 6 applies only to "any sub-regional arrangements between and among Member States; or (b) any existing agreement notified by Member States to the AIA Council pursuant to Article 8(3) of the AIA Agreement." The effect of such a provision is to maintain the applicability

[47] See Chaisse et al. (2013), p. 44.

of the basic MFN for the benefits of the members. Of course, in the context of a regional integration scheme, such as ACIA, members have an interest to be granted better treatment than one of them would grant of a third country through an IIA in the form of an FTA or a BIT.

The Current Asian Negotiations on Investment: RCEP, Trilateral and TPP

The rise of plurilateral agreements with wider scope is likely to produce greater economic effects while certainly spreading the basic principles of foreign investment protection to most Asian economies. While the rise of plurilateral IIAs may alleviate the problems associated with the noodle bowl of IIAs, it may also intensify the problems by creating more common-member agreements.

In this connection, three determinants are assessed to play a major role in Asian rule-making. Firstly, there are three Asian plurilateral agreements, either recently concluded or currently under negotiations, that deal with investment matters and illustrate the regionalisation of investment law: ACIA; Regional Comprehensive Economic Partnership; and the PRC–Japan–Republic of Korea Trilateral Investment Treaty. Secondly, the current TPP negotiations may soon result in one of the most ambitious investment treaties ever negotiated, which may have the potential to absorb all Asian investment treaties. Thirdly, an exogenous parameter is the EU decision to expand into investment negotiations and replace the negotiating role of EU Members States. Virtually all Asian countries already bound with many of the 28 EU Member States are going to be affected.

There has long been a debate between the PRC and Japan on the "appropriate" membership of Asian economic cooperation bodies. The PRC prefers the ASEAN +3 framework (EAFTA), while Japan insists upon the inclusion of Australia, New Zealand, and India (CEPEA). To avoid being involved in the political rivalry between the two powers, in 2011 ASEAN proposed RCEP, under which the modality of economic interaction in East Asia could be discussed by going beyond membership problems. All partners that have FTAs or EPAs with ASEAN members—which include the PRC, Japan, and the Republic of Korea, as well as Australia, New Zealand, and India—are involved in RCEP.

Officially, the RCEP will aim at creating a liberal, facilitative, and competitive investment environment in the region. Negotiations will cover the four pillars of promotion, protection, facilitation, and liberalisation. In this connection, the RCEP Working Groups in Goods, Services, and Investment were established by the ASEAN Leaders during the 19th ASEAN Summit to consider the scope of the RCEP and the ASEAN Economic Ministers have accepted their recommendations as detailed in the Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership (RCEP). However, no progress had been made as of July 2013.

The ASEAN–PRC FTA came into force in 2005, while its investment chapter became effective in 2010. However, this is not an ambitious agreement, covering

only the protection of investment. Meanwhile Japan's EPAs with individual ASEAN members include relatively sophisticated investment chapters that cover both the protection and liberalisation of investment. However, the Japan–ASEAN EPA was signed in 2008, but its investment chapter is still under negotiation. If Japan–ASEAN EPA's investment chapter simply consolidates Japan's EPA with individual ASEAN countries, it would become a relatively comprehensive one. However, there is a possibility that ASEAN as a bloc will exercise its bargaining power to lower the level of ambition. In any event, the modality of the future investment chapter for the Japan–ASEAN EPA would be likely to affect the investment chapter of RCEP.

Another important development that seems to have important implications for the investment chapter of RCEP is the PRC—Japan–Republic of Korea trilateral investment treaty recently signed after 9 years of negotiations. The trilateral investment treaty is not especially ambitious because it covers the protection of investment only (liberalisation is not covered) and its list of prohibited performance requirement measures is limited. The dominant argument in Japan is that if the trilateral FTA between the PRC, Japan, and the Republic of Korea is to be pursued, its investment chapters should be more ambitious.

Thus, it is difficult to foresee at this stage the modality of the investment chapter of RCEP, mainly because of the disagreement between Japan and the PRC with regard to the level of ambition. Perhaps, from the Chinese perspective, the trilateral investment treaty is a done deal, upon which the investment chapter of a trilateral FTA should be based. From the Japanese perspective, however, upgrading the investment discipline is a necessary component of the trilateral FTA.

The TPP is a twenty-first century FTA designed to change FTAs and the problems associated with them by making them more useful in spreading liberalisation globally by "multilateralizing regionalism."[48] The TPP's potential for successfully achieving such a goal is partly because of the nature of the partners, given their diversity and geographical spread linking both sides of the Pacific,[49] and partly because of the intended nature of the deal in achieving an all-new type of FTA design. In the view of leading authors, the definition of a "high-quality, twenty-first century" FTA means that such an agreement should combine three key features.[50] Firstly, a "high-quality, twenty-first century" agreement should have a comprehensive scope. Secondly, it should have a substantial depth that includes cooperation and integration components between members. Thirdly, it must contain a set of shared values, ideology, or norms between participants.[51]

[48] As early as 2006, Richard Baldwin argued that because the "spaghetti bowl's inefficiencies are increasingly magnified by unbundling and the rich/poor asymmetry, the world must find a solution. Since regionalism is here to stay, the solution must work with existing regionalism, not against it. The solution must multilateralize regionalism.", see Baldwin (2006), p. 1451.

[49] The TPP countries currently are Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Malaysia, Peru, Singapore, United States of America, and Vietnam.

[50] See Lim et al. (2012), p. 3.

[51] See Lim et al. (2012), p. 3.

The TPP is important for the future of trade and investment regulation because it may represent the first concrete effort to sort out some of the negative effects (*i.e.*, stumbling blocks) created by overlapping FTAs. Therefore, the evolution of the TPP could either strengthen or fracture current trading regimes. The specific architecture of the agreement,[52] including the elements of various negotiating chapters, is critical to realising high-quality outcomes. In the short period of negotiations under review (March 2010–July 2013), three key features of TPP regulation on foreign investment have emerged. Firstly, the dynamic characters of the negotiations have progressed quite regularly while incorporating new countries. Secondly, the level of US leadership is obvious in both the form and substance of the TPP. While exerting this leadership in a group of 11 countries, half of which are emerging economies, the USA also has isolated the largest emerging economies: the PRC, India, and Brazil. Thirdly, in the light of the previous points, the TPP represents a major FTA that illustrates the regionalisation of investment rule-making and probably represents a benchmark for state-of-the-art international law for foreign investment.

If the TPP reflects US investment rule-making practice, the EU seems to be willing to negotiate new investment treaties largely inspired by this US practice. To these current developments, one should add the start of the Trans-Atlantic Trade and Investment Partnership (TATP) announced by President Obama in his 2012 State of the Union address. These new negotiations may well confirm the global adoption of a NAFTA-like mode of investment regulation. The current paper focuses on Asian rule-making in international investment but it will also point at the relevant time to possible interaction with developments elsewhere in the world that may affect various Asian economies.

In fact, the June 2012 leaked draft of the TPP investment chapter, which was largely unchanged as of April 2013, resembled in large measure the more recent USA IIAs rather than the 1995 text of NAFTA Chapter 11. In a nutshell, the TPP investment chapter does not provide major innovations in treaty drafting. However, the TPP crystallises the innovations since 2001 concerning NAFTA interpreting notes and NAFTA case law. The normative quality of the TPP, however, places the agreement among the most detailed and important investment treaties. In this light, it is possible to return to the question raised in the Introduction of whether the TPP will strengthen or fracture current regimes.

As these investment treaties were negotiated in the context of an agreement of great economic significance, including a broad MFN provision, if the TPP negotiations proceed successfully, then, as a broad FTA, the TPP will presumably supersede NAFTA and other existing IIAs where there is overlap. Interestingly, the TPP may be read as a strengthening, or a *de facto* renegotiation, of NAFTA and many other agreements such as the ASEAN–Australia–New Zealand FTA (2010). The TPP is even more clearly a strengthening of investment disciplines for some developing countries such as Vietnam and Malaysia, which have not previously been bound to the USA.

[52] For example, how will the TPP relate to existing FTAs between TPP negotiating parties, such as the USA-Australia, USA-Singapore, or Singapore-Australia FTAs?

Last but not least, TPP membership is open to new members willing to sign up to its commitments under the sole condition that it is accepted by the current TPP members. The absence of geographic or economic conditions gives the TPP a significant attractiveness. Japan made an official announcement in joining TPP negotiations on 15 March, 2013. And the list of prospective members is long, including the Republic of Korea; Thailand; Taipei, China[53]; the Philippines; Lao PDR; Colombia; and Costa Rica. Should all of these countries join the TPP and ratify, among other provisions, the investment chapter, this would no doubt signify an embryonic version of a long-awaited multilateral agreement on investment.

Conclusion

This paper provides a framework of analysis for understanding investment rule-making in Asia and challenges which lie ahead for the EU investment policy. Several important issues can be summarised.

Firstly, as in the rest of the world, the regulation of international investment is a field of law, which has experienced major developments in Asia, especially during the last decade. Against such a fast-evolving canvass, the EU negotiations will both benefit from sound practice in investment rule-making from partners but also encounter difficulties in adopting state-of-the-art provisions.

Secondly, there are currently 146 intraregional BITs in force, and there are 41 intraregional BITs that have been signed but have not yet entered into force. In addition, there are 21 intraregional FTAs in Asia that have investment chapters, which have all entered into force. Thus, in total, there are 187 intraregional IIAs in force (208 intraregional IIAs if "signed but not yet in effect" IIAs are included). This large number of IIAs forms the core of the Asian noodle bowl of investment treaties.

Thirdly, out of the 48 ADB developing member economies, 13 comprise a group of frontrunners that have concluded more than 40 IIAs. This group consists of Thailand, Kazakhstan, Mongolia, Azerbaijan, Pakistan, Uzbekistan, Singapore, Vietnam, Indonesia, Malaysia, India, the Republic of Korea, and the PRC. Last but not least, although investment rule-making has undergone profound changes in recent years (e.g., treatification, legalisation, and proliferation) it is very likely to continue to evolve just as quickly. In this regard, a major trend of international investment rule-making is the increasing regionalisation of negotiations, which will have an impact on Asian regulations. If the core of international investment regulations remains based on BITs and bilateral FTAs, it is important to underscore the importance of ongoing negotiations of broader pacts, which involve more than two countries and cover a number of economic areas. The rise of plurilateral agreements with a wider scope—such as ACIA, "ASEAN plus" agreements, RCEP, and TPP—is likely to

[53] Taipei, China, President Ma Ying-jeou said his government will work hard to create the conditions for Taipei, China, to participate in the USA-led TPP at an appropriate time, see Shu-hua and Low (2013).

produce greater economic effects while spreading the basic principles of foreign investment protection to most Asian economies. It also suggests that research and policy efforts should increasingly focus on these new instruments.

Fourthly, the paper also identified the TPP as one of the key investment agreements in Asia which is likely to oblige the EU to negotiate high-level standards for foreign investment—they should at least be of comparable standard with those of Asian countries. The TPP reflects a US investment rule-making practice while the EU seems to be willing to negotiate new investment treaties largely inspired by the US practice.[54] These new negotiations may well confirm the global adoption of a NAFTA-like mode of investment regulation which will provide a benchmark for all future EU negotiations with Asian countries.

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Annex: The Asian "Noodle Bowl" of Investment Treaties

	Armenia	Australia	Azerbaijan	Bangladesh	Brunei Darussalam
Armenia					
Australia					
Azerbaijan					
Bangladesh					
Brunei Darussalam					
Cambodia					ACIA 1 Mar 2012
China, People's Republic of	BIT 18 Mar 1995	BIT 11 July 1988	BIT 1 Apr 1995	BIT 25 Mar 1997	BIT not yet into force
Georgia	BIT 18 Feb 1997		BIT 10 July 1996		

(continued)

[54] To these current developments, one should add the start of the transatlantic trade and investment partnership (TATP) announced by President Obama in his 2012 speech on the State of the Union.

	Armenia	Australia	Azerbaijan	Bangladesh	Brunei Darussalam
Hong Kong, China		BIT 15 Oct 1993			
India	BIT 30 May 2006	BIT 4 May 2000		BIT 7 Jul 2011	BIT 18 Jan 2009
Indonesia		BIT 29 July 1993		BIT 22 Apr 1999	ACIA 1 Mar 2012
Japan				BIT 25 Aug 1999	FTA Brunei Darussalam—Japan 31 Jul 2008
Kazakhstan			BIT not yet into force		
Korea, Republic of			BIT 25 Jan 2008	BIT 6 Oct 1988	
Kyrgyz Republic	BIT 27 Oct 1995		BIT 28 Aug 1997		
Lao PDR		BIT 8 Apr 1995			ACIA 1 Mar 2012
Malaysia				BIT 20 Aug 1996	
Mongolia					
Myanmar					
Nepal					
New Zealand		BIT not yet into force and Australia–New Zealand (ANZCERTA) 1 Jan 1989			FTA Trans-Pacific Strategic Economic Partnership 28 May 2006
Pakistan		BIT 14 Aug 1998		BIT not yet into force	
Papua New Guinea		BIT 20 Oct 1991			
Philippines		BIT 8 Dec 1995		BIT 1 Aug 1998	
Singapore		FTA Singapore–-Australia 28 Jul 2003		BIT 19 Nov 2004	FTA Trans-Pacific Strategic Economic Partnership 28 May 2006
Sri Lanka		BIT not yet into force			
Taipei, China					

(continued)

	Armenia	Australia	Azerbaijan	Bangladesh	Brunei Darussalam
Tajikistan	BIT not yet into force		BIT 26 Feb 2008		
Thailand		FTA Thailand–Australia 1 Jan 2005		BIT 12 Jan 2003	
Turkmenistan	BIT not yet into force				
Uzbekistan			BIT 2 Nov 1996	BIT 24 Jan 2001	
Vanuatu					
Viet Nam	BIT 28 Apr 1993	BIT 11 Sep 1991		BIT not yet into force	

	Cambodia	China, People Republic of	Georgia	Hong Kong, China	India
Armenia		BIT 18 Mar 1995	BIT 18 Feb 1997		BIT 30 May 2006
Australia		BIT 11 July 1988		BIT 15 Oct 1993	BIT 4 May 2000
Azerbaijan		BIT 1 Apr 1995	BIT 10 July 1996		
Bangladesh		BIT 25 Mar 1997			BIT 7 July 2011
Brunei Darussalam	ACIA 1 Mar 2012	BIT not yet into force			BIT 18 Jan 2009
Cambodia		BIT 1 Feb 2000			
China, People's Republic of	BIT 1 Feb 2000		BIT 1 Mar 1995	FTA China–Hong Kong, China 29 June 2003	BIT 1 Aug 2007
Georgia		BIT 1 Mar 1995			
Hong Kong, China		FTA China–Hong Kong, China 29 June 2003			
India		BIT 1 Aug 2007			
Indonesia	BIT not yet into force and ACIA 1 Mar 2012	BIT 1 Apr 1995			BIT 22 Jan 2004

(continued)

	Cambodia	China, People Republic of	Georgia	Hong Kong, China	India
Japan	BIT 31 Jul 2008	BIT 14 May 1989		BIT 18 June 1997	
Kazakhstan		BIT 13 Aug 1994	BIT 24 Aug 2008		BIT 26 Jul 2001
Korea, Republic of	BIT 12 Mar 1997	BIT 1 Dec 2007		BIT 30 July 1997	BIT 7 May 1996
Kyrgyz Republic		BIT 8 Sep 1995	BIT 28 Oct 1997		BIT 10 Apr 1998
Lao PDR	BIT not yet into force and ACIA 1 Mar 2012	BIT 1 June 1993			BIT 5 Jan 2003
Malaysia	BIT not yet into force	BIT 31 Mar 1990			BIT 12 Apr 1997
Mongolia		BIT 1 Nov 1993			BIT 29 Apr 2002
Myanmar		BIT 21 May 2002			BIT 8 Feb 2009
Nepal					BIT not yet into force
New Zealand		BIT 25 Mar 1989 and FTA China–New Zealand 1 Oct 2008		BIT 5 Aug 1995 and Hong Kong, China–New Zealand 1 Jan 2011	
Pakistan	BIT not yet into force	BIT 30 Sep 1990 and FTA Pakistan–China 1 Jul 2007			
Papua New Guinea		BIT 12 Feb 1993			
Philippines	BIT not yet into force	BIT 8 Sep. 1995			BIT 29 Jan 2001
Singapore	BIT 24 Feb 2000	BIT 7 Feb 1986			FTA India–Singapore 1 Aug 2005

(continued)

	Cambodia	China, People Republic of	Georgia	Hong Kong, China	India
Sri Lanka		BIT 25 Mar 1987			BIT 13 Feb 1998
Taipei, China					BIT 28 Nov 2002
Tajikistan		BIT 20 Jan 1994			BIT 14 Nov 2003
Thailand	BIT 16 Apr 1997	BIT 13 Dec 1985		BIT 18 Apr 2006	BIT 13 July 2001
Turkmenistan		BIT 4 June 1994	BIT 21 Nov 1996		BIT 27 Feb 2006
Uzbekistan		BIT 1 Sep 2011	BIT 24 May 1999		BIT 28 Jul 2000
Vanuatu		BIT not yet into force			
Viet Nam	BIT not yet into force	BIT 1 Sep 1993			BIT 1 Dec 1999

	Indonesia	Japan	Kazakhstan	Korea, Republic of	Kyrgyz Republic
Armenia					BIT 27 Oct 1995
Australia	BIT 29 July 1993				
Azerbaijan			BIT not yet into force	BIT 25 Jan 2008	BIT 28 Aug 1997
Bangladesh	BIT 22 Apr 1999	BIT 25 Aug 1999		BIT not yet into force	
Brunei Darussalam	ACIA 1 Mar 2012	FTA Brunei Darussalam–Japan 31 Jul 2008		BIT 30 Oct 2003	
Cambodia	BIT not yet into force and ACIA 1 Mar 2012	BIT 31 Jan 2008		BIT 12 Mar 1997	
China, People's Republic of	BIT 1 Apr 1995	BIT 14 May 1989	BIT 13 Aug 1994	BIT 1 Dec 2007	BIT 8 Sep 1995

(continued)

	Indonesia	Japan	Kazakhstan	Korea, Republic of	Kyrgyz Republic
Georgia			BIT 24 Aug 2008		BIT 28 Oct 1997
Hong Kong, China		BIT 18 June 1997		BIT 30 July 1997	
India	BIT 22 Jan 2004		BIT 26 Jul 2001	BIT 7 May 1996	BIT 10 Apr 1998
Indonesia		FTA Japan–Indonesia 1 Jul 2008		BIT 10 Mar 1994	BIT 23 Apr 1997
Japan	FTA Japan–Indonesia 1 Jul 2008			BIT 1 Jan 2003	
Kazakhstan				BIT 26 Dec 1996	BIT not yet into force
Korea, Republic of	BIT 10 Mar 1994	BIT 1 Jan 2003	BIT 26 Dec 1996		BIT 8 June 2008
Kyrgyz Republic	BIT 23 Apr 1997		BIT not yet into force	BIT 8 June 2008	
Lao PDR	BIT 14 Oct 1995 and ACIA 1 Mar 2012	BIT 3 Aug 2009		BIT 14 June 1996	
Malaysia	BIT 27 Oct 1999	FTA Japan–Malaysia 13 Jul 2006	BIT not yet into force	BIT 31 Mar 1989	BIT not yet into force
Mongolia	BIT 13 Oct 1999	BIT 24 Mar 2002	BIT 3 Mar 1995	BIT 30 Apr 1991	BIT not yet into force
Myanmar					
Nepal					
New Zealand					
Pakistan	BIT 3 Dec 1996	BIT 29 May 2002	BIT not yet into force	BIT 15 Apr 1990	BIT not yet into force
Papua New Guinea		BIT not yet into force			
Philippines	BIT not yet into force	FTA Japan–Philippines 11 Dec 2008		BIT 25 Apr 1996	
Singapore	BIT 21 June 2006	FTA Japan–Singapore 30 Nov 2002		BIT 26 Mar 1998 and FTA Korea, Republic of–Singapore 2 Mar 2006	

(continued)

	Indonesia	Japan	Kazakhstan	Korea, Republic of	Kyrgyz Republic
Sri Lanka	BIT 21 Jul 1997	BIT 7 Aug 1982		BIT 15 Jul 1980	
Taipei, China					
Tajikistan	BIT not yet into force			BIT 13 Aug 1995	BIT not yet into force
Thailand	BIT 5 Nov 1998	FTA Japan–-Thailand 1 Nov 2007		BIT 30 Sep 1989	
Turkmenistan	BIT not yet into force				
Uzbekistan	BIT 27 Apr 1997	BIT 29 Sep 2009	BIT 8 Sep 1997	BIT 20 Nov 1992	BIT 6 Feb 1997
Vanuatu					
Viet Nam	BIT 3 Apr 1994	BIT 19 Dec 2004	BIT not yet into force	BIT 5 Jun 2004	

	Lao PDR	Malaysia	Mongolia	Myanmar	Nepal
Armenia					
Australia	BIT 8 Apr 1995				
Azerbaijan					
Bangladesh		BIT 20 Aug 1996			
Brunei Darussalam	ACIA 1 Mar 2012	ACIA 1 Mar 2012		ACIA 1 Mar 2012	
Cambodia	BIT not yet into force and ACIA 1 Mar 2012	BIT not yet into force and ACIA 1 Mar 2012		ACIA 1 Mar 2012	
China, People's Republic of	BIT 1 June 1993	BIT 31 Mar 1990	BIT 1 Nov 1993	BIT 21 May 2002	
Georgia					
Hong Kong, China					
India	BIT 5 Jan 2003	BIT 12 Apr 1997	BIT 29 Apr 2002	BIT 8 Feb 2009	BIT not yet into force
Indonesia	BIT 14 Oct 1995 and ACIA 1 Mar 2012	BIT 27 Oct 1999 and ACIA 1 Mar 2012	BIT 13 Oct 1999	ACIA 1 Mar 2012	
Japan	BIT 3 Aug 2009	FTA Japan-Malaysia 13 Jul 2006	BIT 24 Mar 2002		

(continued)

	Lao PDR	Malaysia	Mongolia	Myanmar	Nepal
Kazakhstan		BIT not yet into force	BIT 3 Mar 1995		
Korea, Republic of	BIT 14 June 1996	BIT 31 Mar 1989	BIT 30 Apr 1991		
Kyrgyz Republic		BIT not yet into force	BIT not yet into force		
Lao PDR		BIT not yet into force and ACIA 1 Mar 2012	BIT 29 Dec 1994	BIT not yet into force and ACIA 1 Mar 2012	
Malaysia	BIT not yet into force		BIT 14 Jan 1996		
Mongolia	BIT 29 Dec 1994	BIT 14 Jan 1996			
Myanmar	BIT not yet into force				
Nepal					
New Zealand		New Zealand–Malaysia 1 Aug 2010			
Pakistan	BIT not yet into force	BIT 30 Nov 1995 and FTA Pakistan–Malaysia 1 Jan 2008			
Papua New Guinea		BIT not yet into force			
Philippines			BIT 1 Nov 2001	BIT 11 Sep 1998	
Singapore	BIT 26 Mar 1998		BIT 7 Jan 1996		
Sri Lanka		BIT 31 Oct 1995			
Taipei, China		BIT 18 Match 1993			
Tajikistan			BIT 16 Sep 1999		
Thailand	BIT 7 Dec 1990			BIT not yet into force	
Turkmenistan		BIT not yet into force			
Uzbekistan		BIT 20 Jan 2000			
Vanuatu					
Viet Nam	BIT 23 Jun 1996	BIT 9 Oct 1992	BIT 13 Dec 2001	BIT not yet into force	

	New Zealand	Pakistan	Papua New Guinea	Philippines
Armenia				
Australia	BIT not yet into force and Australia-New Zealand (ANZCERTA) 1 Jan 1989	BIT 14 Aug 1998	BIT 20 Oct 1991	BIT 8 Dec 1995
Azerbaijan				
Bangladesh		BIT not yet into force		BIT 1 Aug 1998
Brunei Darussalam	FTA Trans-Pacific Strategic Economic Partnership 28 May 2006			ACIA 1 Mar 2012
Cambodia		BIT not yet into force		BIT not yet into force and ACIA 1 Mar 2012
China, People's Republic of	BIT 25 Mar 1989 and China-New Zealand 1 Oct 2008	BIT 30 Sep 1990 and FTA Pakistan-China 1 Jul 2007	BIT 12 Feb 1993	BIT 8 Sep. 1995
Georgia				
Hong Kong, China	BIT 5 Aug 1995 and FTA Hong Kong, China-New Zealand 1 Jan 2011			
India				BIT 29 Jan 2001
Indonesia		BIT 3 Dec 1996		BIT not yet into force and ACIA 1 Mar 2012
Japan		BIT 29 May 2002	BIT not yet into force	FTA Japan-Philippines 11 Dec 2008
Kazakhstan		BIT not yet into force		
Korea, Republic of		BIT 15 Apr 1990		BIT 25 Apr 1996
Kyrgyz Republic		BIT not yet into force		
Lao PDR		BIT not yet into force		ACIA 1 Mar 2012
Malaysia	New Zealand-Malaysia 1 Aug 2010	BIT 30 Nov 1995 and FTA Pakistan-Malaysia 1 Jan 2008	BIT not yet into force	
Mongolia				BIT 1 Nov 2001

(continued)

	New Zealand	Pakistan	Papua New Guinea	Philippines
Myanmar				BIT 11 Sep 1998
Nepal				
New Zealand				
Pakistan				BIT not yet into force
Papua New Guinea				
Philippines		BIT not yet into force		
Singapore	FTA New Zealand-Singapore 1 Jan 2001 and Trans-Pacific Strategic Economic Partnership 28 May 2006	BIT 4 May 1995		
Sri Lanka		BIT 5 Jan 2000		
Taipei, China				BIT 28 Apr 1992
Tajikistan		BIT not yet into force		
Thailand				BIT 6 Sep 1996
Turkmenistan		BIT not yet into force		
Uzbekistan		BIT 15 Feb 2006		
Vanuatu				
Viet Nam				BIT 29 Jan 1993

	Singapore	Sri Lanka	Taipei, China	Tajikistan
Armenia				BIT not yet into force
Australia	FTA Singapore-Australia 28 Jul 2003	BIT not yet into force		
Azerbaijan				BIT 26 Feb 2008
Bangladesh	BIT 19 Nov 1994			
Brunei Darussalam	FTA Trans-Pacific Strategic Economic Partnership 28 May 2006			
Cambodia	BIT 26 Feb 2000 and ACIA 1 Mar 2012			

(continued)

	Singapore	Sri Lanka	Taipei, China	Tajikistan
China, People's Republic of	BIT 7 Feb 1986	BIT 25 Mar 1987		BIT 20 Jan 1994
Georgia				
Hong Kong, China				
India	FTA India-Singapore 1 Aug 2005	BIT 13 Feb 1998	BIT 28 Nov 2002	BIT 14 Nov 2003
Indonesia	BIT 21 June 2006	BIT 21 Jul 1997		BIT not yet into force
Japan	FTA Japan–Singapore 30 Nov 2002	BIT 7 Aug 1982		
Kazakhstan				
Korea, Republic of	BIT 26 Mar 1998 and FTA Korea, Republic of–Singapore 2 Mar 2006	BIT 15 Jul 1980		BIT 13 Aug 1995
Kyrgyz Republic				BIT not yet into force
Lao PDR	BIT 26 Mar 1998 and ACIA 1 Mar 2012			
Malaysia		BIT 31 Oct 1995	BIT 18 Match 1993	
Mongolia	BIT 7 Jan 1996			BIT 16 Sep 1999
Myanmar				
Nepal				
New Zealand	FTA New Zealand–Singapore 1 Jan 2001 and Trans-Pacific Strategic Economic Partnership 28 May 2006			
Pakistan	BIT 4 May 1995	BIT 5 Jan 2000		BIT not yet into force
Papua New Guinea				
Philippines			BIT 28 Apr 1992	
Singapore		BIT 30 Sep 1980	BIT 9 Apr 1990	

(continued)

	Singapore	Sri Lanka	Taipei, China	Tajikistan
Sri Lanka	BIT 30 Sep 1980			
Taipei, China	BIT 9 Apr 1990			
Tajikistan				
Thailand		BIT 14 May 1996	BIT 30 Apr 1996	BIT not yet into force
Turkmenistan				
Uzbekistan	BIT 23 Nov 2003			
Vanuatu				
Viet Nam	BIT 25 Dec 1992	BIT not yet into force	BIT 23 Apr 1993	BIT not yet into force

	Thailand	Turkmenistan	Uzbekistan	Vanuatu	Viet Nam
Armenia		BIT not yet into force			BIT 28 Apr 1993
Australia	FTA Thailand-Australia 1 Jan 2005				BIT 11 Sep 1991
Azerbaijan			BIT 2 Nov 1996		
Bangladesh	BIT 12 Jan 2003		BIT 24 Jan 2001		BIT not yet into force
Brunei Darussalam	ACIA 1 Mar 2012				ACIA 1 Mar 2012
Cambodia	BIT 16 Apr 1997				BIT not yet into force and ACIA 1 Mar 2012
China, People's Republic of	BIT 13 Dec 1985	BIT 4 June 1994	BIT 1 Sep 2011	BIT not yet into force	BIT 1 Sep 1993
Georgia		BIT 21 Nov 1996	BIT 24 May 1999		
Hong Kong, China	BIT 18 Apr 2006				
India	BIT 13 July 2001	BIT 27 Feb 2006	BIT 28 Jul 2000		BIT 1 Dec 1999
Indonesia	BIT 5 Nov 1998	BIT not yet into force	BIT 27 Apr 1997		BIT 3 Apr 1994 and ACIA 1 Mar 2012
Japan	FTA Japan-Thailand 1 Nov 2007		BIT 29 Sep 2009		BIT 19 Dec 2004

(continued)

	Thailand	Turkmenistan	Uzbekistan	Vanuatu	Viet Nam
Kazakhstan			BIT 8 Sep 1997		BIT not yet into force
Korea, Republic of	BIT 30 Sep 1989		BIT 20 Nov 1992		BIT 5 Jun 2004
Kyrgyz Republic			BIT 6 Feb 1997		
Lao PDR	BIT 7 Dec 1990 and ACIA 1 Mar 2012				BIT 23 Jun 1996 and ACIA 1 Mar 2012
Malaysia		BIT not yet into force	BIT 20 Jan 2000		BIT 9 Oct 1992 and ACIA 1 Mar 2012
Mongolia					BIT 13 Dec 2001
Myanmar	BIT not yet into force				BIT not yet into force ACIA 1 Mar 2012
Nepal					
New Zealand					
Pakistan		BIT not yet into force	BIT 15 Feb 2006		
Papua New Guinea					
Philippines	BIT 6 Sep 1996				BIT 29 Jan 1993 and ACIA 1 Mar 2012
Singapore			BIT 23 Nov 2003		BIT 25 Dec 1992 and ACIA 1 Mar 2012
Sri Lanka	BIT 14 May 1996				BIT not yet into force
Taipei, China	BIT 30 Apr 1996				BIT 23 Apr 1993
Tajikistan	BIT not yet into force				BIT not yet into force
Thailand					BIT 7 Feb 1992 and ACIA 1 Mar 2012
Turkmenistan			BIT 2 Aug 1996		
Uzbekistan		BIT 2 Aug 1996			BIT 6 Mar 1998
Vanuatu					
Viet Nam	BIT 7 Feb 1992		BIT 6 Mar 1998		

BIT bilateral investment treaty, *IIA* international investment agreement

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Part III
International Economic Institutions

Institutional Developments in Investor–State Dispute Settlement and Arbitration Under the Auspices of the International Centre for Settlement of Investment Disputes

Catharine Titi

One of the seminal characteristics of most modern–day international investment agreements (IIAs) is the provision for access to investor–State dispute settlement (ISDS), through which an investor alleging a violation of the agreement may directly claim against its host State in international arbitration. Protection standards offered to investors through these international law instruments, such as fair and equitable treatment, full protection and security, and a guarantee of 'prompt, adequate and effective'[1] compensation in case of expropriation, have been tested when their provisions came to be interpreted by arbitral tribunals. And it is so that investor–State arbitration evolved into the centrepiece and guarantor of this system of investment protection and was placed in a unique position from which to formulate international investment law.[2] This privileged position of investment arbitration, evident in the proliferation and growing importance of arbitral tribunals and exponential recourse to dispute settlement,[3] has acted as a catalyst bringing to the fore the uncomfortable tension between investment protections and host State regulatory interests, and, by the same token, it has revealed arbitration as part of a problem.[4] It should then not be astonishing that the much–publicised discussion on the need for reform of international investment law started with and focused on the reform of the investor–State dispute settlement mechanism. The debate has recently

[1] On this dictum of the *Hull doctrine*, see OECD (2004), p. 2, ft. 1; Newcombe and Paradell (2009), p. 18; Sornarajah (2011), pp. 414 et seq.; Kuokkanen (2002), pp. 180 et seq.

[2] Titi (2014a), p. 67. See also Lavranos (2010), p. 2.

[3] See UNCTAD (2013), p. 110; UNCTAD (2012), p. 86; ICSID (2011), pp. 25 et seq.; OECD (2006), p. 184; Reinisch (2008); Lavranos (2006), p. 223, with further references.

[4] Titi (2014a), pp. 67–68.

C. Titi (✉)
University of Panthéon-Assas (Paris 2), Paris Center for Law and Economics (CRED),
19–21 Rue Valette, 75005 Paris, France
e-mail: cathy_titi@hotmail.com

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European Yearbook of International Economic Law 6,
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intensified, and reform is currently underway. Institutional developments that will lead in the long run to systemic changes are reflected in both novel investment treaty provisions and collective efforts made at various international *fora*.

It is worth recalling that investor–State dispute settlement is closely affiliated with the function of the International Centre for Settlement of Investment Disputes (ICSID). Attracting the vast majority of known investment arbitrations, this World Bank institution provides an important backbone to substantive protection offered to foreign investors through international investment agreements, and it is the most influential investment arbitration forum. Advantages and shortcomings of ISDS conducted under ICSID Rules are quasi–synonymous with advantages and shortcomings of ISDS more generally, although, as will be discussed, one of the leading efforts for reform has been conducted outside the World Bank system by the United Nations Commission on International Trade Law (UNCITRAL).

The present contribution purports to examine recent institutional developments affecting either the investor–State dispute settlement mechanism in general or the ICSID system. The chapter is organised in the following manner. First, it explores investment arbitration in numbers. Second, it considers institutional developments specific to the ICSID context, in the post–Latin American ICSID Convention–denunciations era. Third, it focuses on recent developments in the context of EU negotiations and, particularly, on the division of financial responsibility and ISDS provisions in the treaties under negotiation. Fourth, it reviews two issues that have recently come to the spotlight, namely arbitration of sovereign debt restructurings and mass claims, and transparency. A final section concludes.

Dispute Settlement in Numbers (Or the Popularity of ISDS)

Dispute Settlement in General

The popularity of investor–State dispute settlement is manifest in the multiplication of claims that are being filed each year. In 2013, at least 57 new investor–State claims were registered, bringing the total of known investment treaty claims to 568 by the end of that year.[5] A relatively high percentage of these claims were filed against developed countries, and remarkably against Member States of the European Union.[6] This in itself is a noteworthy development, given that industrialised countries, especially EU Member States, have generally been

[5] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 7, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[6] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 2, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

shielded from investment claims. Treaties concluded by EU Member States have been strongly protective of investor interests, essentially offering European investors protection in their ventures in the developing world as well as the possibility to resort to arbitration against their host State without the expectation of ("reciprocal") claims initiated against the EU Member States.[7] Interestingly, some older bilateral investment treaties (BITs) were concluded on an expressly non-reciprocal basis.[8] One such example is the 1972 BIT concluded between France and Tunisia, which explicitly encouraged *only* the 'development of French investments in Tunisia'.[9] Although the above description belongs now to the history of investment treaties, it testifies to the one–sided interest of EU Member States in the protection of their own investors. In line with this long–standing tradition of concluding treaties with countries with minimal investment in EU Member States, investment claims have generally been initiated by EU investors against third countries. For instance, in 2012 EU investors were at the basis of 60 % of new disputes.[10]

But the new claims reveal that this comfortable position of EU Member States may be slowly changing. Focusing on 2013, six cases were filed against Spain.[11] Disputes involving the country, also claims against the Czech Republic, were born out of measures relating to renewable energy.[12] In September 2013, France faced its first known investor–State claim.[13] More significantly, recent cases registered against EU Member States resulted from the economic and financial crisis in Europe—notably, the *Ping An* (2012)[14] and the *Marfin*[15] cases against Belgium

[7] Titi (2013a), p. 829 (845); Titi (2014a), p. 21.

[8] Banifatemi and von Walter (2013), pp. 247–251.

[9] Convention entre le Gouvernement de la République française et le Gouvernement de la République tunisienne sur la protection des investissements, 1972, Preamble (translation of the author).

[10] European Commission Fact sheet, Investment Protection and Investor-to-State Dispute Settlement in EU agreements, 2013, p. 5. See also UNCTAD, Recent Developments in Investor–State Dispute Settlement, updated for the Multilateral Dialogue on Investment, 28–29 May 2013, IIA Issues Note, No. 1, May 2013, UNCTAD/WEB/DIAE/PCB/2013/3/REV, p. 4.

[11] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 2, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[12] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 1, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[13] ICSID, ARB/13/22, *Erbil Serter v. France*, registered 10 September 2013.

[14] ICSID, ARB/12/29, *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Belgium*, registered 19 September 2012.

[15] ICSID, ARB/13/27, *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. Cyprus*, registered 27 September 2013.

and Cyprus respectively arising out of nationalisations in the banking sector and the *Poštová banka*[16] claim against Greece in relation to that State's 2012 debt restructuring.

Thirty–seven known arbitral decisions were rendered in 2013.[17] Out of an overall number of 274 known concluded cases, approximately 43 % have been decided in favour of the host State and 31 in favour of the investor.[18] The apparent partiality in favour of the State is belied by the fact that investor–State arbitration in the quasi–totality of cases is initiated by the investor with the host State constantly finding itself in the position of respondent.[19] At least 72 of the 2013 cases were initiated on the basis of intra–EU BITs.[20]

ICSID

General

ICSID remains the most popular venue for ISDS. In 2013, 40 new cases—i.e. 70 % of known claims—were registered under the ICSID Convention and the ICSID Additional Facility Rules,[21] bringing the total of registered ICSID disputes at the end of the year to 459.[22] Of these, 407 have been investment arbitration cases under the ICSID Convention, 43 ICSID Additional Facility arbitration cases, and nine conciliation cases under the ICSID Convention or the Additional Facility Rules.[23] A comparison between the topography of all-time claims and new claims is revealing. Most of the former have been brought under bilateral investment treaties,[24] and they have involved a South American party.[25] In 25 % of all decided

[16] ICSID, ARB/13/8, *Poštová banka, a.s. and ISTROKAPITAL SE v. Greece*, registered 20 May 2013.

[17] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 9, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[18] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, 2014, p. 10, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[19] Juillard (2009), p. 274 (280); see also Titi (2014a), p. 70. At the time of writing, less than five *State*–investor arbitrations are known to have been initiated; see *ibid.*

[20] UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 9, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[21] Thirty–eight of these cases were registered under the ICSID Convention and two of them under the ICSID Additional Facility Rules.

[22] ICSID (2014), p. 7.

[23] ICSID (2014), p. 8.

[24] ICSID (2014), p. 10.

[25] ICSID (2014), p. 11.

cases, the tribunal has denied jurisdiction, in 28 % arbitrators have dismissed all claims, in 46 % the tribunal has at least partially upheld the claims, and in 1 % the tribunal has rejected the claim for manifest lack of merits, according to ICSID Arbitration Rule 41(5) and Article 45(6) of the Additional Facility Rules, as amended in 2006.[26] At the same time, while in the decade 2001–2010, 96 annulment decisions were rendered, in the 3 years that followed (2011–2013), tribunals delivered already 53 such decisions.[27] In 2013, although the majority of cases were still brought on the basis of a bilateral investment treaty, the percentage of such claims (57 %) was lower than the average of all history. 17 % of cases were brought under the investment law of the host State, 12 % of cases were brought under the Energy Charter Treaty, and 14 % of cases were brought under an investor–State contract.[28] Latin America stopped being the most popular ICSID respondent in 2013,[29] with most cases brought under the ICSID Convention involving, firstly, Eastern Europe and Central Asia and, secondly, Middle East and North Africa.[30] In the same year, in 40 % of cases the tribunal declined jurisdiction, in 30 % the tribunal dismissed all claims, and in the remaining 30 % the tribunal upheld at least one claim.[31]

ICSID Convention

The ICSID Convention counts currently 159 signatory States, of which 150 have also deposited their instruments of ratification, acceptance, or approval of the Convention with the World Bank.[32] Three new members were added in 2013. In April 2013, Montenegro deposited with the World Bank its instrument of ratification of the ICSID Convention, which consequently entered into force for the country in May 2013, in accordance with Article 68(2) of the ICSID Convention.[33] The Democratic Republic of São Tomé and Príncipe deposited its ratification instrument in May 2013, and the Convention entered into force in its respect in June 2013.[34] But probably the most seminal new membership is that of Canada's. Already a signatory to the Convention since 2006, Canada deposited its instrument of ratification of the ICSID Convention on 1 November 2013.[35] Pursuant to Article

[26] ICSID (2014), p. 14.

[27] ICSID (2014), p. 17.

[28] ICSID (2014), p. 23.

[29] Latin America, and especially Argentina, has had the sad privilege of heading investment disputes as a respondent, inviting in one case the comment that Argentina has been ICSID's best client. Christakis (2007), p. 879 (881). See further Titi (2014b), p. 357.

[30] ICSID, The ICSID Caseload—Statistics, Issue 2014–1, p. 24.

[31] ICSID, The ICSID Caseload—Statistics, Issue 2014–1, p. 28.

[32] See https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome$32#&pageName=MemberStates_Home.

[33] Montenegro Ratifies the ICSID Convention, ICSID News Release, 11 April 2013.

[34] Sao Tome and Principe Ratifies the ICSID Convention, ICSID News Release, 21 May 2013.

[35] Canada Ratifies the ICSID Convention, ICSID News Release, 1 November 2013.

68(2) of the ICSID Convention, the latter entered into force for Canada on 1 December 2013. Canada's adhesion to the ICSID Convention opens the door for North American Free Trade Agreement (NAFTA) disputes to be adjudicated under the ICSID Convention. In accordance with Article 1120 of the NAFTA, an investor may submit a claim to arbitration under 'the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention'. Given that among NAFTA's signatories only the United States had been party to the Convention prior to Canada's membership, the conditions for the submission of a NAFTA dispute to arbitration under the ICSID Convention may be fulfilled for the first time. It is noteworthy that both the 2004 Canadian Model BIT and the current version of the same model[36] adopted before Canada's ratification of the ICSID Convention provide for the possibility of submitting a claim to the ICSID Convention if both the disputing party and the home economy of the disputing investor are party to the ICSID Convention.[37]

Investor–State Dispute Settlement Challenges and the Division of Financial Responsibility in Arbitration on the Basis of EU Investment Agreements

If the preceding paragraphs have demonstrated the popularity of investment arbitration, the ISDS mechanism has become target for a growing number of critiques.[38] These have not always left government actors indifferent, and some of them have questioned the necessity of including access to investor–State dispute settlement in their investment agreements. The previous Australian government, for example, sought to adopt a policy that would discontinue access to investor–State arbitration in its international investment treaties.[39] However, after the conclusion of a recent Australian FTA that provides for investor–State dispute settlement,[40] it is less than certain that the new Australian Government will go down the same

[36] See Titi (2013b), p. 14.

[37] Article 27(1)(a) Canadian Model BIT of 2004 and Article 24(1)(a) Canadian Model BIT of 2012.

[38] See, e.g., Alvarez (2011), pp. 75–93, 257–263, 352–406; Franck (2005), p. 1521; Van Harten (2007), pp. 152–184; see also Public Statement on the International Investment Regime, 31 August 2010, Osgoode Hall Law School, available at: http://www.osgoode.yorku.ca/public_statement. For further bibliography on the topic, see Titi (2014a), p. 70.

[39] Government of Australia, Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity, 2011, available at: http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf, p. 14. On the Australian Government's rejection of investor–State dispute settlement, see further Kurtz (2012), p. 9; Kurtz (2011); Nottage (2011). See also Titi (2014a), pp. 25, 45 et seq.

[40] This is the 2014 Korea–Australia FTA (KAFTA), see Section B of Chapter 11 (Articles 11.15 et seq.).

path.[41] Beyond the Australian context, scepticism has been expressed in Latin America, with obvious disapproval of investor–State arbitration in recent denunciations of the ICSID Convention.[42] As noted elsewhere, these denunciations constitute a political statement vis-à-vis investor–State dispute settlement, but they target the ICSID system in particular.[43] And more recently, concerns have reportedly been raised in Europe by Germany.[44] The following paragraphs will briefly examine some particular issues and challenges posed by investment arbitration in the framework of the ongoing EU investment negotiations, with a focus on the apportioning of financial liability between the EU and its Member States.[45]

The EU institutions involved in the negotiations have made clear that EU investment agreements need to provide an effective investor–State dispute settlement mechanism.[46] For example, the European Commission has indicated that ISDS is 'such an established feature of investment agreements that its absence would in fact discourage investors and make a host economy less attractive than others',[47] and the Council has stressed 'the need for an effective investor-to-state dispute settlement mechanism'.[48] The European Parliament has dedicated five paragraphs to investment arbitration in its Resolution of 6 April 2011,[49] although it is remarkable that in the text accompanying a proposed amendment to the Commission's Proposal for a Regulation 'establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party', the European Parliament has observed that including ISDS in EU investment agreements 'is not a necessity'.[50] It has further added that inclusion of investor–

[41] See further Australian Government Department of Foreign Affairs and Trade, Frequently Asked Questions on Investor–State Dispute Settlement (ISDS), available at: https://www.dfat.gov.au/fta/isds-faq.html and Nottage (2013).

[42] See Titi (2014b), p. 357.

[43] Titi (2014b), p. 357 (364–365).

[44] See also UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 24, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[45] For a more detailed analysis of some of these issues, see Bungenberg and Titi (2014).

[46] European Commission, Communication, Towards a comprehensive European international investment policy, COM(2010) 343 final, 7 July 2010, pp. 9–10; European Council, Conclusions on a comprehensive European international investment policy, 25 October 2010, para. 18; European Parliament, Resolution of 6 April 2011 on the future European international investment policy, 2010/2203 (INI), 2 October 2012, paras. 31–35.

[47] European Commission, Communication, Towards a comprehensive European international investment policy, COM(2010) 343 final, 7 July 2010, p. 10.

[48] European Commission, Communication, Towards a comprehensive European international investment policy, COM(2010) 343 final, 7 July 2010, pp. 9–10, recital 18, see also 14.

[49] European Parliament Resolution of 6 April 2011 on the future European international investment policy, 2010/2203 (INI), 2 October 2012, paras. 31–35.

[50] European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor–state

State dispute settlement 'should be a conscious and informed policy choice that requires political and economic justification'.[51] In a more recent document, the European Parliament's Position 'with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party' (hereinafter Position of the European Parliament),[52] and which was adopted with the legislative resolution of 16 April 2014,[53] the Parliament expressly states that EU investment agreements 'may' provide for ISDS.[54]

It does not appear, as of the time of writing, that this statement has an impact on the design of the EU investment policy, although it may reflect a certain amount of sympathy for some policy decisions, such as those of the previous Australian government.[55]

One of the crucial questions that have confronted the EU concerns the highly debated issue of how to apportion responsibility and financial liability between the EU and its Member States as a consequence of investment disputes, and the

dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 0335-C70155/2012–2012/0163(COD), 26 March 2013, Amendment 2, Justification.

[51] European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 0335-C70155/2012–2012/0163(COD), 26 March 2013, Amendment 2, Justification.

[52] Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, P7_TC1-COD(2012)0163, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN.

[53] European Parliament legislative resolution of 16 April 2014 on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 0335-C7-0155/2012-2012/0163.

[54] Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, P7_TC1-COD(2012)0163, recital 2, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN. See also recital 4 of the same document that requires EU investment agreements to provide the same high level of protection as Union law but not higher, raising the question of whether this phrasing could eventually also relate to procedural standards of investment protection. The oxymoron is that this statement is included in a document that in fact explains how ISDS is to function with respect to financial liability.

[55] See Bungenberg and Titi (2014).

concomitant topic of identifying the appropriate respondent.[56] The issue was already touched in the 2010 Communication of the European Commission 'Towards a comprehensive European international investment policy', whereby the Commission suggested that the European Union, represented by the European Commission, would be responsible for defending all actions of EU institutions.[57] According to this same argument put forward by the Commission, the EU would be the only defendant where a Member State has taken measures impacting foreign investment and falling within the scope of the agreement in question.[58] In another document issued by the European Commission, its 2010 Proposal for a Regulation establishing transitional arrangements for bilateral investment agreements between Member States and third countries, there was provision for participation of both the EU and the Member States in investment arbitrations initiated on the basis of EU investment treaties,[59] and the topic was also evoked in the Council's Conclusions of the same year, with the Council inviting the Commission to carry out a study on the question of responsibility.[60] In 2011, the European Parliament called on the Commission to propose a regulation on the division of responsibilities between the Union and its Member States, particularly relating to financial liability where the defendant has lost a dispute to an investor of another party.[61]

Things have evolved since these early discussions. In 2012, the European Commission submitted a Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor–State dispute settlement tribunals established by international agreements to which the European Union is party,[62] which in its own express terms sought to establish the framework for managing the financial consequences of investment disputes on the basis of EU investment agreements.[63] The Proposal's main argument was that financial liability born out of an investment dispute needs to be attributed to the actor affording the disputed treatment; in other words, where the EU or an EU institution is responsible

[56] On these issues, see also Bungenberg and Titi (2014).

[57] European Commission, Communication, Towards a comprehensive European international investment policy, COM(2010)343 final, 7 July 2010, p. 10.

[58] European Commission, Communication, Towards a comprehensive European international investment policy, COM(2010)343 final, 7 July 2010, p. 10.

[59] European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, COM(2010) 344 final, 7 July 2010, see Article 13.

[60] Council of the European Union, Conclusions on a comprehensive European international investment policy, 25 October 2010, recital 18, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf.

[61] European Parliament Resolution of 6 April 2011 on the future European international investment policy, 2010/2203 (INI), 2 October 2012, para. 35.

[62] European Commission, Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012)335 final, 2012/0163 (COD), 21 June 2012.

[63] European Commission, p. 2. See further Bungenberg and Titi (2014).

for the treatment in question, financial liability should lie with the EU, and where a Member State is responsible for the treatment, liability should be with the Member State.[64] Where treatment afforded by a Member State is required by EU law, then the EU should bear the financial liability.[65] The central organising ideas of the Commission's Proposal have been integrated into the aforecited Position of the European Parliament.[66]

One particular question that needs to be examined in relation to the issue at hand is that the conclusion of an agreement as purely a mixed agreement or as a pure EU agreement may have an impact on the allocation of financial responsibility and on identifying the appropriate respondent.[67] Indeed, this position was upheld by the European Parliament, which notes that in principle the EU will 'be responsible for defending any claims alleging a violation of rules included in an agreement which falls within the Union's exclusive competence, irrespective of whether the treatment at issue is afforded by the Union itself or by a Member State'.[68]

The question of whether EU investment agreements are to be concluded as pure EU agreements or as mixed agreements is one that has been subject to a heated debate since the very beginning of the extension of the EU's competence over the conclusion of treaties that cover foreign direct investment by virtue of Article 207 of the Treaty on the Functioning of the European Union, and it is beyond the scope of the present contribution to explore.[69] But in order to better understand the Commission's arguments, and the European Parliament's response, regarding the apportioning of responsibility and financial liability, suffice it to note at this stage that with its Proposal for a Regulation, the Commission stresses its opinion that the EU 'has exclusive competence to conclude agreements covering all matters relating

[64] European Commission, Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012)335 final, 2012/0163 (COD), 21 June 2012, p. 2.

[65] European Commission, Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012)335 final, 2012/0163 (COD), 21 June 2012. See further Bungenberg and Titi (2014).

[66] E.g., see Article 3 stating, *inter alia*, that 'the Union shall bear the financial responsibility arising from treatment afforded by the institutions, bodies or agencies of the Union; [. . .] the Member State concerned shall bear the financial responsibility arising from treatment afforded by that Member State; [. . .] the Union shall bear the financial responsibility arising from treatment afforded by a Member State where such treatment was required by the law of the Union'.

[67] Bungenberg and Titi (2014). See also Schill (2011), pp. 133 et seq.

[68] Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, P7_TC1-COD(2012)0163, recital 3, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN.

[69] E.g., see Bungenberg et al. (2011).

to foreign investment, that is both foreign direct investment and portfolio investment'.[70]

If a treaty were to be concluded as a mixed agreement, the Commission considered that the responsible actor should be determined 'on the basis of the competence for the subject matter of the international rules in question, as set down in the Treaty' rather than on who were the authors of the act.[71] In the same vein, the Commission recognised that, while international responsibility for the breach of a provision of an agreement falling within the EU's competence rests with the EU itself, it is possible to allocate financial liability between the Union and the Member States. Therefore, while in principle it is the EU that should act as respondent in disputes concerning alleged violations of such provisions, it is possible to empower a Member State to act as respondent under given circumstances. The Commission considered that this approach offers 'pragmatic solutions'.[72]

In the same Proposal, the Commission expressed the opinion that an investor having initiated arbitration on the basis of an EU investment agreement should not suffer the consequences of a potential disagreement between the EU and the Member State concerned as regards the apportioning of responsibility between the two and provision should be made that compensation allocated in a final award or settlement award shall be promptly paid to the investor.[73] While this approach seems reasonable in the case of a final arbitral award, its suitability to a settlement award could be questioned where a Member State has freely negotiated the settlement and its disagreement with the EU leads the latter to undertake the

[70] European Commission, Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335 final, 2012/0163 (COD), 21 June 2012, p. 3. See also the Joint declaration by the European Parliament, the Council and the Commission, annexed to the European Parliament's legislative resolution of 16 April 2014 on the proposal for a regulation of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 0335-C7-0155/2012-2012/0163, which attempts to ensure that the adoption of the regulation in question 'shall not be interpreted as an exercise of shared competence by the Union in areas where the Union's competence has not been exercised'.

[71] European Commission, Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335 final, 2012/0163 (COD), 21 June 2012.

[72] European Commission, Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335 final, 2012/0163 (COD), 21 June 2012, p. 5.

[73] European Commission, Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335 final, 2012/0163 (COD), 21 June 2012, p. 6. See also Bungenberg and Titi (2014).

payment.[74] For this reason, the Commission's Proposal and the Proposal of the European Parliament explain that a Member State may settle a dispute so long as 'it accepts full financial responsibility'.[75] Likewise, where a dispute also concerns treatment afforded by a Member State, the EU should only be able to negotiate a settlement if this has no 'financial or budgetary implications for the Member State concerned'.[76] A further interesting element in the Commission's proposal has been the establishment of a mechanism for regular payments to be made into the EU budget to be allocated to investor–State dispute settlement costs and for the reimbursement of the Union where it has paid for an award.[77]

These are some of the issues and challenges facing investment arbitration, notably in the context of the European Union, and it will be interesting to watch out in the months to come how some of these dilemmas will be resolved.

[74] Bungenberg and Titi (2014).

[75] European Commission, Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335 final, 2012/0163 (COD), 21 June 2012, p. 17; Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, P7_TC1-COD(2012)0163, recital. 18, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN.

[76] Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, P7_TC1-COD(2012)0163, recital 18, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN.

[77] European Commission, Proposal for a Regulation establishing a framework for managing financial responsibility linked to investor–state dispute settlement tribunals established by international agreements to which the European Union is party, COM(2012) 335 final, 2012/0163 (COD), 21 June 2012, p. 6. The Commission's Proposal for a Regulation has been commented in a study prepared by Tietje et al. (2013); Article 20 Position of the European Parliament adopted at first reading on 16 April 2014 with a view to the adoption of Regulation (EU) No. . ./2014 of the European Parliament and of the Council establishing a framework for managing financial responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is party, P7_TC1-COD(2012)0163, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=−//EP//TEXT+TA+P7-TA-2014-0419+0+DOC+XML+V0//EN. See also Bungenberg and Titi (2014).

Further Topical Issues: Adjudication of Sovereign Debt Restructurings and Transparency

The remaining part of the chapter will consider two particular issues that have arisen in relation to investor–State dispute settlement: the adjudication of sovereign debt restructurings and the concomitant question of multiparty treaty claims and transparency.

Investor–State Dispute Settlement and Sovereign Debt Restructurings

Recent disputes concerning Argentina's sovereign debt restructuring have given rise to new issues in investment arbitration. More concretely, two questions have been asked: whether sovereign debt instruments qualify as protected investment under the relevant IIA and, when arbitration is conducted under the ICSID Convention, under Article 25 of the ICSID Convention; and whether multiparty, or *mass*, claims are allowed. Although the issues discussed here are born in the context of Argentina's sovereign debt restructuring, and especially in the *Abaclat*,[78] *Ambiente Ufficio*,[79] and *Alemanni*[80] cases, they may become relevant to other disputes, such as those relating to Greece's sovereign debt restructuring. As mentioned above, an ICSID case has already been registered against the country, and other recent sovereign debt restructurings, including those of Belize, Ecuador, and Jamaica,[81] may open the way for further claims. The paragraphs that follow will give a brief consideration to some of these issues.

While a number of investment treaties expressly include bonds in their definition of investment,[82] it is generally essential to look at the particular way the relevant treaty provision has been drafted. Regarding the question of whether sovereign bonds constitute investment under the ICSID Convention, the majority in the *Abaclat* Tribunal, having rejected the *Salini* test,[83] found that the purchase of security entitlements in government bonds did constitute investment for the

[78] ICSID, ARB/07/5, *Abaclat and Others v. Argentina*, Decision on Jurisdiction and Admissibility, 4 August 2011.

[79] ICSID, ARB/08/9, *Ambiente Ufficio S.P.A. and Others* (*Case formerly known as Giordano Alpi and Others*) *v. Argentina*, Decision on Jurisdiction and Admissibility, 8 February 2013.

[80] ICSID, ARB/07/8, *Giovanni Alemanni and others v. Argentina*, registered 27 March 2007.

[81] International Monetary Fund, Sovereign Debt Restructuring—Recent Developments and Implications for the Fund's Legal and Policy Framework, 26 April 2013, p. 6.

[82] E.g., see Article 1 of the US Model BIT (2012).

[83] ICSID, ARB/07/5, *Abaclat and Others v. Argentina*, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 362 et seq.

purposes of the ICSID Convention.[84] The dissenting arbitrator noted his disagreement with the majority view remarking that 'a good faith international law interpretation [. . .] derived from the inherent *ordinary meaning* of term "investment" of Article 25(1) in its context and in the light of the object and purpose of the 1965 ICSID Convention' cannot lead to the conclusion that portfolio investment and 'other financial negotiable products (traded with high velocity of circulation in capital markets and at places far remote from the State in whose territory the investment is supposed to take place) between persons alien to any economic activity in the host State and which, generally speaking, cover a wide spectrum of financial products ranging from standardized instruments (i.e. shares, bonds, loans) to structured and derivatives products (i.e. hedges of currencies, oil, etc., credit default swaps)'.[85]

The second important question has been whether multiparty claims are covered by a State's consent to arbitrate in the investment treaty and under the ICSID Convention. Two relevant decisions have been rendered so far. First, the *Abaclat* Tribunal, and then the *Ambiente* Tribunal, following in the latter's steps, found that nothing in the ICSID Convention 'would militate in favour of interpreting the "silence" of the ICSID Convention as standing in the way of instituting multi–party proceedings'.[86] It is worth noting the dissenting arbitrator's 'total disagreement' with the majority view in the *Ambiente* dispute.[87]

Some treaties, especially newer ones, have started to preclude sovereign debt restructuring from coming into the scope of an investment dispute. They do so by altogether excluding portfolio investments from their coverage,[88] by specifying that 'public debt operations' do not constitute an investment[89] or that such operations

[84] ICSID, ARB/07/5, *Abaclat and Others v. Argentina*, Decision on Jurisdiction and Admissibility, 4 August 2011, para. 387.

[85] ICSID, ARB/08/9, *Ambiente Ufficio S.P.A. and Others* (*Case formerly known as Giordano Alpi and Others*) *v. Argentina*, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Santiago Torres Bernárdez, paras. 262–263.

[86] ICSID, ARB/08/9, *Ambiente Ufficio S.P.A. and Others* (*Case formerly known as Giordano Alpi and Others*) *v. Argentina*, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 146.

[87] ICSID, ARB/08/9, *Ambiente Ufficio S.P.A. and Others* (*Case formerly known as Giordano Alpi and Others*) *v. Argentina*, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Santiago Torres Bernárdez, para. 81. See further UNCTAD, Recent Developments in Investor–State Dispute Settlement (ISDS), IIA Issues Note, No. 1, April 2014, UNCTAD/WEB/DIAE/PCB/2014/3, p. 18, available at: http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx.

[88] Article 1(1)(b) Denmark–Poland BIT (1990).

[89] Article 838, ft 11, Canada–Colombia FTA, Article I Colombia–UK BIT (2010), Article I Colombian Model BIT (2007). For a relevant discussion, see also República de Colombia, Departamento Nacional de Planeación, 2002, Documento Conpes 3197, 'Manejo de los Flujos de Endeudamiento en los Acuerdos Internacionales de Inversión Extranjera', 26 August 2002, available at: https://www.dnp.gov.co/Portals/0/archivos/documentos/Subdireccion/Conpes/3197.PDF. See also Rivas (2013), p. 203.

are not subject to the treaty's investment protection provisions,[90] or by excluding the possibility of raising claims related to sovereign debt restructurings.[91] Other ways in which States could ensure that agreements prevent the arbitration of this type of claims would be to specify that sovereign crises come within the scope of an essential security interest exception[92] or provide explicit waivers in contracts associated with sovereign debt.[93]

Transparency in Investor–State Dispute Settlement

A catchword in today's international investment law, transparency kindled a particularly vivid discussion in the context of (the reform of) investor–State dispute settlement.[94] Envisioning the future EU investment policy, already in 2010, the European Commission emphasised that 'the EU should ensure that investor–state dispute settlement is conducted in a transparent manner'[95] and transparency in ISDS is a prominent feature of current investment policy discussions at the EU level.[96] Transparency in ISDS is essentially related to publication of and access to arbitral awards and open hearings, and third–party participation.[97] These topics will be briefly examined below.

While according to the ICSID Convention, publication of awards is subject to the parties' consent[98] and comparable provisions are found in most arbitration rules,[99] UNCITRAL has pioneered in the transparency debate by adopting, on 11 July 2013, the UNCITRAL Rules on Transparency in Treaty–based Investor–State Arbitration (hereinafter UNCITRAL Transparency Rules), which provide for transparency in investment dispute resolution conducted

[90] Annex 10–A US-DR-CAFTA.

[91] See Annex 10–F US–Colombia FTA.

[92] See also Gallagher (2011), p. 27; Gallagher (2012).

[93] Strong (2014).

[94] Titi (2014c).

[95] European Commission, Communication, COM(2010) 343 final, 7 July 2010, p. 10.

[96] E.g., see European Commission (Trade), Fact sheet: Investment Protection and Investor-to-State Dispute Settlement in EU agreements, November 2013, available at: http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf; European Commission, Public consultation on modalities for investment protection and ISDS in TTIP 2014, http://ec.europa.eu/yourvoice/ipm/forms/dispatch?form=ISDS.

[97] Titi (2014c).

[98] Article 48(5) ICSID Convention.

[99] E.g., see Article 53(3) Schedule C, Arbitration (Additional Facility) Rules; Article 6 of Appendix I: Statutes of the International Court of Arbitration annexed to the ICC Arbitration Rules; Article 46 SCC Arbitration Rules (2010); Article 30(1) (LCIA) Arbitration Rules (1998).

under the UNCITRAL Rules.[100] The Transparency Rules are an unprecedented set of norms providing, *inter alia*, for the publication of documents relating to the proceedings, such as the notice of arbitration and the awards,[101] and, subject to the exceptions in Article 7 of the Transparency Rules, for hearings open to the public.[102] The Transparency Rules are applicable to investor–State dispute settlement pursuant to an agreement concluded on or after 1 April 2014, unless the parties to the treaty agree otherwise.[103] In some cases, the Transparency Rules may equally apply to investment disputes born on the basis of earlier investment agreements.[104] In all probability, the UNCITRAL Transparency Rules will apply to future EU investment agreements.[105] In December 2014, UNCITRAL adopted the Convention on Transparency in Treaty–based Investor–State Arbitration (Mauritius Convention on Transparency) to extend application of the Transparency Rules to earlier IIAs. Signed by ten States as of the end of March 2015, the Convention has not yet come into force.

Where participation of third parties is concerned, ICSID Rule 37(2), introduced in 2006, provides that, after consultations with the parties, the tribunal may allow non-disputing parties to file submissions in relation to matters that fall within the purview of the dispute. Comparable provisions exist in the ICSID Additional Facility Rules[106] and the UNCITRAL Transparency Rules.[107] One step ahead in the transparency debate, the latter further establish that the tribunal shall allow or, after consultation with the parties, *invite* 'submissions on issues of treaty interpretation from a non-disputing Party to the treaty'.[108]

Beyond these institutional transparency rules, provisions on transparency may be found in a number of investment agreements, especially those concluded by North American countries. The NAFTA itself provides in Annex 1137.4 that, where Canada or the United States is a disputing party, either the State or an investor party to the arbitration may make the award public. The 2001 Notes of Interpretation of Certain Chapter 11 Provisions of the NAFTA Free Trade Commission (FTC) underlined the

[100] UNCITRAL, Rules on Transparency in Treaty–Based Investor–State Arbitration, available at: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

[101] Article 3 UNCITRAL Transparency Rules. See also Titi (2014c).

[102] Article 6 UNCITRAL Transparency Rules.

[103] Article 1(1) UNCITRAL Transparency Rules.

[104] Article 1(2) UNCITRAL Transparency Rules.

[105] See for example Article x–33 of the Draft CETA text of March 2014, annexed to the European Commission's Public consultation on modalities for investment protection and ISDS in TTIP (Consultation document) 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

[106] Article 41(3) Schedule C, Arbitration (Additional Facility) Rules.

[107] Article 4 UNCITRAL Transparency Rules.

[108] Article 5 UNCITRAL Transparency Rules.

absence of a general duty of confidentiality.[109] Three years later, the FTC welcomed the fact that Mexico has 'joined Canada and the United States in supporting open hearings for investor–state disputes'.[110] All NAFTA awards have been made public.[111] It is further worth noting that, although the NAFTA does not contain express provisions on *amicus curiae* submissions, the *Methanex* Tribunal allowed third–party participation.[112] Its approach was formally endorsed in 2003, with the FTC's Statement on third–party participation.[113] Provisions on transparency figure more prominently in new North American treaties,[114] and they also appear in the draft CETA text of March 2014.[115]

Conclusion

Reform of investor–State dispute settlement is part of an attempt to both improve the system and to increase its legitimacy. Reform is currently afoot with important amendments, such as the provision for more transparency, having taken place in the last couple of years. The present contribution has examined some of these recent institutional developments concerning investment arbitration in general and, especially, the ICSID system. Particular attention has been paid to issues that have arisen in the ongoing EU negotiations, with a focus on one of the seminal 'internal' decisions that need to be taken in that context, namely the division of financial responsibility between the EU and its Member States. Lastly, two questions were considered, the arbitration of mass claims and claims relating to sovereign bonds in light of recent sovereign debt restructurings and transparency in institutional and conventional provisions. Of course, several other investor–State dispute settlement issues that may have unfurled in parallel have remained unexplored in the present contribution, and this is an interesting area to watch, given the importance of the

[109] NAFTA Free Trade Commission Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at: http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

[110] See NAFTA FTC, Joint Statement on 'Decade of Achievement', 16 July 2004, available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/JS-SanAntonio.aspx?lang=eng.

[111] Ortino (2013), p. 124.

[112] E.g., UNCITRAL, *Methanex Corporation v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'amici curiae', paras. 47 et seq.

[113] Statement of the Free Trade Commission on non–disputing party participation, 7 October 2003, available at: www.naftaclaims.com/Papers/Nondisputing-en.pdf.

[114] E.g., see Articles 28–29 US Model BIT (2012), Articles 31–32 Canadian Model BIT (2012), Article 10.20 US-Chile FTA, Article 10.21 US-DR-CAFTA.

[115] Articles x–33 and x–35 of the Draft CETA text of March 2014, annexed to the European Commission's Public consultation on modalities for investment protection and ISDS in TTIP (Consultation document) 2014, available at: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf.

essential investment protection mechanism that is access to international arbitration.

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Overview of WTO Jurisprudence in 2013

Jan Bohanes and Karolyn Salcedo

WTO Jurisprudence in 2013 at a Quick Glance

In 2013, only four Panel reports were circulated. Of these four Panel reports, one was appealed, namely, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (DS400, DS401) ("*EC – Seal Products*"). The appeal in this dispute was not finalised in 2013 and is therefore not covered in this review. In addition, the Appellate Body in 2013 decided an appeal from a Panel report that had been circulated in 2012, namely, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector/Canada – Measures Relating to the Feed-in Tariff Program* (DS412, DS426) ("*Canada – Feed-in Tariff Program*") disputes. For this dispute, we provide also a summary of the Panel report because it is difficult to fully appreciate the Appellate Body report without a sound understanding of the Panel's findings.

Of the five circulated Panel or Appellate Body reports, three were trade remedies disputes, namely *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union* (DS425) ("*China – X-Ray Equipment*"), *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* (DS427) (*China – Broiler Products*) as well as *United States – Final Anti-Dumping Measures on Stainless Steel From Mexico –*

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J. Bohanes (✉)
Advisory Centre on WTO Law (ACWL), Avenue Giuseppe Motta 31-33, C.P.132, Geneve 20, 1211 Geneva, Switzerland
e-mail: Jan.Bohanes@ACWL.CH

K. Salcedo
World Customs Organization, Rue du Marché, 30, 1210 Brussels, Belgium
e-mail: Karolyn.Salcedo@wcoomd.org

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Recourse to Article 21.5 of the DSU by Mexico (DS344) ("*US – Stainless Steel (Mexico) (21.5)*"). This last case, however, was settled and no substantive Panel report was published. *Canada – Feed-in Tariff Program* related to the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"[1]), the General Agreement on Tariff and Trade 1994 (the "GATT 1994"[2]) and the *Trade-Related Investment Measures Agreement* ("*TRIMS Agreement*"[3]), whereas *EC – Seal Products* involved the *Agreement on Technical Barriers to Trade* ("*TBT Agreement*"[4]) and the GATT 1994, including a defence based on public morals.

Although the number of Panel and Appellate Body reports in 2013 was relatively low, some of these reports have attracted significant attention and have given rise to intense discussions in the international trade community. For instance, the *Canada – Feed-in Tariff Program* dispute was the first dispute to address a subsidy programme for renewable energy, even if the measure at issue was not that "green subsidy" itself, but rather a discriminatory local content requirement. Nevertheless, concerns about environmental subsidies arguably permeated the Appellate Body's conspicuous benefit ruling under Article 1 of the *SCM Agreement*. As another example, the Panel report in *EC – Seal Products* addressed a number of systemically important issues under both the GATT as well as the *TBT Agreement*, including a hitherto rare defence on the grounds of public morals.

China – X-Ray Equipment (DS425)

Facts of the Case

The dispute concerned an anti-dumping measure imposed by the People's Republic of China ("China") on X-ray security inspection equipment from the European Union. The X-ray security inspection equipment at issue covered a broad range of products (or product types), including both so-called "low-energy" and "high-energy" scanners. "Low-energy scanners" are, for instance, walk-through detectors used in civil airports. In contrast, "high-energy" scanners include industrial scanners able to scan cars, cargo containers, and container trucks at seaports, border crossings and airports.

The petitioner in the Chinese domestic investigation was Nuctech Company Limited ("Nuctech"), a company created under the auspices of Qinghua University in Beijing in 1997. Nuctech claims to be one of the world's top providers of airport

[1] Agreement on Subsidies and Countervailing Measures, 1869 U.N.T.S. 14.

[2] General Agreement on Tariffs and Trade (1994), 1867 U.N.T.S. 187.

[3] Agreement on Trade-Related Investment Measures, 1868 U.N.T.S. 186.

[4] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120.

security equipment, and reportedly is the dominant supplier of security equipment in China's airports.[5]

Only one company participated in the investigation, namely, Smiths Heimann GmbH ("Smiths"). Smiths exported only low-energy scanners to China. The investigation was initiated in August 2009 and was concluded in January 2011. Based on the final determination issued by the Ministry of Foreign Commerce ("MOFCOM"), China imposed a 33.5 % duty on Smiths and a residual rate of 71.8 % on imports from other EU sources.

Salient Legal Findings

The Panel found that China had violated WTO law on a number of counts. Most of the findings are not necessarily systematically significant or surprising. Nevertheless, the report touched on a number of issues that hold significance for further development of the trade remedy case law.

Determination of Price Effects

First, the EU challenged MOFCOM's price effects determination. Pursuant to Article 3.2 of the *Anti-Dumping Agreement,*[6] an investigating authority is required to "consider" whether dumped imports had resulted in certain price effects—namely, price undercutting, price suppression or price depression. The Panel found that, when analysing such price effects, MOFCOM had failed to distinguish between low-energy and high-energy scanners and had failed to ensure price comparability between the product groups on the domestic and the imported side. Whereas imported products included only low-energy scanners, the group of domestic products included both low-energy and high-energy scanners. In other words, MOFCOM was confronted with two differently-composed product groups.

The key problem was that, rather than comparing imported low-energy with domestic low-energy scanners, MOFCOM calculated a weighted-average unit price for the *entire* domestic product bundle. MOFCOM then compared that average unit price with the average unit price of the imported products. Not surprisingly, the Panel found this to be an improper price comparison because MOFCOM had failed to consider the fact that each product group had a very different composition. This Panel finding fits into an evolving line of case law that requires investigating authorities to ensure price comparability under Articles 3.2 of the *Anti-Dumping*

[5] See http://en.wikipedia.org/wiki/Nuctech; and http://www.worldsecurity-index.com/details.php?id=1034.

[6] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201.

Agreement, despite the fact that Article 3.2 does not *explicitly* require investigating authorities to do so.[7] At the same time, investigating authorities retain discretion on how precisely to ensure such price comparability—for instance, investigating authorities can choose to make multiple comparisons or, instead, perform price adjustments.

The MOFCOM analysis underscores that the problem of price comparability will arise in particular in situations in which several distinct products are "bundled up" into one single overarching "product under investigation". Since the early 2000s, several Panel reports have rejected claims challenging an allegedly excessively broad product definition.[8] These Panels found that investigating authorities have virtually unlimited discretion in how to group products (or product types) into one single "product under investigation". From a complainant's perspective, the risk of such unlimited discretion is that the investigating authority may attempt to manipulate the scope of the product—and thereby the scope of the domestic industry producing the like product—to increase the plausibility of an affirmative injury finding. Arguably, in *EC – Aircraft*, although it did not speak directly to this issue, the Appellate Body indicated obliquely its disagreement with the broad discretion reflected in those Panel reports.[9] However, even under the permissible Panel case law, investigating authorities pay a price for a broad product definition—that is, they have to pay particular attention to price comparability.

In reaching its finding on price comparability, the Panel also confirmed previous case law that a failure by an investigated party to raise a particular issue during the domestic investigation does not preclude a government from raising the same issue during WTO proceedings.[10] In the domestic investigation, Smiths (the investigated exporter) had failed to raise concerns regarding the price comparability issue described above. However, this failure of the company was held not to preclude the EU from raising this point before a WTO Panel.[11]

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[7] See also WTO, report of the Panel, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/R, para. 7.530.

[8] WTO, report of the Panel, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, paras. 7.46–7.68. WTO, report of the Panel, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia,* WT/DS312/R, para. 7.219; WTO, report of the Panel, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, para. 7.157.

[9] WTO, report of the Appellate Body, *European Communities – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, para. 1133.

[10] WTO, report of the Appellate Body, *United States – Safeguard Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS117/AB/R, para. 113. WTO, report of the Appellate Body, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, para. 131.

[11] WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.40.

Implicit Investigation of Injury Factors Under Article 3.4 Anti-dumping Agreement

Second, the Panel made a finding that China had failed to examine one of the 15 injury factors under Article 3.4 of the *Anti-Dumping Agreement*. According to well-established case law, Article 3.4 requires an investigating authority to examine individually each one of the 15 injury factors listed in that provision[12] and requires a process of evaluation and assessment.[13] In this case, the EU alleged that MOFCOM had failed to examine the factor "magnitude of the margin of dumping".

China sought to defend itself by invoking the Appellate Body's 2003 report in *EC – Tube or Pipe Fittings*, which had agreed that a particular injury factor had been analysed "implicitly", without an explicit reference, because in that dispute there was sufficient evidence on the record that the factor had nevertheless been evaluated.[14] China argued that MOFCOM's report contained a reference to the dumping margins, not in the injury section, but rather in the section listing the dumping margins for the various companies. However, the Panel did not accept this defence. Instead, it reasoned that, a mere listing of the dumping margins did not constitute the requisite analysis and assessment. Moreover, if the listing of dumping margins relied on by China were sufficient for purposes of Article 3.4, then the mention of "magnitude of the margin of dumping" in Article 3.4 would be superfluous. This is because every investigating authority report leading to the imposition of anti-dumping measures would, necessarily, contain a mention of margins of dumping and their magnitude.[15]

This Panel finding is useful in further limiting the reach of the concept of "implicit" evaluation of injury factors, created by the Appellate Body in *EC – Tube or Pipe Fittings*. The Appellate Body's ruling on that point was arguably an unnecessary blunder that complicates the lives of complainants and introduces an entirely unnecessary ambiguity into the process. Findings such as the one by this Panel are a useful limitation of that Appellate Body finding.

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[12] WTO, report of the Appellate Body, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland*, WT/DS122/AB/R, para. 125.

[13] WTO, report of the Panel, *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India (21.5)*, WT/DS141/RW, para. 6.162.

[14] WTO, report of the Appellate Body, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, para. 161. The possibility of such an "implicit" evaluation seems to have been alluded also in the Panel report in *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India (21.5)*, WT/DS141/RW, para. 6.162.

[15] WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.184.

Concept of "Start-Up Operations" as a Non-attribution Factor

Third, the Panel provided interesting reflections on the concept of "start-up" operations. The Panel made these remarks as part of its non-attribution analysis. More specifically, as part of its challenge to MOFCOM's causation and non-attribution analysis, the EU argued that Nuctech was in a "start-up situation" on low-energy scanners, which fact would explain the negative profitability on this product line. As a result, the EU argued, negative profitability should not be attributed to the dumped imports, but rather to the "start-up" scenario.

The Panel examined Article 2.2.1.1 and Annex IV(4) of the *SCM Agreement* to gain better understanding of the concept of "start-up" operations. Ultimately, the Panel rejected the EU's claim, among others because there was record evidence that Nuctech had been producing low-energy scanners for three years before the period of investigation and, during the period of investigation, was already selling significant amounts of this type of scanners. The Panel admitted that there may be "room for debate" on the number of years during which a company may be considered to be in a "start-up" phase.[16] Nevertheless, the Panel finding may henceforth serve as an (outer) guiding post on the "start-up" concept, given the lack of other guidance in the treaty text and case law. This may be relevant not only in the context of an investigating authority's non-attribution analysis, such as in this particular dispute. For instance, under Article 2.2.1.1, an investigating authority is required to consider "start-up operations" when determining appropriate cost allocation methodologies.

Examination of "Impact" of Dumped Imports Under Article 3.4 Anti-dumping Agreement

Fourth, the Panel made a number of findings on MOFCOM's non-attribution analysis, finding that MOFCOM had not fulfilled the standards of Article 3.5 Anti-Dumping Agreement. In the process, the Panel had to grapple with the consequences of a previous finding by the Appellate Body in *China – GOES*. Specifically, in *China – GOES*, the Appellate Body found that Article 3.4 Anti-Dumping Agreement requires not only the traditional factor-by-factor as well as comprehensive overall analysis of injury, but also an "examination" of the "impact" of the subject (dumped) imports on the domestic industry. In the Appellate Body's view, Article 3.4 Anti-Dumping Agreement (as well as Article 15.4 of the *SCM Agreement*) do not merely require "an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of the impact of subject imports on the basis of such an examination."[17]

[16] WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.296.

[17] WTO, report of the Appellate Body, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/AB/R, paras. 149–150.

These Appellate Body findings arguably contradict the long-established analytical approach under which Article 3.4 requires an examination of the individual "injury factors" and an overall finding of whether injury exists, whereas Article 3.5 requires an examination of the causal link between that injury and dumped imports, including a non-attribution analysis of the impact of other causal factors. In other words, Article 3.4 asks whether the domestic industry is in a state that can be described as injurious, regardless of what may have caused that injurious state of affairs. In contrast, Article 3.5 enquires which factor(s) are the cause of this injurious state of affairs.

The problem with the Appellate Body's findings is that an examination of the "impact" of dumped imports on the domestic industry (under Article 3.4) is difficult to distinguish from an examination of the causal link between dumped imports and injury (under Article 3.5). Thus, despite the Appellate Body's reassurances to the contrary,[18] its findings necessarily suggest a degree of duplication between the traditional causation analysis under Article 3.5 and the newly required "impact" analysis under Article 3.4.

This duplication or overlap became apparent in the *China – X-Ray Equipment* Panel report. Before addressing the EU's claims concerning the non-attribution analysis, the Panel had to resolve the question whether this issue was more appropriately addressed under Article 3.4 or Article 3.5. After pondering the import of the Appellate Body's findings in *China – GOES*, the Panel drew a useful distinction between factors that are *indicia of the state* of the industry and those that may *cause injury* to the industry. The former, according to the Panel, are to be examined under Article 3.4, whereas the latter are to be examined under Article 3.5.[19] This (logical) approach arguably obviously does not square with the Appellate Body's findings in *China – GOES*; rather it serves to highlight the unnecessary confusion that the Appellate Body has injected into the relationship between Articles 3.4 and 3.5. The Panel ultimately decided to examine the EU's allegations under Article 3.5.

It remains to be seen whether other Panels will follow this approach, which would appear to effectively sideline the Appellate Body's ill-considered "impact" requirement. This would provide for a degree of predictability in the case law, until the Appellate Body gets another opportunity to explain more in detail how it views the relationship between Articles 3.4 and 3.5.

[18] WTO, report of the Appellate Body, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/AB/R, para. 150.

[19] WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.263.

Treatment of Confidential Information and Preparation of Non-confidential Summaries

Fifth, the Panel found that MOFCOM had violated Article 6.5.1 Anti-Dumping Agreement. Article 6.5.1 is of significant practical relevance, as it requires investigating authorities to ensure that confidentiality of information submitted by interested parties does not deny the due process rights of other parties. Article 6.5 requires investigating authorities to treat as confidential information that is either by its nature confidential, or that has been submitted on a confidential basis. Such information can only be disclosed upon agreement by the party which submitted that information. However, to counterbalance the confidentiality requirement under Article 6.5, Article 6.5.1 requires that the party submitting confidential information provide a non-confidential summary of that information. This summary must be "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". Nevertheless, Article 6.5.1 also envisages that, "in exceptional circumstances", confidential information may not be susceptible of summary. In these exceptional circumstances, "a statement of the reasons why summarisation is not possible must be provided."

The Panel's findings in this dispute provide a useful contribution to the case law under this provision. Three points can be highlighted. First, the Panel confirmed previous case law that confidential information should, as a general rule, be susceptible of summarisation.[20] Second, the Panel also rejected a "curing"-type defence by China. Specifically, the mere fact that interested parties did not complain during the investigation about the inadequate nature of the summaries provided by the domestic industry—and the fact that the parties were able to prepare comments based on the (allegedly deficient) summaries—was deemed not to be legally relevant in a WTO proceeding. The Panel found that the consistency of a non-confidential summary with Article 6.5.1 should be assessed "by reference to the content of that summary, rather than any propensity for respondents to prepare comments on the basis of their best estimate of the substance of the underlying confidential information".[21]

Third, the Panel found that a domestic governmental agency acting as an interested party could not be exempted whole-sale from the requirement to provide non-confidential summaries. The Panel found that "[t]he mere fact that an authority is required to perform a particular function under its domestic law" [e.g. air transport safety] "does not demonstrate, for the purpose of WTO dispute settlement

[20] WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.334, quoting report of the Panel, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, para. 7.90.

[21] WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.363.

proceedings, that the authority did actually perform that function."[22] As a result, the confidential nature of information must be demonstrated *with regard to that specific information*, rather than with regard to the general task of the *entity submitting that information*.

Findings on "Disclosure of Essential Facts" Under Article 6.9 Anti-dumping Agreement

Finally, *sixth*, the Panel made relevant findings concerning the sufficiency of "disclosure" under Article 6.9. The Panel's findings on Article 6.9 add to the evolving standard concerning the disclosure of "essential facts". This case law has over the years provided incremental insights into what constitutes "essential information".

In *China – X-Ray Equipment*, the Panel found insufficiencies in MOFCOM's disclosure because of the failure to publish certain data. The data at issue underlay MOFCOM's calculations of the average unit values of the subject products as well as the calculations of the dumping margins. The Panel found that this information was "essential" within the meaning of Article 6.9, because it "constituted the body of facts on which MOFCOM's determination of price effects was based." This "body of facts" was "required" to understand the basis for MOFCOM's price effects analysis as well as MOFCOM's dumping margin calculations, and therefore had to be disclosed pursuant to Article 6.9.[23] However, the Panel found that the "essential facts" did not include the *actual mathematical calculations* underpinning the dumping margins, because these calculations were more properly characterised as "consideration" of the facts, rather than the facts themselves.[24] As we shall see below, the Panel in *China – Broiler Products* subsequently addressed this very same issue and arrived at a (arguably) different result.

China – Broiler Products

Facts of the Case

The other trade remedy dispute in 2013 involving China was *China – Broiler Products*. "Broilers" are chickens raised specifically for meat production.

[22] WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.370.

[23] WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.404.

[24] WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.420.

China had imposed both anti-dumping and countervailing duties on broiler products from the United States. The two underlying investigations were both initiated on 27 September 2009, upon petition by the China Animal Agriculture Association ("CAAA"). Preliminary determinations were issued in February 2010 (Anti-Dumping) and April 2010 (Countervailing Duties, CVDs), final determinations in August 2010 (antidumping duties) and September 2010 (CVDs). MOFCOM imposed individual anti-dumping duties ranging from 50.3 to 53.4 %, and individual CVDs ranging from 4 to 12.5 %. Non-investigated firms that had come forward and registered themselves at initiation received an 51.8 and 7.4 % rate, respectively. However, "all other" companies received very high rates, namely, an AD rate of 105.4 and a CVD rate of 30.3 %.

Salient Legal Findings

The Panel report covers a broad range of issues under the *Anti-dumping Agreement* and the *SCM Agreement*. The Panel found a number of violations by MOFCOM, the Chinese investigating authority. The following five sections highlight the most salient legal findings from a systemic perspective.

Application of Facts Available to Unknown Exporters: Article 6.8 and Annex II of the Anti-dumping Agreement

The *first* key legal issue in this dispute was the application of "facts available" to unknown exporters. This is an issue that many investigating authorities regard as a key policy tool to encourage cooperation by foreign companies. The Panel ruling explicitly contradicts the Panel ruling in *China – GOES* on this very issue, creating a tension within the case law that can ultimately be resolved only by the Appellate Body.

The finding in this dispute was as follows: MOFCOM applied a very high anti-dumping duty (105.4 %) and CVD (30.3 %) to companies that did not make themselves known to MOFCOM at the outset of the investigation. These companies are generally referred to as "unknown" exporters.

By way of background, in a typical anti-dumping investigation, an investigating authority may calculate and apply three kinds of duty: (1) individual anti-dumping duties for each of the investigated (sampled) exporters; (2) an average rate—calculated based on the individual rates under (1)—that will be applied to all companies that the investigated authority knew of but decided not to investigate individually[25]; and finally (3) a residual rate applied to all other (unknown)

[25] This rate is sometimes referred to as the "all others" rate; however, sometimes that term is used for the rate applied to unknown exporters.

companies. In an investigation involving only a few foreign exports, each exporter can be investigated and can receive an individual dumping margin, and there will be no duty type (2). In contrast, in investigations involving a large number of companies, the investigating authority may decide to create a sample of exporters, attribute an individual margin to each exporter in the sample (rate (1)), but then apply an average rate to the known companies left outside the sample (rate (2)) and a residual rate to all unknown remaining companies (rate (3)). Under the practice of many investigating authorities, (3) is higher than (2). For instance, rate (3) will be equal to the highest individual rate calculated under (1). This differential treatment of known non-sampled companies and unknown companies is intended to create an incentive for exporters to come forward at the beginning of the investigation, rather than to "hide" from the investigation.[26]

The *Anti-dumping Agreement* explicitly regulates rates (1)[27] and (2).[28] However, concerning rate (3)—the dumping duty to be applied to unknown exporters—the legal situation is unclear. According to a widely held view, rate (3) is not regulated by the *Anti-dumping Agreement* and thus investigating authorities have discretion.[29] This also appears to have been the view espoused by the Panel in *EC – Salmon*.[30] According to a contrary view—not reflected in existing case-law—the same provision that governs rate (2)—that is, Article 9.4—applies also to rate (3).[31]

There are two more pieces to the puzzle. The first piece is the Appellate Body's ruling in *Mexico – Rice*, which establishes that the attribution of a dumping margin to unknown companies constitutes application of facts available.[32] Second, the Appellate Body has arguably suggested that the application of facts available is not intended to be *per se* punitive.[33]

In keeping with the Appellate Body's decision in *Mexico – Anti-Dumping Measures on Rice*, the Panel in *China – Broiler Products* deemed the application of the 105.4 % anti-dumping duty to the unknown companies an instance of "facts available". The Panel then proceeded to examine whether MOFCOM had satisfied the substantive and procedural requirements for applying facts available. Article 6.8

[26] A company may be "hiding" because it suspects it would receive a high individual dumping margin if investigated individually. It may therefore "hide" to benefit from a rate calculated based on the data excluding its own low export price.

[27] Article 6.10 of the Anti-Dumping Agreement.

[28] Article 9.4 of the Anti-Dumping Agreement.

[29] This view relies on the fact that Article 6.10 refers to *known* exporters, and Article 9.4 refers to Article 6.10. Moreover, this postulated existence of a lacuna Anti-Dumping Agreement.

[30] WTO, report of the Panel, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, para. 7.431.

[31] This view finds support in the fact that Article 9.4 refers only to the second sentence of Article 6.10, which (unlike the first sentence) does not refer to unknown exporters.

[32] Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, paras. 258–259.

[33] WTO, report of the Appellate Body, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, footnote 60.

provides that facts available may be applied when an interested party "(i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes an investigation". These conditions are further fleshed out in Annex 2 to the *Anti-dumping Agreement*. The thrust of the provisions of Annex 2 is to impose substantive and procedural disciplines on the investigating authority's recourse to facts available. For instance, pursuant to Annex 2(1), an investigating authority can apply facts available only if it "specif[ies] in detail the information required from any interested party." Moreover, the authority must also "ensure that the party is aware that, if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available".[34] In other words, facts available can be applied only if an interested party was aware of the information required of it, and if it subsequently does not supply that information.

A typical situation in which facts available may be applied is when the investigating authority sends a questionnaire to an investigated company and the company subsequently fails to respond adequately to the questionnaire. In these circumstances, provided other requirements are satisfied, the investigating authority may ultimately apply facts available.

The problem with *unknown* exporters, of course, is that these exporters logically cannot be directly apprised of the information required of them—by definition, they are unknown. The question therefore is how the requirement in Article 2(1) can be satisfied with respect to them. The Panel in *China – GOES*, which was decided in 2012, found that a certain set of notifications by MOFCOM were insufficient in this regard. MOFCOM's action in that case consisted of (1) placing the notice of initiation on the internet (2) placing the notice in a public reading room and (3) requesting the US Embassy in Beijing to notify US exporters. In any event, the Panel in that dispute relied on the fact that the notice of initiation did not specify the information to be provided by exporters. The Panel also found the case at hand to be very similar to *Mexico – Anti-Dumping Measures on Rice* and rejected China's attempts to differentiate these two disputes. Therefore, the application of facts available to those unknown exporters was in violation of WTO law.[35] This finding was not appealed.

The Panel in *China – Broiler Products* reached a radically different conclusion from essentially identical facts. Again, China had placed the public notice of initiation on the internet as well as in a MOFCOM reading room and had requested assistance of the US Embassy in Beijing. The Panel reasoned that it was "generally recognised and accepted" that the manner to inform and communicate with interested parties in administrative proceedings was by way of public notices.[36]

[34] These "facts available" can include information provided by the domestic industry, which is highly unlikely to be favourable to the exporter.

[35] WTO, report of the Panel, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, WT/DS414/R, paras. 7.383–7.393.

[36] WTO, report of the Panel, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, para. 7.303.

Although MOFCOM's notice did not request information underlying the calculation of a dumping margin (that is, information about normal value and export price), the Panel nevertheless reasoned that the notice, *had it been properly answered by the unknown parties*, would have subsequently led the authority to request that information.[37] The Panel also distinguished this case from the Appellate Body's decision in *Mexico – Anti-Dumping Measures on Rice*, based on differences between the content of the public notice. The Panel also reasoned that not accepting China's approach as sufficient would render it impossible to apply a distinct anti-dumping rate to unknown exporters, thereby creating an incentive for non-cooperation.

Ultimately, the Panel still found a violation in how MOFCOM had treated unknown exporters. However, this violation was not related to MOFCOM's notifications. The Panel found that MOFCOM had not provided an explanation of how and based on what information it had calculated the very high 105.4 % "all others". This was a violation of Annex II(7), because it failed to reflect the requisite "special circumspection" demanded of investigating authorities when applying facts available.[38] Thus, in the end, China lost on this particular claim. However, the Panel's legal interpretation and its finding on principle opens the door for investigating authorities to apply "residual" rates to unknown exporters.

Because of this ruling, WTO case law on this important issue points in two radically different directions. A decision by the Appellate Body appears to be the only solution. Until the Appellate Body has the opportunity to do so, investigating authorities may seek to rely on the Panel ruling in *China – Broiler products*, and emulate precisely what MOFCOM did in the *Broiler* investigation. However, even these authorities will have to worry that a WTO Panel may instead decide to follow the *China – GOES* approach.

Investigating authorities may also "play it safe" and apply rate (2)—calculated pursuant to Article 9.4—to unknown exporters. This approach is highly unlikely to be challenged or found WTO-inconsistent, given that nobody would seriously contest the authority's right to apply *some* form of duty to unknown exporters. The Article 9.4 rate is an objective and non-controversial tool to impose duties on non-investigated companies. At the same time, investigating authorities would lose their much-vaunted policy tool to encourage cooperation by exporters. However, while the need to encourage cooperation is accepted as legitimate by a number of investigating authorities and practitioners, it is not explicitly enshrined in the *Anti-dumping Agreement* and may not be a valid objective that should inform the interpretation of the agreement.

[37] WTO, report of the Panel, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, para. 7.304.

[38] The Panel reached a similar finding concerning the "all others" countervailing duty. It found that there was no rational connection between the highest individual rate and the "all others" rate applied by MOFCOM, because the former was 12.5 %, while the latter was 30.3 %. WTO, report of the Panel, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, para. 7.359.

Definition of the Domestic Industry

The *second* noteworthy finding from the *China – Broilers Products* case relates to the definition of the domestic industry. Objective parameters for defining the domestic industry are important, because both the *Anti-dumping Agreement* and *SCM Agreement* permit the investigating authority to define the "domestic industry" as less than the totality of the domestic producers. Instead, the "domestic industry" can be defined as a "major proportion" of the domestic producers producing the like product.[39]

Adequate interpretation requires ensuring the appropriate margin of discretion for investigating authorities, all the while ensuring that the authorities exercise this discretion in an even-handed manner. Once the investigating authority starts selecting producers to be included and excluded from the scope of the domestic industry, necessarily a risk of bias arises and the choices in the authority's definition must be subject to review by a WTO Panel. Disputes in which the domestic industry had been defined in an inconsistent manner include *EC – Salmon (Norway)*, where the Commission failed to include in the domestic industry the producers of a sub-section of the product under consideration.[40] A more recent instance is *EC – Fasteners*, where the domestic industry included only domestic companies that had expressed a willingness to be included in a sample. This willingness—while undoubtedly important from the practical perspective of collecting data—was held to be a biased criterion for defining the industry. This is because this form of self-selection made an affirmative injury finding more likely, thereby creating a "material risk of distortion".[41]

In the dispute at hand, the Panel found that the domestic industry had been properly defined and rejected an analogy to *EC – Fasteners*. As an important principle, the Panel confirmed previous findings that there is no hierarchy between the two options granted by both the *Anti-dumping Agreement* and the *SCM Agreement*, that is, the option to (1) define the domestic industry as all producers or the option to (2) using "only" a "major proportion". As a result, the investigating authority is not required, at the outset, to seek out all domestic producers and use the "major proportion" option only as a fallback of sorts, in case information on all producers cannot be obtained. Rather, the authority can from the outset choose the "major proportion" option. However, the authority must have sufficient information concerning the total volume of production of the domestic industry.[42]

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[39] Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement.

[40] WTO, report of the Panel, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, para. 7.116.

[41] WTO, report of the Appellate Body, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, para. 427.

[42] WTO, report of the Panel, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, para. 7.423.

Moreover, on the facts of this particular case, the Panel rejected the United States' allegations that MOFCOM ignored certain information about certain producers and thereby made it more likely that companies supporting the petition would be included in the scope of the domestic industry. The Panel accepted that, although MOFCOM indeed failed to contact a company after receiving information about its existence, this did not lead to a WTO inconsistency. The Panel reasoned that, at that point in time, information from producers accounting for approximately 50 % of the domestic production had already been received.[43]

This finding arguably demonstrates that, absent very cogent evidence of obvious bias in the industry definition process, Panels will be reluctant to find that the selection of producers for the "major proportion" is inconsistent with WTO law.

Sufficiency of Disclosure

The *third* systemically interesting finding relates to the sufficiency of the investigating authority's disclosure. Similarly to the *China – X-Ray Equipment* case, the *China – Broiler Products* case included a claim on the sufficiency of the disclosure of the dumping margin calculations.

The Panel found that MOFCOM had disclosed insufficient information to satisfy that requirement. The Panel's reasoning started with the premise that the "essential facts" to be disclosed under Article 6.9 Anti-Dumping Agreement include the data that are the basis for the dumping determination. Therefore, a declaration of the weighted-average dumping margin for a particular model does not satisfy Article 6.9, unless it is "accompanied by the data relied on to reach that conclusion". The Panel referred to the finding of the Panel in *China – X-Ray Equipment*, described above, which had held that the actual mathematical determination of the dumping margins was not part of the "facts … under consideration", but rather only part of the "consideration" of those facts.[44] The *Broiler Products* Panel agreed with the *China – X-Ray Equipment* Panel that presenting the actual calculations in the form of spreadsheets, while useful and efficient to disclose the essential facts, was not required under Article 6.9. However, the Panel also reasoned that, if the *X-Ray Equipment* Panel ruling were to be read as suggesting that the "formula" used to make those calculations need not be disclosed, then it would "respectfully disagree".[45] As a way of disclosing the "formula", without disclosing e.g. the spreadsheet calculations, the Panel mentioned a narrative explanation and references to

[43] WTO, report of the Panel, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, para. 7.435.

[44] WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, para. 7.420.

[45] WTO, report of the Panel, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, para. 7.92.

questionnaire responses, "as long as the respondent would be able to defend its interests based on the information disclosed".[46]

The Panel then found that MOFCOM had not satisfied this legal standard, because it had failed to provide information about which sales prices had been used to calculate the aggregate normal values and export prices. The Panel reasoned that, without the information concerning the sales prices used to make all these calculations, the respondents would be unable to ascertain the accuracy of MOFCOM's calculations and properly defend their interests.

It is not clear whether the Panels in *China – Broiler Products* and *China – X-Ray Equipment* set out two distinct standards for the Article 6.9 disclosure. In any event, the thrust of both rulings is to create a fairly comprehensive and far-reaching disclosure requirement. From a policy perspective, there would seem to be little basis to argue against providing as much information as possible to investigated companies concerning the calculations of the dumping margins.

Cost Allocation Methodologies

Perhaps the most colourful finding in this dispute—involving a rare cross-cultural aspect of consumption patterns—pertains to chicken feet. A delicacy in China, chicken feet are considered offal in the United States and presumably in most other countries around the world. The key relevant issue in the anti-dumping investigation as well as in the WTO proceedings was the question of allocation of costs. Which production costs should be allocated to the chicken feet in the companies' financial records? Broadly speaking, the investigated US companies in their financial statements followed a value-based approach. This approach was based on the value of the various parts of the chicken in the US market; because that value was very low, the production cost of chicken feet were correspondingly allocated a very small percentage of the total production cost. In contrast, in its investigation, MOFCOM favoured a weight-based approach. Under that approach, if chicken feet represented X per cent of the total weight of the broiler product, a corresponding X percentage of the production costs should be allocated to chicken feet.

Under the companies' approach, no dumping margin existed, because the relatively high prices that chicken feet commanded in the Chinese market (export price) exceeded the relatively low production costs assigned to these feet in the companies' books (normal value). To the contrary, MOFCOM's weight-based approach would generate a dumping margin, because it resulted in higher production costs that, in this particular instances, exceeded the value (price) of the chicken feet on the Chinese market.

[46] WTO, report of the Panel, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, fn. 175.

The US companies' value-based approach was one that these companies traditionally used and that was consistent with United States general accepted accounting principles (GAAP). Pursuant to Article 2.2.1.1 of the *Anti-dumping Agreement*, this should mean, in principle, that MOFCOM had to accept the allocation methodology, unless it determined that the allocated costs do not "reasonably reflect" the costs associated with the production of the product at issue. In principle, the investigating authority would then have to provide a thorough, reasoned and adequate explanation for why it rejected the costs as allocated in the companies' books.

The resolution of this case hinged on the applicable standard of review in WTO trade remedy disputes. Pursuant to well-established case law, compliance with the majority of the substantive obligations in the *Anti-dumping Agreement* depends on the existence of a reasoned and adequate explanation in the investigating authority's published report.[47] In the instant case, MOFCOM was found not to have properly explained why it rejected the companies' value-based allocation methods, and why it instead relied on its own weight-based allocation method. The Panel rightly rejected China's explanation during the panel proceedings as being too late and outside the Panel's terms of reference—the Panel was entitled to review only the explanations contained in MOFCOM's published determination. However, the Panel also signalled that it considered (or would have considered) pertinent the fact that the US investigated companies had based their value-based allocation methods exclusively on values derived from the US market. The Panel signalled sympathy for China's argument that, although the companies sold their products also in markets other than the US, including in markets in which the product values were different (e.g. China), these other markets were not taken into consideration for determining the proper value-based allocation.[48]

While this dispute is particularly idiosyncratic, in the light of the very different attitudes to the product "chicken feet" in different cultural contexts, the underlying issue of how to value products across different markets is interesting and may present itself in future cases.

Other Findings of Interest

In addition, the *Broiler products* Panel report contains findings of interest, including on the adequacy of disclosure under Articles 6.9 (AD) and the adequacy of the public notice under Article 12 (AD) and 22 (SCM), the sufficiency of

[47] For instance, WTO, report of the Panel, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R, paras. 7.4–7.7 and WTO, report of the Appellate Body, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, paras. 186–187.

[48] WTO, report of the Panel, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R, para. 7.171.

non-confidential summaries (Article 6.5.1 AD) and the grant of opportunity for parties to meet with parties with adverse interests under Article 6.2 (AD).

EC – Seal Products (DS400, 401)

The *EC – Seal Products* dispute was arguably the politically most sensitive dispute of 2013, attracting the attention of not only the traditional trade community, but also of animal welfare groups and even prominent Hollywood actors sympathetic to animal welfare concerns.[49] As of the timing of writing, the case was under appeal.

Facts of the Case

The measure at issue was an EU ban on the placing on the market of products derived from seals. The measure was ostensibly driven by ethical and animal welfare concerns surrounding the commercial hunt of seals and the "inhumane killing" methods occurring during at least parts of such commercial hunts. However, the EU regime also contains exceptions that seem to run, at least in part, counter to those concerns.

The regime consists of a main regulation and an implementing regulation. Jointly, these two measures impose a ban on seal products unless one of the following three situations occurs: (1) the seal products at issue "result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence" (the "IC condition"); (2) the seal products are obtained from seals hunted for marine resource management purposes, i.e. seal population control (the "MRM exception") and (3) the seal products are imported by travellers in limited circumstances (for personal use) (the "Travellers condition").

The implementing regulation specifies the precise conditions and provides for procedural requirements that must be met to place the seal products on the market. For instance, the seal product must be accompanied by an attesting document issued by a recognised body.

Overview of the Key Findings

The complainants presented claims under the *TBT Agreement* and the GATT 1994. The Panel first examined the claims under the *TBT Agreement*. It found that the

[49] *Amicus curiae* briefs were reportedly submitted by, *inter alia*, "Pamela Anderson on behalf of People for the Ethical Treatment of Animals (PETA)" and by Jude Law. WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, fn. 16.

EU's seals regime was a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*. It then found that the IC and MRM exceptions were inconsistent with Article 2.1, because the IC exemption was available *de facto* exclusively to Greenland and therefore was not designed and applied in an even-handed manner. The Panel found the MRM exception not justifiable given that, concerning the incidence of "inhumane killing" methods, there was no practical difference between standard commercial hunts and hunts for MRM purposes.

However, the Panel rejected the claim that the EU seals regime was more trade restrictive than necessary within the meaning of Article 2.2 of the *TBT Agreement*. The Panel found that the complainants' proposed alternative measure(s) were not "reasonably" available, in that they did not adequately ensure that products derived from inhumanely killed seals would not reach the EU market.

The Panel also concluded that certain provisions of the implementing regulation constitute a "conformity assessment procedure" ("CAP") within the meaning of Annex 1.3 of the *TBT Agreement*. It then went on to find that the CAP had created unnecessary obstacles to international trade and therefore violated Article 5.1.2 of the *TBT Agreement*. This was because the EU had failed to create a conformity assessment body by the time the seals regime entered into effect; therefore, there was no body to verify compliance with the statutory exceptions, the result being that trade could not practically occur.

Concerning the claims under the GATT 1994, the Panel found that the IC and MRM exceptions violated Article I:1 and III:4. Although both exceptions were provisionally justified under Article XX(a), they were found to be inconsistent with the chapeau of Article XX and therefore could ultimately not be justified. The reasons underpinning that finding were the same as those underlying the finding on the IC and MRM exceptions under Article 2.1.

The Panel report was appealed by Canada and Norway and a decision is expected in late May 2014.

Salient Findings

The following is a discussion of certain salient aspects of the Panel's findings.

Definition of a Technical Regulation

Summary of the Finding

The Panel found that the EU seals regime was a "technical regulation" under Annex 1.1 of the *TBT Agreement*. This, of course, opened the door to Canada's claim under Article 2.1 and Norway's claim under Article 2.2. The Panel relied on the Appellate Body's ruling in *EC – Asbestos*, to find that the applicability of the *TBT Agreement* had to be assessed against the totality of the measure—that is, both the general ban

and the exceptions taken together or, put differently, "taking into account both the prohibitive and permissive aspects".[50] The Panel also found that a ban on all products containing seal elements was a measure that prescribed physical characteristics of an identifiable group of products, namely, *all* products. Moreover, in any event, numerous product categories to which the seal regime was applicable were explicitly listed in a "Technical Guidance Note" issued by the EU Commission. The Panel also found that the criteria of the exceptions identified the seal products that may be legally placed on the EU market, because they define the categories of seal that can be used as an input for such products.

With regard to the implementing regulation, the Panel found that certain provisions in those regulations constituted "conformity assessment procedures" under Annex 1.3 of the *TBT Agreement*. The basis for this finding was that particular provisions of the implementing regulation "established the procedure for determining whether the specific requirements under the EU Seal Regime are fulfilled."[51]

Observations

The applicability of the *TBT Agreement* to measures that might qualify essentially as product or input bans remains a controversial issue in academic discussions, and it will be interesting to learn about the Appellate Body's current approach to this important question. The leading precedent is of course *EC – Asbestos* and the Panel faithfully attempted to apply that case law. However, despite that precedent, veterans of GATT and WTO law are sometimes heard to allege that the *TBT Agreement* was not designed to deal with bans, but instead were designed to deal with product specifications that do not altogether "ban" particular aspects. According to this view, the requirement that a technical regulation apply to an "identifiable product", in Annex 1.1, bears testimony to that intention of the drafters. A counter-argument is that, in *EC – Asbestos*, the Appellate Body distinguished between "identifiable" and "given" products[52] and found that "all" products was an "identifiable" product category. This distinction appears conceptually entirely respectable, all the more as it would seem a mere formality whether a legislator would or would not include in a legal document a list of the typical products affected by the prohibition of a particular input or component. At the same time, admittedly, there is an obvious factual difference between, for instance, technical specifications of electronic products, on the one hand, and a ban on a particular input or raw material, on the other hand. The *TBT Agreement* could be interpreted to draw

[50] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.99.

[51] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.510.

[52] WTO, report of the Appellate Body, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, para. 70, fn. 40.

legal distinctions between such measures. The search for an adequate response is further complicated when, such as in *EC – Asbestos* and in *EC – Seal Products*, a ban is complemented by exceptions. An adjudicator must decide whether the exceptions should be assessed on their own or together with the general ban.

The Appellate Body's decision in *EC – Asbestos* gave the definition of a technical regulation a broad reading. At the same time, this ruling dates back over ten years and it is entirely possible that in this appeal the Appellate Body, with an entirely different set of Members, may review its approach. What is at stake with the applicability of the *TBT Agreement* are the more far-reaching disciplines that go beyond the GATT strictures.[53]

Moreover, an interesting aspect of this case is that the IC and MRM exceptions to the ban refer to issues unrelated to the physical characteristics of the product, namely, the identity of the hunter or the purpose of the hunt. There is ample academic debate on whether the *TBT Agreement* applies to what is sometimes referred to as product-unrelated process and production methods. The Panel does not seem to have addressed this aspect at all. If the "ban" on seal as raw material is assessed separately and held to fall under the *TBT Agreement*, perhaps the product-unrelated nature of the exceptions is not material. However, if the Appellate Body were to consider either that a ban *per se* does not fall under the *TBT Agreement*, or if the Appellate Body were to consider the ban and the exceptions as one single integrated measure—as the Panel claims to have done—then the applicability of the *TBT Agreement* to the exceptions (and perhaps to the entire measure, considered as a whole) may become a genuine question.

"Overriding" the Objective of a Measure with Another Objective Under Article 2.1

Summary of the Panel's Findings

An interesting aspect of the case is the Panel's approach to the multiple objectives of the EU's regime or plurality of interests protected by that legislation. To recall, the EU argued that its measure was concerned with seal welfare and protected public morals. This objective was achieved by prohibiting the marketing of seal products harvested through inhumane killings of seals, in the context of commercial-style hunts. However, the EU seals regime contains important exceptions to this general rule. Specifically, the EU tolerated on its market seals hunted by traditional Inuit communities and seals hunted in the context of maritime resource management (i.e. seal population control) to reach the EU market. The Panel found that both these exceptions could lead to the marketing of seal products obtained by inhumane killings. This was because neither of these two conditions

[53] In particular, the prohibition to apply unnecessarily trade-restrictive measures even in the absence of discrimination. The GATT, in essence, requires only non-discrimination.

guaranteed that only humanely killed seals would reach the EU market. In other words, the exceptions made possible the very same scenario that the measure was allegedly aiming to prohibit.

The EU's response to this problem was that, in particular circumstances, the initially stated objective—protection of public morals—could be partially *overridden* by another unconnected concern. In this particular dispute, these other concerns were the respect for traditional forms of hunting and subsistence activities of indigenous peoples as well as the need to preserve an ecologically-balanced environment.

The Panel accepted this approach in principle. It found that the concerns underlying the IC and the MRM exception were not the *objective* of the EU seals regime in the same way as the public moral and seal welfare objectives. Rather, these were concerns or "interests" that, while reflected in the measure, did not rise to the level of being the measure's official "objectives". Moreover, these "interests" were not connected to the objective. Indeed, the Panel went as far as explicitly finding that the IC and MRM distinctions did not bear a "rational relationship to the objective of addressing the moral concerns of the EU public on seal welfare".[54] However, the Panel determined that the distinction drawn by the EU between commercial and non-commercial (subsistence Inuit) hunts was "justifiable", largely because the interests of indigenous communities—including the Inuit—were recognised at the international level. The Panel then went on to examine whether the distinction was designed and applied in an even-handed manner. Based on the available evidence, the Panel found that the IC exemption was available *de facto* exclusively to Greenland and therefore had not been designed and applied in an even-handed manner.

With regard to the MRM exception, the Panel found that the distinction between standard and MRM hunts was not justified, because no material difference existed between these two types of hunt. It also found that the MRM exception was not applied in an even-handed manner, because only one EU Member State had registered certain entities as recognised bodies for conformity assessment and because the MRM exception had been designed with the situation of EU Member States in mind.

Observations

It is perhaps too easy to criticise the Panel's approach to the multiple objectives of the EU regime, especially the distinction between the "objectives" of a measure and other "interests", given that limited guidance exists in the treaty language or from the Appellate Body. In the real world, legislative acts are driven by a range of concerns, rather than one single concern, and synthesising all of these concerns into

[54] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.638.

a coherent analytical edifice under a legal provision may not be easy. Moreover, the Panel may be correct that concerns about Inuit communities and marine resource management were different from the public morals and animal welfare objective, because they may not have been the *initial drivers* of the EU's ban. Rather, these concerns were triggered only once the decision had been taken to prohibit seal products on the EU market.

At the same time, it is not clear why this should mean that addressing these concerns was not considered to be an "objective" of the measure. These interests *were* the drivers of an important part of the final legislation, namely the IC and MRM exceptions. Moreover, certain other parts of the Panel's reasoning seem highly questionable—for instance, the fact that certain interests were not "grounded in the concerns of [. . .] citizens"[55] is hardly a reason for denying the existence of an objective. Arguably, most technical regulations respond to technical concerns of which citizens will in most instances be blissfully *unaware*, let alone be *concerned* about. Similarly, denying the "interest" the status of an "objective" on the grounds that it "appear[s] to have been included in the course of the legislative process"[56] is rather puzzling. Legislators can be expected to form their views, articulate objectives and enshrining them in legislation *during the legislative process*—it is not clear when else this should occur.

Be that as it may, a key consequence flowing from the Panel's approach cannot be denied. The Panel developed an arguably new concept, whereby a "justifiable" distinction warrants a partial departure from the official objective of a measure. However, and this is the key concern, this distinction does not, at the same time, constitute a distinct, separate and competing "objective" of the measure. This approach of course carries the risk of limiting the reach of WTO legal disciplines. This is because the *TBT Agreement*—as well as Article XX of the GATT 1994, in a somewhat different manner—require that the objective of a measure be "legitimate". This requirement is important, because not every legislative objective or accommodation of an "interest" is legitimate. Moreover, not every legislative objective or accommodation of an "interest" is legitimate as a *regulatory concern underlying a trade measure*. Nevertheless, the Panel's interpretative approach implies, for instance, that the EU's second-tier "interest" of promoting Inuit traditional ways of hunting is not subject to the "legitimacy" requirement. Rather, this "interest" appears to have been examined only for the coherence of its operationalisation, rationality and even-handedness in justifying a departure from that overall, stated "objective". This is a potential loophole in the disciplines.

Admittedly, the Panel found that the protection of interests of indigenous communities is a concern present in international law and policy. However, this type of endorsement is not the same as arguing that the protection of such interests

[55] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.402.

[56] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.402.

via *trade measures* is a legitimate objective under Article 2.1 or 2.2 of the *TBT Agreement*. It is not clear, for instance, whether WTO members should have a free-hand in determining that particular indigenous communities within certain countries (e.g. developing countries) are worthy of promotion via special trade measures and whether these members should then be permitted to introduce differentiated trade concessions for the benefit of such unilaterally defined special interest groups.

A similar problem arguably arises under Article XX of the GATT 1994. Under Article XX(a), the Panel examined the EU seals regime as a whole, rather than the IC and the MRM exception separately. Admittedly, there is some degree of controversy whether the provisional justification under the sub-paragraphs of Article XX must exist concerning the offending aspect of the measure (e.g. discrimination) or rather the measure as a whole. The Panel relied on the Appellate Body's ruling in *US – Gasoline* to examine the measure as a whole. The Panel then examined the justifiability and even-handedness of the IC and MRM exceptions under the chapeau and reached the same conclusions as under the *TBT Agreement*.

What this means, once again, is that there is no analysis whether the two rationales underlying the IC and MRM exceptions qualify as policy justifications under the sub-paragraphs of Article XX. The test under the chapeau of Article XX—at least for most measures—is whether there is abuse or arbitrariness in the application of a measure, not in its basic design, object and purpose.[57] Thus, a partial objective of a measure can sail through at least some of the legal tests without being sufficiently-well scrutinised.

Application of Article 2.2 TBT Agreement

Summary of the Panel's Findings

Under Article 2.2, the complainants argued that the EU measure was unnecessarily trade restrictive. They submitted that observation of strict animal welfare standards in commercial hunts and corresponding labelling of the products would be an equally effective, but less trade restrictive alternative to the EU's outright ban.

The Panel found that the objective of the EU measure was to address the moral concerns of the EU public with regard to the welfare of seals. This objective had two aspects—the incidence of inhumane killing of seals and the EU citizens' individual and collective participation as consumers in, and exposure to, the economic activity that sustains the market for seal products derived from inhumane hunts. The Panel also found that these objectives were "legitimate", within the meaning of Article 2.2. However, as noted above, the Panel rejected the argument that the protection "interests" accommodated in the three exceptions (Inuit communities, travelers and marine resource management) were also "objectives" of the

[57] However, see the finding of the Panel in *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R, para. 7.349.

measure. Rather, these "interests" occupied some undefined and unspecified lower-level significance and role.

The Panel then examined the contribution that the EU's seals regime made to its objectives. The Panel emphasised that it was required to examine the "actual" contribution. It found, respectively, that the ban was "capable" of making a contribution and actually made "some contribution".[58] However, the IC and MRM exceptions "diminish[ed] the degree of the actual contribution made by the ban",[59] because they permitted consumers to be exposed to seal products derived from seals killed inhumanely. At the same time, because some Inuit communities have been adversely impacted and had not been able to benefit from the exceptions, the negative impact of the IC exception on the EU's ethical and animal welfare objective was less than it could have been.

The Panel then examined the contribution of the complainants' proposed alternatives. In essence, these alternatives were that market access for seal products would be conditioned on compliance with animal welfare standards combined with certification and labelling requirements. The Panel found that there were uncertainties, subjectivity and divergence of opinions among experts with regard to the prescription of animal welfare criteria, for instance, delays in the seal killing process. It found that the alternative measures "could possibly span a range of different levels of stringency and leniency".[60] It also appeared to doubt that the enforcement of the standards could be effectively assessed and that distinctions between humane and inhumane killings could be readily undertaken. It concluded that an alternative measure within the range of measures proposed "may give rise to an increase in the number of seals hunted with the accompanying risks to seal welfare through restored market opportunities within the EU",[61] which would undermine the EU's objective. It also found that "[t]he complainants do not deny [. . .] and the evidence [. . .] confirms [. . .] that killing and poor animal welfare do occur in seal hunts".[62] The Panel also found that the complainants had not precisely defined the exact welfare standard to be imposed and thus had not clearly defined an alternative measure "in respect of its separate components and their [sic] cumulative capability to address the moral concerns of the EU public".[63] On that basis, the Panel concluded that the alternative measure proposed by the complainants was not reasonably available, within the meaning of Article 2.2.

[58] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.460.

[59] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.447.

[60] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.496.

[61] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.502.

[62] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.503.

[63] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.503.

Observations

This is yet another example of an unsuccessful claim under Article 2.2, following the initial "trinity" of disputes under the *TBT Agreement*, namely, *US – COOL,*[64] *US – Tuna II (Mexico),*[65] and *US – Clove Cigarettes*.[66] This series of findings has led some observers to wonder if an Article 2.2 claim effectively has a chance of ever succeeding. This is an important question, because if the bar to findings of Article 2.2 violations is set unattainably high, a very important added-value of the *TBT Agreement* over the GATT 1994 will be compromised.

The *Seal Products* Panel finding is arguably problematic, for two reasons. The first reason is, as already previously explained, the characterisation of the IC and MRM concerns not as "objectives", but rather as "interests" that do not require justification as "legitimate objectives". One can understand the Panel's view these concerns may not have been the key driving force of the legislation, in the same manner as the concerns about seal welfare. However, placing these concerns, for this reason, at a level below "objectives" seems a disproportionate analytical conclusion to draw from this fact. Consequently, the Panel effectively exempted these "interests" from scrutiny other than non-discrimination or even-handedness. This is a problem, because—as previously noted—while certain concerns are very worthy causes in general, it is far from clear that such concerns should be legitimate drivers of trade measures.[67]

The second problem is the Panel's approach to comparing the contribution of the challenged measure and the proposed alternative. Although the Panel emphasised that it had to examine the "actual" contribution of the EU's measure to its stated objective,[68] the Panel's analysis remained entirely conceptual and abstract. In the Panel's view, the ban made some (unspecified) contribution to its stated objective; however, that contribution was then to some (unspecified) extent diminished because of the IC and MRM exceptions, which permitted inhumanely killed seals and their derivate products to reach the EU market. Finally, however, that diminution was reversed to some (unspecified) extent because Inuit communities were unable to fully benefit from the IC exception. The analysis of the complainants' alternatives remained similarly vague.

[64] WTO dispute, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384.

[65] WTO dispute, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS 381.

[66] WTO dispute, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS 406.

[67] For instance, as already noted above, creating trade-related benefits and exemptions measures for the benefit of unilaterally selected defined indigenous communities has the risk of differentiating between different WTO members and circumventing the MFN principle.

[68] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.441.

Admittedly, it is difficult to do full justice to the Panel's analysis without detailed knowledge of the complainants' arguments. However, at the same time, the Panel's criticism that the complainants did not sufficiently specify the particular animal welfare standard under the alternatives; and that the complainants had only indicated a range of measures of varying leniency and stringency also may not be fair. This is because that precise standard would be linked to the EU's detailed choice, driven by its own understanding of public moral concerns and their effective operationalisation within EU domestic law.

One of the Panel's ultimate conclusions, presumably intended to point to an important perceived shortcoming of the alternative measure, that the complainants "do not deny [. . .] that inhumane killing and poor animal welfare outcomes do occur in seal hunts" even when animal welfare standards are applied, rings rather hollow.[69] That conclusion ultimately means only that the alternative measure does not ensure to 100 % that inhumanely killed seals will never reach the EU market. *However, this was precisely the Panel's conclusion also with respect to the current EU regime*. In fact, one could even draw the contrary conclusion that the proposed alternative provided for a higher level of protection. In fact, the Panel's skepticism as to whether welfare standards, certification and labelling—under the proposed alternative measures—could be sufficiently well administered seems misplaced, because the EU's measure had no such standards, certification and labelling *at all*.

The problem is, to a large extent, that the Panel nowhere specified and adequately compared the precise degrees of contribution of the applicable and the alternative measures. However, this of course is precisely the point of the analysis under Article 2.2, so the Panel arguably failed to perform a crucial aspect of its work. Taking the Panel finding at face value, the existence of an alternative that—just like the measure at issue—makes only a partial contribution to the stated objective, but is less trade restrictive (which the proposed alternative measure undoubtedly was) should lead to a finding of violation of Article 2.2. The Appellate Body's decision may thus be an important clarification of how precisely a Panel should specify, quantify and compare the contribution of a measure and the proposed alternative to the stated objective.

US – Stainless Steel (Mexico) (21.5) (DS344)

Facts and Salient Aspects

In this dispute, Mexico claimed that the United States had failed to implement the findings in the original dispute, *US – Stainless Steel (Mexico)*. The original case—decided by the Appellate Body in 2008—was one of several disputes addressing the

[69] WTO, report of the Panel, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/R, para. 7.503.

United States' practice of calculating dumping margins in anti-dumping determinations, using the so-called "zeroing" methodology.[70] The original Panel decided to set aside a series of previous Appellate Body rulings and found that "zeroing" was consistent with the *Anti-dumping Agreement*. The Appellate Body overruled the Panel, confirmed its rejection of the zeroing methodology and expressed deep systemic concerns about the Panel's refusal to follow clear Appellate Body precedent. That Appellate Body report is often quoted far beyond the anti-dumping context, because it established a new standard for precedent in WTO dispute settlement. In brief, Panels may depart from previous Appellate Body rulings only where "cogent reasons" exist for doing so.[71]

In 2009, Mexico initiated this Article 21.5 of the Dispute Settlement Understanding (DSU[72]) dispute, arguing that the United States had not implemented the rulings in that dispute and continued to be in violation of its WTO obligations. The 21.5 Panel was established in September 2010 and issued its final report to the parties in March of 2012. In April 2012, at the request of Mexico, the Panel suspended its work. The suspension was subsequently extended, until the parties in April 2013 notified the Panel that they had reached a mutually agreeable solution.[73] The mutual agreed solution identifies a number of United States Department of Commerce determinations that appear to be recalculations of dumping margins without the use of the zeroing methodology.

Additional Observations

It is not very common that WTO disputes are settled at such a relatively late stage, namely, after a Panel report has been issued to the parties. To the authors' knowledge, a settlement after the conclusion of significant procedural steps has occurred only in two previous disputes.[74] At the same time, the initial issuance of the final reports to the parties—before circulation to the Membership at large and the global public—does serve, *inter alia*, precisely the purpose of permitting the parties to reach a settlement. The fact that such settlements do not occur very often

[70] In reality, there is no single "zeroing" methodology. Rather, there are several permutations of zeroing, of which the WTO case law appears to have addressed all but one, namely, zeroing in the context of the so-called targeted dumping methodology, pursuant to Article 2.4.2, second sentence, of the Anti-Dumping Agreement.

[71] WTO, report of the Appellate Body, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, para. 160.

[72] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), 1869 U.N.T.S. 401.

[73] See WTO, United States – Final Anti-Dumping Measures on Stainless Steel from Mexico, Notification of a mutually agreed solution, WT/DS344/26, G/L/778/Add.1, G/ADP/D67/2.

[74] WTO dispute, *European Communities – Trade Description of Scallops*, WT/DS7, WT/DS12, WT/DS14) and WTO dispute, *United States – Anti-Dumping Measures on Cement from Mexico*, WT/DS281.

is presumably because, at that stage, there is certainty about the distribution of gains and losses, and the winning party may require a very high price for a settlement. The losing party, despite its wish to suppress the publication of an unfavourable judgment, may simply be unable or unwilling to pay that price. Moreover, with political stakes on both sides in a typical WTO dispute, there is strong domestic pressure on the complainant to take the WTO dispute settlement process to its conclusion. In this dispute, the technical nature of the issue and the previous extensive case law may have contributed to the parties' willingness for a mutually agreed solution.

Canada – Feed-in Tariff Program (DS 412, DS 426)

These disputes received significant attention for being the first Panel and Appellate Body reports dealing with renewable energy subsidies. A frequently-heard concern in policy and academic circles is that WTO subsidy rules may be excessively restrictive in tying the hands of governments wishing to promote renewable energy. However, in this dispute, the challenged measure was a local content subsidy that—although formally embedded in a governmental renewable electricity generation scheme—was itself unrelated to strictly ecological concerns.

Facts of the Case

In 2009, the Government of Ontario implemented a scheme to increase the supply of electricity generated from renewable sources called the Feed-in Tariff Programme (the "FIT Programme"). Renewable electricity suppliers who participated in the FIT Programme would feed their electricity into the electricity system under 20-year or 40-year contracts with the Ontario Power Authority (OPA) and were paid a guaranteed price per kWh. These participants were located in Ontario and produced electricity from several energy sources, i.e. wind, solar photovoltaic, renewable biomass, biogas, landfill gas, and waterpower. Each renewable energy supplier that entered into the FIT Programme was remunerated, in accordance with a formula based on a standard "Contract Price" established by the OPA.

Additionally, and crucially for this dispute, the FIT Programme imposed a "Minimum Required Domestic Content Levels". Under these rules, a renewable energy supplier was eligible for participating in the FIT Programme only if its solar or wind power generating facilities contained a minimum percentage of locally produced goods, for instance, wind turbines.

The Appellate Body report in this dispute was issued in May 2013. The preceding Panel report was circulated in late December 2012, was covered in last year's EYIEL issue and is therefore technically outside the scope of this dispute. However,

because an understanding of the Panel report is required to fully appreciate the Appellate Body report we include the Panel report again in this year's overview.

General Overview of the Panel and Appellate Body Findings

The Panel found that the requirement to use a certain minimum percentage of local content fell within the scope of Paragraph 1(a) of the Illustrative List of the TRIMs Agreement. As such, the local content requirement was inconsistent with Article III:4 of the GATT 1994 and with Article 2.1 of the TRIMs Agreement. In reaching that finding, the Panel rejected Canada's argument that the measures were government procurement activities covered by Article III:8(a) of the GATT 1994 and as such exempted from the scope of Article III:4.

However, the Panel rejected the complainants' claims under Articles 3.1(b) and 3.2 of the *SCM Agreement*. The Panel accepted that a subsidy existed, because the government provided a "financial contribution" under Article 1.1(a)(1)(iii) in the form of "government purchases of goods" (electricity). However, the Panel found that the complainants failed to establish the existence of a "benefit" within the meaning of Article 1.1(b), because they had not identified a proper comparison benchmark against which to compare the electricity prices paid by the OPA to the electricity suppliers.

The Appellate Body upheld some of the Panel's findings and reversed others. It confirmed the Panel's conclusion related to Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. In reaching those findings, the Appellate Body also confirmed that the measures at issue were not covered by the government procurement exemption under Article III:8(a) of the GATT 1994. However, the Appellate Body relied on different reasons than the Panel. The Appellate Body also upheld the Panel's finding regarding financial contribution. However, the Appellate Body reversed the Panel's finding on benefit. It adopted a different analytical approach to benefit than the Panel, but was unable to complete the analysis. Thus, the Article 3.1(b) and 3.2 claims ultimately remained unresolved.

Salient Legal Findings

Article III:8(a) of the GATT 1994

Summary of the Panel and Appellate Body Findings

Article III:8(a) of the GATT 1994 exempts from the national treatment obligation those laws, regulations or requirements that govern government procurement. In other words, procurement that favours domestic products and disadvantage imported goods is carved out from the scope of Article III:4. However, this

exception applies only when such procurement is undertaken "for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale".

The Panel agreed with Canada that the FIT Programme and Contracts "governed" procurement, because it saw a "close relationship" between the products affected by the domestic content requirements (the products used to build the energy-generating infrastructure, e.g. wind turbines) and the product procured (electricity).[75] However, the Government of Ontario and municipal governments earned profits from the resale of electricity under the FIT Programme and Contracts. Therefore, the purchase of electricity by the Government of Ontario was undertaken "with a view to commercial resale" and was therefore not government procurement within the meaning of Article III:8(a). As a result, the disciplines of Article III:4 of the GATT 1994 (and of the TRIMS Agreement) remained applicable.

The Appellate Body reached the same conclusion as the Panel, but for different reasons. The Appellate Body disagreed with the Panel's finding that the Canadian local content requirement was a legal requirement "governing" the procurement of electricity. To recall, the Panel had to address the fact that the procurement activity concerned a product (electricity) that was different from the product subject to the local content requirement (e.g. wind turbines). The Panel bridged this gap by claiming that there was a "close relationship" between the two products and considered this relationship a sufficient trigger for Article III:8(a). In contrast, the Appellate Body required a significantly tighter link, in that the product procured of foreign origin must be in a *competitive relationship* with the product purchased. Because renewable energy generation equipment and electricity cannot be said to be in a competitive relationship, Article III:8 was not triggered and Canada could not benefit from the exemption on the national treatment requirement. The Panel finding was thus reversed, but the ultimate result under Article III:8 remained the same.

Observations

These disputes were the first time that the Appellate Body interpreted Article III:8 (a) of the GATT 1994. The Appellate Body's clarification of the term "governing" tightens the requirements for a measure to benefit from the exemption under Article III:8(a). The Panel's "close link" standard appears as both unnecessarily generous to defendants, as well as too vague to provide sufficient *ex ante* guidance. The Appellate Body's focus on likeness and competitive relationship arguably provides a clearer and more predictable framework.

[75] WTO, report of the Panel, *Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/R, WT/DS426/R, para. 7.125.

However, the Panel's approach appears to have been rooted—at least in part—in a concern regarding *inputs*. For instance, a government may be procuring cars and accepts both domestic and foreign car. However, the government requires that the tyres of the cars procured be of domestic production only. It may make sense, as a matter of policy, to permit the government to employ this form of discrimination in its procurement activities because it may be deemed a "lesser evil" than requiring that the *entire car* be of domestic production. However, cars and tyres are not in direct competition, such that the Appellate Body's "competitive relationship" standard would not be satisfied and Article III:8(a) therefore not triggered. Nevertheless, perhaps conscious of this matter, the Appellate Body explicitly left unresolved the question whether the derogation in Article III:8(a) can also refer to "inputs" or "processes of production" used in respect of products purchased by way of procurement.[76]

Article 1.1(a) SCM Agreement: "Financial Contribution"

The complainants challenged the local content requirement as a prohibited subsidy under Article 3.1(b) of the *SCM Agreement*. To reach Article 3.1(b), the Panel first had to find whether the requirement conferred a subsidy. Article 1 requires two elements for a subsidy—a "financial contribution" (or income or price support) and "benefit".

Summary of the Panel and Appellate Body Findings

The complainants argued that a "financial contribution" existed, because the government both purchased goods as well as provided a "direct transfer of funds". The Panel accepted that the government was purchasing goods, but it rejected the argument that a "direct transfer of funds" existed. The Panel's reasoning was, in essence, that the various forms of financial contributions under the *SCM Agreement* were mutually exclusive. For that reason, a transaction properly characterised as a "purchase of goods" could not, at the same time, constitute a "direct transfer of funds", otherwise the principle of effective treaty interpretation would be violated.[77] The Panel also found that the measure in this case was properly characterised as a governmental purchase of goods.

The Appellate Body confirmed the Panel's finding that the transactions between the government and the energy suppliers were appropriately characterised as governmental purchase of goods. It also agreed that there were no additional,

[76] See WTO, report of the Appellate Body, *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R, para. 5.63.

[77] See WTO, report of the Panel, *Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/R, WT/DS426/R, para. 7.245.

independent elements that would also permit characterising these transactions as a "direct transfer of funds". However, the Appellate Body disagreed with the Panel that the forms of financials contribution under Article 1 were mutually exclusive. It also rejected the Panel's argument that characterising the same transactions as both a governmental purchase of goods and a direct transfer of funds would necessarily violate the principle of effective treaty interpretation.[78]

Observations

The Appellate Body's finding is a useful clarification of the relationship between the various forms of financial contribution under Article 1 SCM Agreement. This is important, because different types of financial contributions have different implications for the "benefit" test, e.g. they may imply a lesser evidentiary threshold for the complainant. The Panel's approach whereby all forms of financial contribution would be mutually exclusive is more constraining for the complainant than the Appellate Body's approach. At the same time, it is not entirely clear how exactly the "direct transfer of funds" differs from the governmental purchase of goods and which "different" characteristics the Appellate Body had in mind.[79]

Article 1.1(a) SCM Agreement: "Benefit"

Summary of the Panel and Appellate Body Findings

The complainants argued that the challenged measures conferred a benefit, based on two distinct and independent benchmarks. They argued (1) that the guaranteed price paid to the renewable energy generators exceeded the price on the wholesale and retail markets in Ontario (or, alternatively, in four alternative comparison markets); and (2) that the inherent nature of the FIT Programme was to facilitate private investment in new renewable energy generation that the market, on its own, would be incapable of attracting. Under this second benchmark, the mere existence and operation of energy suppliers that would have otherwise not entered the market suggested the existence of benefit.

The Panel rejected both benchmarks. As regards (1)—that is, the price on the Ontario market—a key finding of the Panel was that electricity and competitive wholesale electricity markets exhibit certain idiosyncratic features, in particular the inability to attract sufficient investment in the generation capacity infrastructure

[78] WTO, report of the Appellate Body, *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R, paras. 5.119–5.121, referring to report of the Panel, *Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/R, WT/DS426/R, para. 7.246.

[79] WTO, report of the Appellate Body, *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R, paras. 5.130–5.131.

(referred to as the "missing money" problem). As a result, strong governmental intervention would often be necessary to secure an electricity supply that is safe, reliable and sustainable. Moreover, the equilibrium price in the electricity whole sale market was not determined through forces of supply and demand, but rather was based on pervasive government intervention, and reflected the government's pricing policy as well as the desired mix of energy sources. Hence, no "natural" market with sufficiently free forces of supply and demand existed in Ontario. For these reasons, the Panel did not consider these parameters as an appropriate market benchmark.

The Panel also rejected arguments regarding wholesale electricity markets outside of Ontario, because these markets either also failed to attract sufficient generation capacity investment or because they were not comparable to Ontario.

The Panel also rejected benchmark (2), namely, the allegation that the mere existence of renewable energy generation demonstrated a benefit. The Panel pointed once more to the inherent challenges faced by electricity markets as well as the particular situation in Ontario. Because the amount of investment in generating capacity needed to secure a reliable electricity supply could only be secured via government intervention, and because competitive market outcomes would not be acceptable as an alternative, the Panel found the proposed benchmark not to be appropriate.

In sum, the Panel found that the "competitive wholesale electricity market that is at the centre of the complainants' main submissions cannot be the appropriate focus of the benefit analysis in these disputes".[80]

Nevertheless, at the request of the complainants, the Panel also identified a benefit benchmark that it considered would have been appropriate and acceptable. That benchmark, according to the Panel, was the rate of return of projects with a comparable risk profile in the same period. This rate of return could be compared with the rate of return achieved by the FIT programme beneficiaries. However, the Panel saw insufficient facts on the record to determine that appropriate benchmark rate of return.

One Panelist dissented from the majority's view. Overall, the dissenter revealed less skepticism about the inherent failures of a freely competitive market for electricity and found that a potential competitive market could in principle be an appropriate benchmark. He found that "the fact that a market is imperfect in its operation or does not meet the objectives that a government might have for the goods or services [at issue] does not shield financial contributions [. . .] in th [at] market from the benefit analysis [. . .] under the SCM Agreement."[81] Like the majority, the dissenter ultimately rejected the price benchmarks proposed by the complainants. However, he accepted the proposed benchmark (2)—namely, that by

[80] WTO, report of the Panel, *Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/R, WT/DS426/R, para. 7.320.

[81] WTO, report of the Panel, *Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/R, WT/DS426/R, para. 9.6.

bringing high cost renewable electricity producers into the wholesale electricity market through government-sponsored programmes, when these producers otherwise would not be present, the Government of Ontario's purchases of electricity from these generators conferred a benefit upon those very same generators.[82]

The Appellate Body reversed the Panel. It found that the appropriate market was not the overall wholesale electricity market (as the Panel had found) but rather only the market for *renewable energy*—that is, wind and solar energy. One reason given by the Appellate Body was that both on the demand side and supply side, renewable and non-renewable electricity were distinct. On the demand side, the Appellate Body mentioned criteria such as type of contract, customer size and standard vs. peak electricity needs. On the supply side, the Appellate Body highlighted *inter alia* different cost structures and operating costs of the different categories of producers. Another factor was the government's determination of what the Appellate Body called the "supply-mix" for electricity. The government's policy of fostering and including renewable energy among the desired sources of electricity meant—at least in this case—that the government had *created* a market for wind- and solar PV-generated electricity.

Having decided that the relevant market was the market only for wind and solar energy, the Appellate Body then set out to define the proper benchmark for that market. It emphasised that the fact that the government had created the market at issue, it did not preclude a search for a market-based benchmark within that market. In justifying this approach, the Appellate Body drew a distinction between markets that, although created by the government, could still function in a competitive fashion and where a benchmark could be found; and, in contrast, pre-existing markets that were distorted by governmental intervention, to the point where no benchmark could be identified in that market.

The Appellate Body then rejected both benchmarks put forward by the complainants. The first, price-based benchmark was rejected because it related to the overall market—energy from all sources—and not solely to the solar and wind power market. The second benchmark—the mere presence of otherwise non-competitive high-cost renewable energy suppliers in the overall market—was also rejected. The relevant question according to the Appellate Body was whether, absent the FIT programme, the renewable energy suppliers would have entered the *wind and solar market*, not whether they would have entered the *overall wholesale market*.

The Appellate Body then attempted to complete the legal analysis and to identify the proper market benchmark itself. Not surprisingly, the government-administered FIT price was not considered a market-based benchmark. The Appellate Body then attempted to identify a benchmark in competitive bidding prices offered by renewable energy suppliers under a predecessor programme of the FIT. However, it found that there were insufficient facts on the record. The Appellate Body saw some

[82] WTO, report of the Panel, *Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/R, WT/DS426/R, para. 9.23.

indications that the FIT prices for wind power were above the wind power prices under the predecessor programme, but these facts did not in its view suffice to reach a proper finding.

Observations

Perhaps the biggest question surrounding the Appellate Body's benefit ruling is whether its logic is confined to the idiosyncratic situation of electricity markets or whether it can be applied to other industries as well. Previous Appellate Body caselaw establishes that a government that intervenes strongly in a market may distort that market to the point where a market-based benefit benchmark can no longer be found; in that scenario. The benchmark can only be identified in outside, proxy markets (such as in *US – Softwood Lumber IV*[83]). However, the present case demonstrates that, if the government intervenes in the market to such an extent that an entirely new category of high-cost suppliers is enabled to participate, then the goods offered by these suppliers are suddenly considered to be a free-standing, separate market and a benchmark must be found within *that narrower market*. This approach is by no means obvious and raises questions about how the benefit requirement will be applied in the future, in cases involving different types and different degrees of governmental intervention. The Appellate Body's approach could possibly mean that, where a government through a far-reaching industrial policy intervention creates a new industry that otherwise would not exist, no benefit is conferred merely by virtue of the fact that the producers would not otherwise exit. The consequence would be, for instance, that the monies disbursed to create and enable these enterprises to operate would not constitute a subsidy and no countervailable duties could be imposed.

In market definition, the Appellate Body's list of demand and supply-side factors that allegedly differentiate the renewable from the non-renewable electricity markets is also remarkable for its attention to minute detail. Arguably, with such a microscopic eye for differences, one wonders whether the Appellate Body would have found, for instance, in *US – Upland Cotton* that there was a single world market for cotton.[84]

Perhaps all of these aspects suggest that the Appellate Body's ruling is indeed particular to electricity markets. The Appellate Body's reasoning may have been driven by the wish to provide governments with policy space in the area of renewable energy. The complainants' and dissenter's approach would affirm the existence of a benefit whenever the government enables otherwise non-competitive

[83] WTO, report of the Appellate Body, *United States – Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS257/AB/R, para. 103.

[84] WTO, report of the Panel, *United States – Subsidies on Upland Cotton*, WT/DS267/R, para. 7.1274 and WTO, report of the Appellate Body, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, paras. 404–414.

suppliers to compete in a market. In contrast, the Appellate Body considers these otherwise non-competitive suppliers to be operating in an entirely separate narrower market, for which rules have to be found within that narrower market. This makes it more challenging for complainants to demonstrate the existence of benefit. Perhaps raising the benefit bar in this manner shields renewable energy and perhaps other socially desirable goods from what some may consider excessive scrutiny under the *SCM Agreement*.

However, one may wonder whether this concern—assuming this was indeed the Appellate Body's concern, echoing the concerns voiced in scholarly writing—about the vulnerability of green energy subsidies under WTO law is unnecessary. Even if benefit is affirmed under Article 1 of the *SCM Agreement*, a genuine green energy subsidy may very likely not be specific. Specifically, a government that promotes the use of green energy by any and all users (or objectively defined users, such as large or small industries) can rest assured that no WTO challenge will succeed. If the challenge were directed directly at the energy producers themselves, then the subsidy would have to be found to cause serious prejudice to trade in energy of other members under Articles 5 and 6 of the *SCM Agreement* to make this subsidy vulnerable under WTO law. This is arguably quite unlikely. Energy is traded under very particular conditions and it is doubtful whether a serious prejudice finding would ever be more than just a theoretical possibility. In any event, as shown in the present case, the complainant's grievance was with the local content requirement, not with the renewable energy policy itself. Another similar case has been brought to the WTO, and again the target are local content requirements.[85] There is thus no indication so far that (1) genuine renewable energy subsidies are in the cross-hairs of potential complainants and (2) that genuine renewable energy subsidies would run afoul of WTO law. One can legitimately ask whether creating new concepts under the benefit analysis, or going to great lengths to modifying the existing concepts, to further shield (genuine) green energy subsidies from WTO challenges, is worth the risk that these new and untested concepts entail for other industries and other contexts.

[85] WTO dispute, *European Union and certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452.

Institutional Developments in the WTO: Recent Trends and the Challenge Going Forward

Joy Kategekwa

The last 2 years have witnessed the WTO re-stamp its relevance on the face of global trade regulation. Faced with still transmitting effects of the global economic crisis, the organisation found itself re-oriented into roles for which it was not that well known traditionally i.e. monitoring protectionism. Continued threats from regional trade agreements in both goods and services and increased in- ward looking policies made it all the more urgent for the WTO to succeed in its negotiation arm. As such, effort, unprecedented in recent years, went into ensuring success at the ninth Ministerial Conference that saw a ground-breaking success in what can be termed as the first real score on a core negotiating area of the DDA: the Trade Facilitation Agreement. The period also saw the WTO opens its doors to seven more countries; Russia's accession clearly standing out, but also important steps in bringing more least developed countries into the fold of the MTS (Lao PDR, Samoa, Yemen, and Vanuatu). Dispute settlement thrived with consideration of previously unchartered territory such as electronic payments in services and trading in natural resources. The Trade Policy Review Mechanism continued to provide a robust opportunity for peer review style assessment of regimes put in place to support implementation of WTO Agreements, and the Institute for Training and Technical Cooperation strengthened its delivery of technical assistance. In all, it was two interesting years with important successes. Yet, the real challenge remains—for success in Bali is known by all to have been but a start. . .

J. Kategekwa (✉)
World Trade Organization, Geneva, Switzerland
e-mail: joy.kategekwa@wto.org

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Introduction

As the global organisation responsible for establishment and administration of international trade rules, the WTO is at centre stage in global trade regulation. Born in 1994 transiting from its predecessor the GATT, the WTO, now in its 20th year of existence, is a dynamic organisation overseeing about 60 agreements, annexes, decisions and understandings[1] across a broad spectrum of trade topics ranging from goods[2] to services[3] to intellectual property.[4] The organisation is also charged with the settling of disputes as provided in the Understanding on Rules and Procedures Governing the Settlement of Disputes[5] (DSU) reviewing Members' trade policies mandated by the Trade Policy Review Mechanism[6] and also oversees plurilateral agreements for those Members party thereto.[7]

The WTO's institutional structure is organised around the above-mentioned functions—typically in the form of Councils, Committees and "Other WTO Bodies". In the case of trade in goods, several Committees such as on market access, agriculture, sanitary and phytosanitary measures, subsidies and counterveiling measures, exist.[8] The Council for Trade in Services oversees implementation of the General Agreement on Trade in Services (GATS[9]), while the Trade Related Aspects of Intellectual Property (TRIPS[10]) Council concerns itself with issues of intellectual property. At the launch of the Doha Development Agenda (DDA) in 2001, the Trade Negotiations Committee (TNC) established negotiating bodies as the fora under which such negotiations would be held. Some of these were special sessions of existing WTO Bodies while, in other cases, new negotiating bodies were established. As such, you have a separate and parallel track of work focused on DDA negotiations such as the special session of the Committee on Agriculture, the special session of the Council for Trade in Services, etc.[11]

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[1] The WTO came into force on 1 January 1995. The so-called results of the Uruguay Round. See Understanding the WTO, The Agreements, Overview, a navigational guide, available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm.

[2] Contained in Annex 1A, Marrakesh Agreement establishing the WTO, 1867 U.N.T.S. 154 (WTO Agreement).

[3] Annex 1B, WTO Agreement.

[4] Annex 1C, WTO Agreement.

[5] Annex 2, WTO Agreement.

[6] Annex 3, WTO Agreement.

[7] Plurilateral Trade Agreements, Annex 4, WTO Agreement.

[8] Other examples include anti-dumping practices, rules of origin, etc. Available at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm.

[9] Annex 1B of the Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 183.

[10] Annex 1C of the Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 299.

[11] For more on the organisational set up of committees and interactions with special sessions, see http://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm.

This paper analyses key institutional developments in the WTO from 2012 to date.[12] It starts with an analysis of institutional responsiveness to global trade dynamics—assessing how the WTO dealt with the global economic crisis, follows on to how the organisation continues its pursuit for universality in Membership—through exploration of developments in the work on WTO accessions. It considers developments in the settlement of disputes highlighting characteristics defining the period under review but also pointing out shortcomings of this success, considers advancements in trade capacity building, emphasising why there is consistent focus on this part of the Secretariat's functions, highlights the work of trade policy reviews and then gets into success in negotiations. The paper concludes with an assessment of the challenge going forward—emphasising that recent successes in negotiations will need to be complemented by a broader brush of comprehensive scores on the DDA, in order for the WTO to remain central not only to global trade regulation, but to widening the frontier of global rule making.

Institutional Responsiveness to Global Trade Dynamics

For the WTO to remain relevant to global trade policy making, it must be able to respond in a timely manner to changes in global dynamics—including but not limited to trade.

Before the recent global economic and financial crisis, a lot of the WTO's work focused on the DDA negotiations.[13] However, the onslaught of the crisis shifted members' attention to domestic challenges—forcing them to look at the immediate task of resolving its impact. Europe[14] and the US started to record very low growth rates notably in 2008 and 2009, and because the growth of several developing countries exporting minerals, oil, commodities etc. had been largely dependent on external markets in developed ones, the trickledown effect concerning the spread in negative impact was alarming. The WTO itself predicted a 9 % global trade decline in 2009, reporting it as the biggest such contraction since the Second World War.[15]

Naturally, the appetite for negotiations dropped as members grappled with several challenges ranging from home losses resulting from the sub-prime mortgage crisis, closure of banks previously deemed too big to fail, the attendant credit crunch and ensuing unemployment.

[12] Time of writing is March 2014.

[13] See Doha Development Agenda, Doha Work Programme, The July 2008 package, available at: http://www.wto.org/english/tratop_e/dda_e/meet08_e.htm.

[14] For more on the impact of the global economic crisis on international trade and Europe in particular, see Curran (2009), p. 264.

[15] See WTO news, World Trade 2008, Prospects for 2009, WTO sees 9 % global trade decline in 2009 as recession strikes, available at: http://www.wto.org/english/news_e/pres09_e/pr554_e.htm.

Amidst this climate, it was not realistic to keep the organisation's greatest focus on negotiations only. As such, the WTO responded by re-orienting itself into protectionism police—through the production of periodic reports as early as 2009[16]—work which continued through to the period under consideration in this paper.[17] These periodic reports were an important contribution in providing members with information on global trade trends, based on which they could discuss coping strategies and more importantly, how to keep protectionism at bay.[18] A series of reports, one set focused on the general situation with respect to all members, and another on the G-20- as a group representative of leading global markets,[19] have since been produced.[20]

A December 2013 WTO report on G-20 measures revealed that G-20 trade restrictions are on the increase as trade flows continue to slow down.[21] Global economic growth remained slow in 2013 not only in developed but also major emerging markets, with this weighing heavily on world trade flows.[22] 2014 was expected to remain below the historical trend, as was the volume of world merchandise trade—expected to grow by 4.5 %.[23] According to this report, the number of new trade restrictions increased in 2013, with most G-20 members introducing new trade restrictions, totalling at 116 measures.[24] Examples included new trade remedy actions (anti-dumping investigations, tariff increases and more stringent customs procedures) affecting about 1.1 % of G-20 merchandise imports or 0.9 % of world merchandise imports. Others included subsidies, public procurement activity and goods and services regulations (in the areas of Technical Barriers to

[16] While the WTO through its TPR function has always carried out a somewhat similar role, the importance of a focus on protectionist measures in reports produced had been unprecedented.

[17] For all reports on trade monitoring, see http://www.wto.org/english/news_e/archive_e/trdev_arc_e.htm.

[18] See WTO news, Lamy: WTO is working to mitigate impact of economic crisis on trade, 22 January 2009, available at: http://www.wto.org/english/news_e/sppl_e/sppl113_e.htm.

[19] Following on the April 2009 request to the WTO and the OECD to jointly provide these monitoring reports to the G-20.

[20] The group consists of 19 countries and the European Union. Its Members are Argentina, Australia, Brazil, Canada, China, European Union, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, Saudi Arabia, South Africa, South Korea, Turkey, United Kingdom, United States.

[21] See WTO news, Reports on recent trade developments—G-20 trade restrictions increase as trade flows slow down, says WTO report, 18 December 2013, available at: http://wto.org/english/news_e/news13_e/trdev_18dec13_e.htm.

[22] See WTO, Report on G20 Trade and Investment Measures (Mid May 2013 to mid-November 2013), available at: http://wto.org/english/news_e/news13_e/g20_wto_report_dec13_e.pdf.

[23] WTO, Report on G20 Trade and Investment Measures (Mid May 2013 to mid-November 2013), available at: http://wto.org/english/news_e/news13_e/g20_wto_report_dec13_e.pdf.

[24] Up to 109 measures as at the last WTO report, WTO, Report on G20 Trade and Investment Measures (Mid May 2013 to mid-November 2013), available at: http://wto.org/english/news_e/news13_e/g20_wto_report_dec13_e.pdf.

Trade and Sanitary and Phytosanitary regulations).[25] Overall, compared to the past, fewer trade liberalising or facilitating measures were being taken. A summary and status of G-20 trade and trade-related measures since October 2008 was also prepared.[26]

For an organisation that had previously been in the press almost exclusively for trade liberalising negotiations and their content, these reports introduced a qualitatively different variation to the public perception of the organisation's role, the attention created contributing to members' commitment against protectionism. For example, the bleakness of the situation contributed to G-20 members extending their pledge to a standstill until 2016 concerning measures affecting global trade and investment, as well as their commitment to roll back new protectionist measures.[27] In these times, the WTO was defined by some as the insurance policy against global protectionism.[28] This adaptability and responsiveness was an important contribution in demonstrating that the WTO is alive to the challenge of keeping its liberalisation values at the fore of its work, even if this not be immediately served through negotiations per se, but reports on trade monitoring.

Opening Doors to New Members

The ability to become a member of the WTO in current times is preceded by a complex process of negotiations covering several areas under WTO law.[29] These rigorous negotiations involve engagement between such State or separate customs territory on the one hand, and WTO members on the other, aimed at the offering of trade concessions from the former. Such concessions typically take the form of reducing tariffs, undertaking policy and regulatory reforms and committing to pursuing its trade agenda in tandem with the organisation's objectives. This is important not only for the acceding country (in the opportunity to lock in reforms) but also for existing WTO members from the perspective of opening new market opportunities. But the value of the WTO accession process goes beyond that, as it

[25] WTO, Report on G20 Trade and Investment Measures (Mid May 2013 to mid-November 2013), available at: http://wto.org/english/news_e/news13_e/g20_wto_report_dec13_e.pdf.

[26] See Summary and Status of G-20 trade and trade-related measures since October 2008, available at: http://www.wto.org/english/news_e/news12_e/igo_31oct12_e.htm.

[27] See OECD/WTO/UNCTAD, Reports on G20 Trade and Investment Measures (Mid May 2013 to mid-November 2013), available at: http://wto.org/english/news_e/news13_e/g20_joint_summary_dec13_e.pdf.

[28] See WTO news, Reports on recent trade developments, Lamy hails transparency as the best insurance policy against protectionism, 19 July 2013, available at: http://www.wto.org/english/news_e/news13_e/trdev_19jul13_e.htm.

[29] Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and other matters covered in the WTO Agreement and in other multilateral Trade Agreements may apply to join the WTO, see Article XII:1 WTO Agreement.

builds incremental steps towards the overall objective of making the organisation more universal in its membership.

In 2012, members concluded the accession process of Lao PDR, Montenegro, Russia, Samoa, Tajikistan and Vanuatu.[30] Least developed country (LDC) accession (such as Lao PDR and Samoa) is a particularly important victory, even if some of the domestic ratification processes remain ongoing, because WTO accession is hoped to give them the requisite momentum to drive the much-needed domestic reform agenda, aimed at creating enabling environments for business and investment to thrive, thereby allowing trade to play its role in boosting economic growth and development. Because of this, some analysts perceive WTO accession as an important stepping stone towards graduation out of LDC status.[31]

2012 also saw WTO members strengthening the 2002 Guidelines on LDCs Accessions—responding to LDC concerns that the process was difficult, cumbersome, and overly encroached on flexibilities that are available to existing LDC WTO members. As such, the strengthened guidelines set benchmarks in goods and services, provided for transparency in accession negotiations, and reiterated the importance of flexibility, embodied in the principle of Special and Differential treatment (S&D) in WTO Agreements, and technical assistance.[32]

In 2013, members concluded the accession of Yemen[33] a decision that was adopted by Ministers at the WTO's ninth Ministerial Conference in Bali, Indonesia.[34] According to the 2013 Director General's annual report on accessions, after the most recent accessions, 23 Working Parties remain of which approximately 13 are active.[35] Working Parties on the Accessions of Bosnia and Herzegovina and Kazakhstan have advanced to their final stages and technical advancements have been made with respect to Afghanistan, The Bahamas and Seychelles.[36]

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[30] See WTO Accessions, 2012 Annual Report by the Director-General, WT/ACC/19 (3 December 2012).

[31] See Blank, The case for recently graduated LDCs? Or smooth transition measures for graduating LDCs in the WTO, A paper presented to the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (2012).

[32] See WTO, Accession of least-developed countries, Decision of 25 July 2012, WT/L/508/Add.1.

[33] See WTO Accessions, 2013 Annual Report by the Director-General, WT/ACC/21, WT/GC/155, WT/MIN(13)/6 (1 November 2013).

[34] See Paragraph 1.7 of the Bali Ministerial Declaration, WT/MIN(13)/DEC of 11 December 2013, see also Accession of the Republic of Yemen, Decision of 4 December 2013, WT/MIN(13)/24, WT/L/905.

[35] WTO Accessions, 2013 Annual Report by the Director-General, WT/ACC/21, WT/GC/155, WT/MIN(13)/6 (1 November 2013). The following countries are involved in working parties: Afghanistan, Algeria, Andorra, Azerbaijan, The Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Comoros, Union of the Equatorial Guinea, Ethiopia, Iran, Iraq, Kazakhstan, Lebanese Republic, Liberia, Libya, Sao Tomé and Principe, Serbia, Seychelles, Sudan, Syrian Arab Republic, Uzbekistan.

[36] WTO Accessions, 2013 Annual Report by the Director-General, WT/ACC/21, WT/GC/155, WT/MIN(13)/6 (1 November 2013).

Thriving Business at the Dispute Settlement Arm

When WTO members fail to agree on a matter concerning the covered Agreements, the WTO dispute settlement mechanism is available to assist the parties to resolve the matter.[37] Systems exist not only for consultations[38] or first instance hearings[39] but also for appellate review.[40] The WTO dispute settlement mechanism, overseen by its Dispute Settlement Body (DSB), is perhaps one of the marked variations between the old GATT style to settling disputes—a process that was heavily politicised and inherently flawed or self-defeating, as members losing cases could veto adoption of reports that were not in their favour. Yet, adoption of such reports was a necessary first step in enabling the winning party to gain the fruits of its judgement. As such, the WTO dispute settlement system provides teeth to the implementation of its rules—allowing not only the amicable resolution or, if needed, adjudication of a matter, but also a determination as to what must be done to correct the situation, and seeing the process through to implementation of Panel or Appellate Body rulings and recommendations.

Even though there had been some relatively quiet years such as 2011 where only 8 requests for consultations (the initial stage in dispute resolution) were made, the number increased to 27 in 2012[41] slightly reducing to 20 in 2013.[42] In 2012, 11 Panels were established by the DSB, and there were 12 in 2013. As regards the number of disputes covered by Panels established, the number was 13 in 2012 and 14 in 2013.[43]

One of the striking features of this period is the subject matter of disputes being brought for adjudication. Aside from traditional commercial areas such as safeguards, antidumping and animal welfare issues[44] WTO Panels are being presented with ever more complex challenges, requiring them to engage in previously unchartered areas such as electronic payments in services, packaging regulations on tobacco and tobacco products (raising several globally resonating issues such as

[37] Recall Annex 2, WTO Agreement.

[38] See Article 4, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 of the Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 401.

[39] See Article 6 DSU.

[40] See Article 17 DSU.

[41] See WTO Dispute Settlement Body developments in 2012, Ambassador Shahid Bashir, available at: http://www.wto.org/english/tratop_e/dispu_e/bashir_13_e.htm.

[42] With developing countries launching at least nine thereof.

[43] It is worth clarifying that in some cases, several similar disputes are consolidated into one Panel proceeding; thus, the number of disputes that have gone to a Panel exceed the number of Panels established. For example, the *US – Steel Safeguards* case saw one Panel dealing with eight complaints, *United States – Definitive Safeguard Measures on Imports of certain Steel Products*, WT/DS252.

[44] See WTO disputes, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400, WT/DS401; and *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381.

the protection of intellectual property rights[45]) issues around green or renewable energy,[46] Technical Barriers to Trade (TBT)[47] and trade in natural resources.[48]

The DSB continues its work in overseeing implementation of the dispute settlement process (from Panel establishment through to oversight in implementation of recommendations and rulings). Because it is a standing agenda item on its monthly meetings, the question of surveillance of implementation of recommendations adopted by the DSB remains at the top of members' priorities, not only for those winning, but the entire Membership who would naturally have an interest in ensuring that the system works—should they be party to disputes at any point in the future.[49]

For example, in 2013, the DSB authorised Antigua and Barbuda to impose trade retaliation measures against the US for not fully complying with the DSB's recommendations and rulings in a dispute over online gambling. It referred to arbitration a request by Indonesia to take trade retaliation measures against the US in a dispute over flavoured cigarettes. It referred the matter of whether the US was in compliance with its rulings and recommendations concerning Canadian and Mexican complaints against the US labelling requirements for meat products.[50] Finally, it circulated an arbitration award establishing the reasonable period for China to implement DSB rulings and recommendations in a dispute over countervailing and anti-dumping duties on certain electrical steel imports from the US.

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[45] See WTO dispute, *Australia – Certain Measures Concerning Trade Marks and other Plain Packaging Requirements Applicable to Tobacco Products and Plain Packaging*, WT/DS434; see also WTO, Dispute Settlement Body, Minutes of Meeting, Held in the Centre William Rappard on 28 September 2012, WT/DSB/M/322, paras. 65–79.

[46] See WTO dispute, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412; *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS426 in which the Appellate Body reviewed Panel reports on the same issue; WTO dispute, *China – Measure Concerning Wind Power Equipment*, WT/DS419; and WTO dispute, *European Union and Certain Member States – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS452.

[47] WTO dispute, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406; WTO dispute, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381; and WTO dispute, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384, WT/DS386.

[48] WTO dispute, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394, WT/DS395, WT/DS398; and WTO dispute, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431, WT/DS432, WT/DS433; for information on the subject matter of consultations by thematic area see, WTO Dispute Settlement Body developments in 2012, Ambassador Shahid Bashir, Chair, Dispute Settlement Body, 2012–2013, available at: http://www.wto.org/english/tratop_e/dispu_e/bashir_13_e.htm.

[49] See Article 21.6 of the DSU.

[50] WTO dispute, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384, WT/DS386; the last such arbitration was carried out in 2009 in the WTO dispute *Colombia – Indicative Prices and Restrictions on Port of Entry (Arbitration under Art. 21.3 (c) DSU)*, WT/DS366/13.

But while the dispute settlement mechanism is thriving with success in number of disputes handled and breadth of subject matter covered, there is concern about what a litigious approach means to the health of multilateral cooperation, especially so when the negotiating arm—the best shot at multilateral cooperation—could do with much more success. In the words of recently retired Appellate Body Member David Unterhalter:

> If the main business of the WTO became dispute resolution, the institution would not hold together. Adjudication is robust when it lives in a dynamic relationship with legislative competence. If too much rests upon dispute settlement, the system gets out of kilter, and the atrophy of one part of the system ultimately takes hold of everything else.[51]

It seems clear that the tremendous success of the dispute settlement inevitably reveals its own weaknesses thus presenting an urgent need for negotiations to catch up.

Strengthened Delivery of Training and Technical Assistance

One of the core functions of the WTO Secretariat is to provide trade related technical assistance to its members. In Paragraph 38 of the Doha Declaration, Ministers instructed the Secretariat, in coordination with other relevant agencies, to support domestic efforts for mainstreaming trade into national plans for economic development and strategies for poverty reduction—including through the delivery of WTO technical assistance to help them adjust to WTO rules and disciplines, implement obligations and exercise the rights of membership, including drawing on the benefits of an open, rule-based multilateral trading system.[52]

As such, based on biennial work plans, the WTO's Institute for Training and Technical Cooperation (ITTC) rolls out technical assistance programmes to WTO members—with a specific focus on developing countries and LDCs. The assistance takes the form of various customised packages including e-learning courses, national and regional seminars, regional trade policy courses (RTPCs), Geneva based courses, advanced trade policy course (ATPC), thematic courses, reference centres, academic support programmes, the WTO Chairs programme (WCP), and a range of internships. Based on a progressive learning strategy aimed at bringing officials from general to specialist knowledge, these courses allow for development of knowledge amongst all WTO members on the rules governing international trade, embodied in the WTO Agreements.

According to the 2012 Annual Report on WTO technical assistance, in spite of shrinking resources, the organisation continues to provide quality products to

[51] See Farewell speech of Appellate Body Member David Unterhalter, available at: http://www.wto.org/english/tratop_e/dispu_e/unterhalterspeech_e.htm.

[52] See Doha Ministerial Declaration, WT/MIN(01)/Dec/1 (20 November 2001), para. 38.

beneficiaries[53] including through the introduction of results-based management for technical assistance activities and a monitoring and evaluation framework.

Technical assistance has been particularly useful for developing countries and LDCs in increasing their understanding of WTO rules. It has allowed for the creation of a cadre of officers in ministries of trade in such members, who are increasingly more familiar with WTO rules and can therefore lead the process of implementation; be it through the development of policy reform proposals, legal reform processes or bringing the visibility of trade to the fore in national governments and their planning and budgeting processes.

Perhaps more significantly, such technical assistance has seen the strengthening of the negotiating capacity of these members—evidenced in their active participation in the DDA negotiations. Whether it is under the umbrella of the WTO African group or the LDC consultative group, these members have left their mark on the DDA negotiations—with virtually all areas of negotiation having proposals on what outcomes they would like to see. LDCs in particular have been quite impressive—if the starting point in the conversation is a foul cry that they joined the organisation without full appreciation of what they were committing to, and therefore faced a tremendous implementation challenge that they, in their view, continue to grapple with. Fast forward to the 13th year of the DDA negotiations, and LDCs have already pocketed several scores in the negotiations—be it in the form of the five LDC Agreement specific proposals agreed at the 2005 Hong Kong Ministerial Conference, of which the most significant is the agreement to grant them duty and quota free market access to products originating from them,[54] or the 2011 and 2013 Ministerial Decisions establishing a waiver for the provision of special priority market access for LDC services and service suppliers, and mandating the Council for Trade in Service to develop a specific process for ensuring implementation thereof respectively.[55] Other important LDC milestones in recent years, albeit not part of the DDA, include the extension of LDC transition periods concerning Article 66.1 of the TRIPS Agreement[56] and the 2012 improvement of the 2002 guidelines on LDC Accession.[57]

The WTO also has a dedicated unit of staff available to assist LDCs and African countries in their participation in the work of the organisation—be it in the regular

[53] See WTO, Institute for Training and Technical Cooperation, Annual Report on Technical Assistance and Training, 2012, WT/COMTD/W/197 (2 July 2013).

[54] See Hong Kong Ministerial Declaration, WT/MIN(05)/DEC (22 December 2005), Decision 36 on Measures in Favour of Least developed countries, Annex F: Special and Differential Treatment.

[55] See WTO, Preferential treatment to services and service suppliers of least-developed countries, Decision of 17 December 2011, WT/L/847; and WTO, Ministerial Conference, Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries, Ministerial Decision of 7 December 2013, WT/MIN(13)/43, WT/L/918.

[56] For more, see Responding to least developed countries' special needs in intellectual property, available at: http://www.wto.org/english/tratop_e/trips_e/ldc_e.htm.

[57] See above discussion on opening doors to new members.

part of its work such as in the LDC sub-committee, or in the LDC consultative group and the African group. This support has been useful in making their participation more effective through preparation of negotiation positions, articulation of issues through submission of proposals, building coalitions with like-minded groups etc.

Since 2005, the WTO has been working with partners on the Aid for Trade Initiative, including by organising biennial Global Reviews of Aid for Trade where topical issues are discussed. The theme of the fourth Global Review held in July 2014 was connecting to value chains, reflecting one of the main challenges developing countries face in integrating into the multilateral trading system and perhaps a focus area on which donor support should be placed.

The WTO also works with partners in the Enhanced Integrated Framework (EIF) for LDCs—a global partnership between LDCs, donors and international organisations that support LDCs in their pursuit for more active participation in the global trading system. The EIF aims to assist LDCs in tackling supply side constraints to trade by mainstreaming trade into LDC national development plans. It also provides financial assistance to implement projects in areas identified as bottlenecks to trade integration. WTO's commitment to the EIF goes as far back as the programme's inception in 1997 then known as the Integrated Framework—and its Secretariat is administratively housed in the WTO. The EIF currently supports 46 LDCs and 3 recently acceded ones, all of which are at various stages—with some having updated their diagnostic integration studies (DTIS) which identify trade bottlenecks, and others implementing various support programmes to tackle such identified problems.[58]

Steady Momentum on Trade Policy Reviews

Trade Policy Reviews (TPRs) are an important way through which WTO members keep track of the policy changes members adopt at the national level to implement their WTO obligations.[59] The environment within which TPRs are conducted is conducive for peer review-style analysis and discussion and provides an opportunity for members to better understand each other's regimes, raise concerns as well as make proposals for more effective implementation, without the fear of potentially being raised in a dispute settlement context. As such, reviewed countries are more forthcoming with information on their regimes and their plans—which is an important exercise not only in transparency, but also in gauging whether they are on the right track in the implementation of WTO Agreements, or whether there are some improvements that could be made.

For LDCs, TPRs take on an additional importance because they not only show case where steps have been taken, but also where challenges remain, including of a

[58] For more, see http://enhancedif.org/en/about/.

[59] See Article III(4) WTO Agreement.

capacity building nature—which may form an important reference point for members wishing to provide support, but possibly also for the LDCs themselves to undertake internal processes in exploring what can be done to overcome these challenges. Importantly, it is also an opportunity to keep the all-important matter of capacity development challenges at the fore of discussions concerning LDC integration into the multilateral trading system.

An interesting trend observed in TPRs is that recently, African WTO members are increasingly coming together to conduct joint reviews of their trade policies. This is good for enhancing deeper regional integration amongst them—as it is a natural reflection of their objective to have common external trade policies towards third parties—as is the case in the East African Customs Union consisting of Burundi, Kenya, Rwanda, Tanzania and Uganda. It is also indicative that such countries are pursuing the objectives of approximating their internal trade policies. In 2012, the above-mentioned countries held their TPR together as the East African Community, as did Cote D'Ivoire, Guinea Bissau, and Togo. In 2013, Cameroon, Congo, Gabon, Central African Republic and Chad also held a joint TPR.[60]

Breaking the Drought Spell in Negotiation Success

Perhaps the biggest success of the WTO within the review period is that at the ninth ministerial Conference, key decisions were taken on the WTO's regular work as well as on its negotiation work. Regarding regular work, Ministers agreed to decisions concerning TRIPS non-violation and situation complaints[61] the Work Programme on Electronic Commerce[62] the Work Programme on Small Economies[63] Aid for Trade[64] and Trade and Transfer of Technology.[65]

[60] In 2012, the following countries held their trade policy reviews US, Nicaragua, Burundi, Kenya, Rwanda, Tanzania and Uganda (the EAC), Iceland, Israel, Bangladesh, Norway, Korea, Singapore, Cote D'Ivoire Guinea Bissau and Togo, Colombia, China, Uruguay, United Arab Emirates, Philippines, Nepal Trinidad and Tobago, Turkey, Kuwait, Saudi Arabia. The following had their TPRs in 2013 Marcedonia, Krygyz republic, Peru, Costa Rica, Viet Nam, Cameroon, Congo, Gabon Cantral African Republic and Chad, EU, Brazil, Suriname, Macao China, Switzerland and Liechsteinstein, Mexico, Indonesia, Argentina and Japan.

[61] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/31, WT/L/906.

[62] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/32, WT/L/907.

[63] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/33, WT/L/908.

[64] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/34, WT/L/909.

[65] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/35, WT/L/910.

On negotiations, for the first time in the history of the DDA, decision was reached on a core negotiating area which can be claimed as beneficial to all WTO members: the Trade Facilitation Agreement.[66] This Agreement streamlines customs procedures, fees and charges related to imports as well as the publication of laws and regulations linked to imports. In a sense, it aims to streamline the trading environment through cutting out red tape, non-clarity and unnecessary discretion—all of which will significantly reduce the costs of doing business, especially for developed countries and LDCs.

As per the Bali Decision relating to Trade Facilitation, members are currently involved in a preparatory committee concerned with final aspects of bringing the Trade Facilitation Agreement into force: which include a legal review (scrub), receipt of the first category of commitments or measures which members can implement as at entry into force of the Agreement (akin to schedules) and drawing up the protocol of amendment to annex the Trade Facilitation Agreement to Annex 1 A of the GATT.

Other Ministerial Decisions taken at Bali are in the areas of agriculture concerning General Services,[67] Public Stockholding for Food Security Purposes,[68] Tariff Rate Quota (TRQ) Administration Provisions of Agricultural Products, as Defined in Article 2 of the Agreement on Agriculture,[69] Export Competition,[70] and Cotton.[71]

These Decisions are important as they create an initial response to the challenges developing countries have had with core issues of agricultural reform. For example, the Decision concerning public stockholding for food security purposes has been a negotiation priority for several developing countries—seeking flexibility in WTO rules to allow them to stock food for their populations, in spite of the rules regarding subsidies in agriculture. Similarly, that on TRQ administration has been viewed as key in allowing the creation of a lot more transparency in a tool that is deemed important in determining who benefits from agricultural import licences for example. The fact that this Decision (on TRQs) seeks to deal with issues of unfilled quotas is reflective of developing country attempts to ensure that the possibilities for accessing world agricultural markets remain open to them. Regarding export competition, it is well known that one of the core negotiating priorities of

[66] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/36 or WT/L/911.

[67] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/37 or WT/L/912.

[68] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/38 or WT/L/913.

[69] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/39 or WT/L/914.

[70] See WTO, Ministerial Conference, Ministerial Declaration of 7 December 2013, WT/MIN(13)/40 or WT/L/915.

[71] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/41 or WT/L/916.

developing countries is to eliminate export subsidies—which many agree aim at distorting trade. The Bali Decision on export competition can be seen as a first step in reigniting this discussion—with the clear view that what developing countries want is not yet achieved. Finally on cotton, LDCs and especially the four African exporters of cotton (Benin, Chad, Burkina Faso and Mali) seek a fast track treatment of cotton in any attempt to address subsidy related concerns within this sector. The Bali Decision related to cotton is important in as far as it reaffirms members' commitment to address trade related aspects of cotton "ambitiously, expeditiously and specifically" within the agriculture negotiations, as well as establishes a process through which more transparency is expected through dedicated bi-annual discussions on cotton in the three pillars of the agriculture negotiations, i.e. Market Access, Domestic Support, and Export Competition. It is hoped that this will keep a spotlight on the issue—and create the necessary momentum for fast track solutions.

Ministers at Bali also adopted a Monitoring Mechanism on S&D—providing developing countries the opportunity to have action-oriented discussions on challenges in utilising S&D provisions.[72] It is hoped that this will create scope for practical solutions on S&D weaknesses—thereby complementing the ongoing S&D negotiations in the special session of the Committee on Trade and Development.

Finally, Ministers at Bali also agreed to three important decisions concerning LDCs. Concerning the operationalisation of the LDC services waiver,[73] the Council for Trade in Services was instructed to establish a process for implementation of the 2011 waiver decision. It is hoped that this will bring the necessary momentum leading to preferential market access for LDCs services and service suppliers. The decision concerning duty and quota free market access for LDCs[74] will bring more transparency on the various initiatives established by developed countries (and developing countries that declare themselves in a position to do so) concerning performance on the requirement to grant such access to at least 97 % of products originating from LDCs. Finally, the decision on preferential rules of origin[75] provides, for the first time in the history of the WTO, some guidelines on what supportive rules of origin would look like. This should arm LDCs with a negotiation tool for those preferential markets whose rules of origin they consider to be stringent.

[72] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/45 or WT/L/920.

[73] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/43 or WT/L/918.

[74] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/44 or WT/L/919.

[75] See WTO, Ministerial Conference, Ministerial Decision of 7 December 2013, WT/MIN(13)/42 or WT/L/917.

Challenges Going Forward and Conclusion

The last 2 years have witnessed the WTO strengthening its central place in global trade regulation. The regular work of the organisation proceeds in good step, and the negotiation arm has had recent success.

But there should be no illusions that members have got where they want to be with Doha. Several members opine that Trade Facilitation cannot be viewed as the conclusion. The concerns with agricultural reform remain—evident in developing countries push to counter balance the MC9 package with some steps on agriculture, as well as in positions taken in initial discussions to develop a work programme for the conclusion of the DDA.

The immediate challenge facing the WTO therefore is how to tap on the Bali energy to ensure that the process for finalising the Trade Facilitation Agreement proceeds in a timely and successful manner, but also that there is similar weight around steps to conclude the DDA.

The responses are not obvious. As we saw, the remnants of the global economic crisis continue to transmit, protectionism remains, and parallel processes, not touched on in this paper, but which are well known to be a significant challenge to the WTO such as regional trade agreements in both goods and services, continue to abound. For the WTO GATS negotiations, some members remain concerned about how to revive the multilateral GATS negotiations in light of the on-going ones amongst a smaller group of members (for example The International Services Agreement- TISA). As we have seen, the dispute settlement mechanism is slowly becoming a victim of its own successes. It is clear that the real solution to the WTO's challenge lies in a timely strengthening of its negotiating arm. Therefore, a comprehensive delivery on Doha remains urgent. The alternatives are not options.

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WIPO's Global Copyright Policy Priorities: The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled

Andrea Wechsler

Introduction

In the twenty-first century with its global race for economic success and prosperity it is the interests of the developing countries, the weak and disabled that need particular support. The *World Intellectual Property Organization* (WIPO) has ever since its establishment in 1967 played a crucial role in governing global intellectual (IP) protection with particular emphasis on such interests. In line with this crucial role, 2013 marks a special year with the conclusion of the *Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled (Marrakesh Treaty)*.[1] The *Marrakesh Treaty* constitutes a landmark in global copyright policy as it increases access to information for millions of visually impaired people around the world, and in particular in developing countries. In addition to the conclusion of the *Marrakesh Treaty* WIPO policies have placed particular emphasis on developing policies, innovation policies, and on environmental policies. In the light of these priorities, the following paper provides, first, an overview of WIPO priorities and developments in 2013. Second, it analyses in more detail the *Marrakesh Treaty* as key WIPO development of 2013. It will provide a background to the Treaty, an overview of the Treaty efforts, an analysis of the objections to the treaty, an account of the treaty obligations, its implementation, and finally, a brief evaluation of the Treaty.

[1] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled, 52 ILM 1312 (2013).

A. Wechsler (✉)
Hochschule Pforzheim, Tiefenbronner Str. 65, 75175 Pforzheim, Germany
e-mail: andrea.wechsler@gmx.de

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Overview of WIPO Priorities and Developments in 2013

In 2013, WIPO policies can be clustered into the following areas: first, copyright policies with, inter alia, the conclusion of the *Marrakesh Treaty*; second, trademarks with developments of the Madrid System, patents with advances in WIPO's patent responsibilities, third, innovation and developing policies, fourth, environmental policies, and fifth, anti-piracy policies. The following section introduces and discusses the achievement of these policy priorities in more detail.

Copyrights: Marrakesh Treaty and Beijing Treaty

In the realm of copyright law, the key development is marked by the conclusion of the *Marrakesh Treaty* which will further be discussed in the second part of this contribution.[2] Another milestone of 2013 in the realm of global copyright policies was the ratification of the *Beijing Treaty on Audiovisual Performances* (Beijing Treaty) in July 2013.[3] The Treaty reinforces the rights of performers in audiovisual works, such as TV series or films. Once 30 countries will have ratified the treaty, it will enter into force. China's early ratification of the Beijing Treaty demonstrates its more and more active role in shaping and supporting WIPO's IP policies. Most noticeable, the ratification happened simultaneously with the inauguration of the new WIPO China Office which demonstrates a further shift towards and emphasis on Asian IP policies on the part of WIPO.[4] The office was set up to provide technical and legal assistance in all areas of intellectual property law to public authorities and institutions. It will also promote the use of WIPO's services in the framework of the Madrid System, the Patent Cooperation Treaty (PCT) and the Hague System.

Trademarks: The Madrid System

In the realm of trademarks laws, the international trademark system has further developed towards internationalisation. In essence, the Madrid System for the International Registration of Marks allows for a cost effective, user friendly and streamlined mechanism for protecting and managing trademarks internationally. In numbers, the Madrid system has noted the highest number of international trademark applications in 2012 with 44,018 applications. In 2014, two further important

[2] See Analysis of Key WIPO Developments: The Marrakesh Treaty below.

[3] WIPO News, PR/2014/763, WIPO Director General Welcomes Ratification by China of Beijing Treaty on Audiovisual Performances, Inaugurates WIPO China Office, 9 July 2013.

[4] See http://www.wipo.int/directory/en/contact.jsp?country_id=38.

countries have joined the international trademark system. On the one hand, India joined the international trademark system on 8 July 2013.[5] India is the 14th of the G/20 economies to join the Madrid Protocol thereby reinforcing the importance of the global registration system. On the other hand, Tunisia joined the international trademark system on 16 October 2013 by depositing its instrument of accession to the Madrid Protocol for the international Registration of Marks.[6] In consequence, the Madrid System now has 92 members. It, thus, demonstrates an unprecedented expansion which not only features India and Tunisia but also Colombia, Mexico, New Zealand, Philippines and Rwanda.

Patents: WIPO's PATENTSCOPE

In the area of patent law, key developments are noticeable in the area of search systems and, thus, increasing transparency in the global patent search. WIPO's policy developments are happening against the background of record numbers of patent filings worldwide. In 2012, global patent filings have seen the fastest growth in 18 years with 2.35 million applications having been filed.[7] The main drivers of this development are both registrations at the State Intellectual Property Office of the People's Republic of China (SIPO) and at the United States Patent and Trademark Office (USPTO).[8] Against this backdrop, WIPO plays a key role in providing technical resources for access to information about new technologies that are disclosed in the framework of international patent applications. Notably, it is the PATENTSCOPE system that provides access to PCT international applications in full text format as well as to 30 national and regional patent collections.[9] By April 2013 PATENTSCOPE had reached 28 million searchable patent documents thereby providing a "historical record of humanity's technology" says WIPO Director General Francis Gurry.[10] By September 2013, this number had increased to 32 million with China's national patent collection having been added to WIPO PATENTSCOPE.[11] Most noticeable, PATENTSCOPE provides both English-language and Chinese biographic data of Chinese patents and patent applications

[5] WIPO News, PR/2013/734, India Joins the International Trademark System, 8 April 2013.

[6] WIPO News, PR/2013/747, Tunisia Joins the International Trademark System, 21 October 2013.

[7] WIPO News, PR/2013/752, Global Patent Filings See Fastest Growth in 18 Years, 9 December 2013.

[8] WIPO News, PR/2014/755, US and China Drive International Patent Filing Growth in Record-Setting Year, 13 March 2014.

[9] Available at: http://patentscope.wipo.int/search/en/search.

[10] WIPO News, PR/2013/735, WIPO's PATENTSCOPE tops 28 Million Searchable Patent Documents, 12 April 2013.

[11] WIPO News, PR/2013/744, China Patent Collection Added to WIPO PATENTSCOPE; Search System Surpasses 32 Million Records, 20 September 2013.

from 1996 onwards. These advances in the provision of access to patent information are well in line with WIPO's transparency and information access policies.

Innovation and Developing Policies

As regards innovation and developing policies, WIPO has continuously aimed at closing the knowledge gap in developing countries and at improving the health care situation in developing countries. Thus, the WIPO Assemblies of 2013 were held with the intention of strengthening the linkages between developed world creators and the worldwide online marketplace.[12] Particular emphasis has thereby been placed on opening the global digital marketplace to developed world creators.[13] Further emphasis was placed on bridging the IP knowledge gap in developing countries by cooperating with the US-based international nonprofit organisation, *Public Interest Intellectual Property Advisors* (PIIPA).[14] Yet another emphasis was placed on furthering medical and pharmaceutical innovation to meet market requirements both in the developed and developing world.[15] Solving pressing public-health needs worldwide has become one of the key priorities of WIPO. WIPO has, thus, partnered with the World Trade Organization (WTO) and the World Health Organization (WHO) to undertake collaborative work to promote access to medical technologies and innovation.

Environmental Policies: WIPO GREEN

A policy area that is more and more important in global IP policy is a distinct focus on the inclusion of environmental policies in IP policies. One of the emanations of these policies is the launch of the WIPO GREEN database which constitutes a new online marketplace for environmentally sustainable solutions for climate change.[16] Essentially, the database was launched on 28 November 2013 to promote "innovation and diffusion of green technologies."[17] It provides a search mechanism for green technology and intellectual property assets in the form of inventions,

[12] WIPO News, PR/2013/746, WIPO Assemblies, 3 October 2013.

[13] WIPO News, PR/2013/745, Director General Opens WIPO Assemblies with Call to Help Developing-World Creators, 23 September 2013.

[14] Davis (2013).

[15] WIPO News, MA/2013/61, WIPO, WTO and WHO Director-General Launch High-Level Discussion on Future for Medical and Pharmaceutical Innovation, 25 June 2013.

[16] WIPO News, PR/2013/749, WIPO GREEN: New Online Marketplace Seeks Environmentally Sustainable Solutions for Climate Change, 28 November 2013.

[17] Available at: https://webaccess.wipo.int/green/.

technologies and patents. It, thus, matches owners of technologies with companies and individuals that seek to license or commercialise a distinct green technology. The database has already gained around 1,000 uploads during a pilot and testing phase and has 35 partners globally.[18] Partners are, *inter alia*, the Asian Development Bank, the Brazilian Institute of Industrial Property, the International Chamber of Commerce (ICC), Siemens (Germany) and the United Nations Global Compact (UNGC). With the launch of WIPO GREEN, WIPO puts renewed emphasis on its policy objective to support the diffusion of green technologies and to provide better access to these for developing countries.

Anti-Piracy Policies: The Global Congress on Combating Counterfeiting and Piracy

A policy area of continued relevance is the global fight against counterfeiting and piracy in relation to which WIPO shows continued involvement. WIPO is well involved in finding innovative responses to the combat of trade in counterfeit and pirated goods. One of the major events of 2013 with WIPO involvement was the 3-day *Seventh Global Congress on Combating Counterfeiting and Piracy* in Istanbul.[19] Essentially, over 850 delegates of more than 100 countries discussed global initiatives to stop trade in counterfeit and pirated goods. In the framework of this congress, WIPO joined forces with the World Customs Organization (WCO), INTERPOL, the International Chamber of Commerce (ICC), the Business Action to Stop Counterfeiting and Piracy (BASCAP), and the International Trademark Association (INTA). Even though WIPO recognises the continued issue of counterfeiting and piracy because of socio-economic variables, such as poverty, it puts particular emphasis on fostering respect for intellectual property to—says WIPO Director Francis Gurry—"safeguard the creative and innovative fabric of our societies."[20] In consequence, the Congress—as powerful public-private partnership—has once again constituted an important milestone in formulating global policies and strategies against counterfeiting and piracy.

[18] WIPO News, PR/2013/749, WIPO GREEN: New Online Marketplace Seeks Environmentally Sustainable Solutions for Climate Change, 28 November 2013.

[19] WIPO News, PR/2013/736, Seventh Global Congress on Combating Counterfeiting and Piracy Opens in Istanbul, 24 April 2013.

[20] WIPO News, PR/2013/736, Seventh Global Congress on Combating Counterfeiting and Piracy Opens in Istanbul, 24 April 2013.

Analysis of Key WIPO Developments: The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled

Out of all WIPO priorities and developments in 2013, it is the conclusion of the *Marrakesh Treaty* that warrants closer analysis. In brief, the *Marrakesh Treaty* was signed by 51 countries on 28 June 2013 in the framework of the WIPO diplomatic conference in Marrakesh from 17–28 June 2013.[21] It constitutes a legally binding international copyright treaty that facilitates access to books and other published works of persons who are blind or have a print disability. In essence, the treaty acknowledges that outdated copyright laws act as a barrier to print disabled people's access to information and, thus, allows in a very broad way almost any published work to be transcribed into an accessible format and distributed under its terms.[22] Furthermore, it allows for the exchange of accessible published works cross borders from one authorised entity to another or to an individual. It will enter into force 3 months after ratification by 20 countries.

Treaty Background

The so-called "book famine" describes the situation, in which only a small fraction of books published is available in accessible format which blind and other print disabled people can read. It constitutes the background to the Treaty conclusion insofar as there are 285 million affected people worldwide with print disabilities.[23] Out of these 285 million people, it is about 90 % of them that live in least developed countries which are, thus, disproportionately burdened with the cost of medical care and other services. At the same time, it has been shown that before the Treaty conclusion there were only some 1–7 % of the world's published books ever made it into accessible format.[24] Moreover, new technologies have substantially changed the landscape for accessible books. In particular, the non-profits such as the digital Accessible Information System (DAISY) Consortium and Benetech have created more versatile electronic platforms for VIP (visually impaired people) access[25] requiring the legal framework to account for such technological advances.

[21] As of March 2014, 60 countries had signed the Treaty.

[22] The African Union of the Blind, Fact Sheet on the Marrakesh Treaty, available at: http://www.afub-uafa.org/news/fact-sheet-marrakech-treaty-blind.

[23] Scheinwald (2012), p. 453 (463).

[24] World Blind Union (2014).

[25] Lewis (2013), p. 1311 (1315).

The book famine, however, was only one motif for the Treaty conclusion. Regulatory diversity—a patchwork of national copyright laws—further motivated the push for the Treaty. The mechanism for allowing access to copyright books is the provision of exemptions to copyright.[26] These exemptions are expected to be in line with the Berne Convention and the so-called three-step-test for exemption from illegality an otherwise rights-infringing reproduction of a person's work. Moreover, the *Rome Convention*,[27] a 1980 treaty that protects performers, producers of phonograms and broadcasting organisations offers limited opportunities for exempted use of copyrighted material to benefit visually impaired persons. On a national level, however, there were only 57 countries in 2006 that had specific provision in their national copyright laws that would permit activity to assist visually impaired people unable to access the written word.[28] Overall, however, little consistency was noticeable in national laws and the disadvantages of regulatory diversity striking.[29] Moreover, it was widely recognised that the balance in international copyright law was struck not in favour of users but in favour of producers of intellectual property.[30] In consequence, the need for harmonised international copyright policies for better access to information for the visually impaired was evident.

Treaty Efforts

The core treaty effort that led towards the *Marrakesh Treaty* aimed at helping to end the book famine faced by blind people or the visually impaired or otherwise print disabled. As such, the Treaty fits in well with existing initiatives to benefit the disabled, such as the *UN Convention on the Rights of Persons with Disabilities* (UN CRPD) of 2006.[31] At the same time, however, it is striking that it is a rather old initiative that took its time to come to fruition. In 1982, WIPO and the *UNESCO Working Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright* issued a report containing "model exceptions for national copyright laws."[32] This early report was followed by a series of negotiations on the issue from 2000 onwards. In 2006, the WIPO Standing Committee on Copyrights and Related Rights issued a "*Study on the Copyright Limitations and Exceptions for the Visually Impaired*."[33] Said study constitutes an

[26] Hely (2010), p. 1369 (1391).

[27] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 12 October 1961, 496 U.N.T.S., I-7247, p. 43.

[28] WIPO Standing Committee on Copyright and Related Rights, 15th Session, 11–13 September 2006, Study on Copyright Limitations and Exceptions for the Visually Impaired, SCCR/15/17.

[29] Lewis (2013), p. 1309 (1309–1320).

[30] Scheinwald (2012), p. 451 (473).

[31] Sloan (2014).

[32] de Beer (2013), p. 884 (887).

[33] WIPO Standing Committee on Copyright and Related Rights, 15th Session, 11–13 September 2006, Study on Copyright Limitations and Exceptions for the Visually Impaired, SCCR/15/17.

in-depth analysis of provisions in international treaties relevant to copyright exceptions for visually impaired people as well as case studies of national provisions. It recommends collaboration between all stakeholders to ensure facilitated access and further debate about an international treaty.

Credit for the renewed focus on the issue into global IP policy-making goes to Chile which re-introduced the topic of copyright exceptions for accessible format copies in 2007. In addition, the Treaty also constitutes the product of a number of initiatives that have lobbied for the adoption of the Treaty both at the national and the international level. Supporters of the treaty have, *inter alia*, been the African Union of the Blind,[34] the World Blind Union (WBU) and Knowledge Ecology International (KEI). Following the push of the topic by non-governmental organisations, a draft instrument was presented in 2008. Subsequently, it became the subject of extensive comments by publisher organisations in opposition to the Treaty. In response to this opposition developing countries expressed a high degree of support for a binding treaty while the United States (US) argued for an alternative proposal which suggested for non-binding soft recommendations.[35] Moreover, the European Union (EU) suggested the retention of the right to withhold their permission for the transnational sharing of accessible works by publishers.[36] Eventually, however, the final text of the Treaty was presented that incorporated the earlier proposals to some degree.[37] Upon adoption of the treaty, its historic nature has immediately been hailed by its stakeholders.[38]

Treaty Objections

Even though Scheinwald's question "Who Could Possibly be Against a Treaty for the Blind?"[39] describes well the instant reaction to treaty efforts benefiting the blind, there have nevertheless been objections to the treaty in its earlier and current format. To begin with, there was the overarching discussion right from the beginning whether or not there was a need to provide for a binding treaty at all. Thus, forinstance, non-State parties such as the *International Publishers Association* argued that a treaty stating copyright exemptions would be the "crudest and the bluntest tool in a large toolbox and were nineteenth century solutions to twenty-first century problems."[40] A number of arguments were provided against a WIPO

[34] Available at: http://www.afub-uafa.org/.

[35] For a detailed discussion of the various treaty proposals see Kongolo (2012), p. 812 (812–833).

[36] de Beer (2013), p. 884 (887).

[37] Hely (2010), p. 1369 (1382).

[38] WIPO News (2013); WIPO Magazine (2013), p. 5 (7).

[39] Scheinwald (2012), p. 451 (458).

[40] Scheinwald (2012), p. 469 (480).

copyright-exemption treaty for visually impaired persons. Thus, it was argued that there was an irreconcilable conflict between IP right-holders, on the one hand, and the visually impaired on the other hand. After all, intellectual property protection is seen as part of human rights protection and a WIPO treaty for the blind was seen to infringe the rights of copyright holders to benefit from their work.[41] Moreover, it was argued that there was no rationale for limiting the treaty language to the visually impaired rather than to allow broad exceptions for all those that cannot afford access to copyrighted works altogether.[42] Finally, it was argued that an increase of copyright exemptions would further drive global piracy and loss of profits. Rather than being outright against a global copyright treaty, it was a number of countries that expressed their more subtle concerns about the suggested protection mechanisms.[43]

Such concerns translated into initially four different draft instrument proposals before the respective WIPO committee—that is a treaty drafted by the *World Blind Union* (WBU) and one by the African Group, a consensus instrument suggested by the United States (US) and a joint recommendation suggested by the European Union (EU) delegation.[44] The US, in fact, did express its support for the timely consideration of a copyright-exemption, but it was eventually not among the Treaty's 55 first signatories.[45] Nevertheless and despite these critical evaluations, it was eventually the insight that no national copyright protection scheme and no international coalition had been able to solve the issue of access for the visually impaired—thereby warranting an individual treaty for the benefit of the disabled.

Treaty Obligations

Having evolved out of a long policy discourse around policy exceptions for the visually impaired, the *Marrakesh Treaty* follows a new paradigm for global copyright protection. The limited-exceptions paradigm is somewhat replaced by a social disability model that sets mandatory ceilings to copyrights.[46] In implementing this paradigm shift, the *Marrakesh Treaty* is divided into a Preamble followed by 18 Articles.

Article 2 is devoted to providing the relevant definitions to the Treaty. Thus, Article 2(a) sets out works covered and does not allow for the contents of a work to be changed. These are "literary and artistic works, in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available

[41] Hely (2010), p. 1369 (1381).
[42] Scheinwald (2012), p. 497 (501).
[43] Hely (2010), p. 1369 (1391).
[44] Kongolo (2012), p. 812 (812–833).
[45] Saez (2013).
[46] Harpur and Suzor (2013), p. 745 (766).

in any media." Article 2(b) rather broadly defines the term "accessible format copy" in a way that allows access to a book as "feasibly and comfortably as a person without visual impairment or other print disabilities." Article 2(c) defines the term "authorized entity" as "an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis." Article 2(c) goes on to define the tasks of authorised entities. Consequently, it supports the operation of initiatives such as WIPO-facilitated *Trusted Intermediary Global Accessible Resources* (TIGAR) and the EU-facilitated ETIN initiatives. They remain their relevance for the creation of networks of authorised entities for the cross-border exchange of accessible format copies of works.

Article 3 defines "beneficiary persons" as a person who "is blind, has a visual impairment or a perceptual or reading disability [. . .], or is otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading." This definition is rather crucial as it defines which persons can benefit from the obligations in the treaty.

In Article 4, the Treaty sets out the obligations for its member States. This is a rather notable provision as the Treaty thereby constitutes one of the rare international instruments that make exceptions mandatory thereby introducing a ceiling on the strength of copyright laws. Article 4 requires exceptions to domestic copyright law for visually impaired and print disabled people thereby allowing authorised entities to make accessible copies of works without having to ask permission from rightholders. Article 4 reads: "contracting parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public [...]." In contrast, they "may" provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons. The Treaty leaves it to the member States to decide whether to make the exception or limitation subject to remuneration.

Rather crucially, Articles 5 and 6 deal with the question of cross-border exchange of accessible format books. They allow for import and export of accessible versions of books and other copyrighted works—without copyright holder permission. In this context, it is noticeable that only so-called "authorized entities," such as blind people's organisations, can send accessible books under the treaty terms. However, as far as the import or reception of books is concerned, the treaty allows the receipt either by the authorised entities or directly by the visually impaired or print disabled individuals. In concrete terms, Article 6 sets out that "the national law [. . .] shall also permit them to import an accessible format copy for the benefit of beneficiary persons, without the authorization of the rightholder."

Article 7 deals with technological protection measures (TPMs) by making it legal to circumvent TPMs so that a person with a print disability can get access to books. Article 8 deals with respect for privacy and Article 9 with cooperation to facilitate cross-border exchange. Thus, the Treaty requires WIPO to establish information-sharing procedures in the form of a voluntary register of institutions assisting people with print disabilities for the enhancement of collaboration

between its member States. Article 10 deals with general principles on implementation, Article 11 with general obligations on limitations and exceptions, Article 12 with other limitations and exceptions, and Articles 13–18 with administrative matters.

Treaty Implementation

Following the adoption of the Marrakesh Treaty, governments are now under the obligation to speedily sign and ratify the treaty. At the time of writing, eight States had so far ratified the Treaty.[47] Moreover, contracting parties are required to amend their national copyright laws to bring their exceptions and limitations in line with international copyright law. A number of countries will certainly need support and guidance by WIPO as they seek clarity on how to implement the Treaty.[48] In addition to incorporating the *Marrakesh Treaty* into national laws, governments are now under pressure to in fact implement the Treaty in conjunction with blind people's and disability organisations and other relevant stakeholders.[49] In particular, States should budget the requisite financial resources to support authorised entities and statutory organisations in their implementation of the Treaty. Blind people's organisations and other bodies will also need support in capacity building to ensure that they are able to take advantage of the opportunities that the *Marrakesh Treaty* creates to share books. One of the tasks, for instance, will be to exchange the many thousands of copies of works in accessible formats currently held in special libraries in different countries across borders. One of the greatest tasks, however, will be to reach the beneficiary persons in developing countries who are not yet within the reach of charities and their services. If implementation is successful, it has the potential to make a difference to the lives of millions of blind and print disabled people.[50] One of the right steps into this direction is the establishment of the *Accessible Books Consortium* (ABC) by WIPO in late June 2013.[51] Essentially, ABC was created to support implementation of the Marrakesh Treaty on a practical level. It focuses, in particular, on the provision of technical skills, on the promotion of inclusive publishing and on building an international database of accessible books. ABC is also responsible for the TIGAR book exchange, a database of the titles of over 238,000 accessible format books in 55 languages from libraries all around the globe.[52]

[47] See http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year= ANY &end_year=ANY&search_what=N&treaty_id=843.

[48] Bammel (2013), p. 7.

[49] Sloan (2014).

[50] Pescod (2013), p. 5 (6).

[51] Harris (2013).

[52] Harris (2013).

Treaty Evaluation

In general, public and private responses to the Treaty conclusion have been very positive. Thus, it is recognised that the Treaty sets a historic precedent and will have a huge impact on accessibility for people with print disabilities. Its significance lies in the fact that it constitutes the first multilateral instrument that establishes harmonised standards for exceptions and limitations in copyright law rather than for the protection of IP rights as such.[53] The Treaty has, thus, been regarded as a "resounding victory for supporters of disability rights."[54]

In particular, public interest groups are very content with the Treaty as such. Nevertheless, there is still some light criticism of its respective format. Thus, it has been pointed out that the Treaty allows for options loopholes that might reduce its effectiveness.[55] For instance, provisions allow, under certain circumstances, that governments exclude books from the treaty that are already "commercially available" in accessible formats. In particular in countries that use the three-step test for assessing the exceptions and limitations in copyright law, it was feared that a broad interpretation would allow for a broad interpretation of commercial availability.

On a policy level, however, the most noticeable change is the first-time introduction of ceilings in international copyright law. The introduction of mandatory exceptions to copyrights can be interpreted as the first successful initiative to limit intellectual property rights in international law through the introduction of mandatory ceilings rather than minimum standards. This paradigm shift in international copyright law is rather noteworthy in that it comes at a time in which bilateralism rather than successful multilateral initiatives is the norm.

Conclusion

In conclusion, 2013 has been a year yet again marked by an important milestone in WIPO policies. Most laudable is the *Marrakesh Treaty* with its potential to remedy the global book famine. By creating a mandatory exception and limitation regime in international copyright law, it has created an unprecedented ceiling in copyright law that limits the rights-based approach to intellectual property law. Moreover, by creating an international import/export regime for the exchange of accessible books across borders it has created a global precedent in transnational IP policies.[56] These WIPO policies and achievements come at a time in which significant opposition to ever stronger IP policies is noticeable. This is evident in the failure of the *Anti-Counterfeiting Trade Agreement* (ACTA) as well as in the watering down of IP

[53] de Beer (2013), p. 884 (887).

[54] Harpur and Suzor (2013), p. 745 (767).

[55] See evaluation of the Africa Union of the Blind, available at: http://www.afub-uafa.org/.

[56] Trimble (2014).

language in *Trans-Pacific Partnership Agreements*. WIPO's greatest achievement is, thus, not the reduction of the book famine worldwide but the establishment of a new framework for global copyright protection. It breaks the dominance of both bilateralism and of international content industries in global copyright debates by introducing a multilateral positive obligation on member states to "take all appropriate measures to ensure that persons with disabilities [can enjoy] access to cultural materials in accessible formats."[57] In conclusion, the Treaty is to be applauded as carefully, yet successfully addressing very specific humanitarian purposes within unique circumstances.

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[57] Cf. Convention on the Rights of Persons with Disabilities, Article 30(1)(a).

Part IV
Book Reviews

Sanford E.Gaines, Birgitte Egelund Olsen, Karsten Engsig Sørensen (Eds.), Liberalising Trade in the EU and the WTO: A Legal Comparison

Cambridge University Press, 2012; ISBN 9781107012752

Wolfgang Weiß

The volume is dedicated to comparing EU and WTO legal approaches to problems caused by liberalisation of cross-border trade. It comprises the results of the research project "WTO law and EU law: legal conflict and integration" steered from the law department of the Aarhus University, Denmark. Its 18 chapters attempt to explore the legal state of affairs in both EU and WTO law regarding a broad range of contemporary challenges to national autonomy by striving for harmonised rules in goods and services trade. The book not only deals with a broad range of specific trade topics and fundamental legal issues of international trade relations, but also addresses basic fundamental structures of trade regulation both in WTO and EU law, such as the concept and notion of non-discrimination or the compatibility of trade and non-trade concerns. The red thread throughout the book is a comparative perspective which contrasts approaches and solutions adopted under EU and WTO law. The book serves the ultimate aim of fostering "constructive coordination" of the EU and WTO systems (see the introductory first chapter "Comparing two trade liberalisation regimes" by *Gaines/Olsen/Sørensen*, p. 8).

The first chapter sets the scene as it explains the approaches adopted, introduces the core questions which the authors evolved around and unites some of the conclusions relevant insofar. The research collected in the volume is mindful of both the convergences as well as the differences between the EU and the WTO and shares the conviction that both can learn from each other. *Gaines/Olsen/Sørensen* conclude, for example, that the EU and the WTO share many similarities in the application of non-discrimination disciplines whereas the treatment of mere

W. Weiß (✉)
German University of Administrative Sciences Speyer, Freiherr-vom-Stein-Str. 2, 67346 Speyer, Germany
e-mail: Weiss@uni-speyer.de

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European Yearbook of International Economic Law 6,
DOI 10.1007/978-3-662-46748-0_17

restrictions which do not discriminate against foreign goods differs significantly even though the authors perceive a certain degree of convergence (p. 16). While one must agree with the authors that the CJEU revoked the extensive scope of the ban on non-discriminatory restrictions, the issue of non-discriminatory restrictions under WTO law is far from being less complex than under EU law, as it is subject to diverse discourses (one may think of the likeness issue or the PPM (disciplines on process and production methods) debate which have a bearing on the issue of whether WTO law also reviews non-discriminatory restrictions under WTO law; hence, assessing the scope of the non-discrimination test under WTO law for comparative purposes needs a more comprehensive view; such more comprehensive view is reflected in the chapter by *Cottier/Oesch* on non-discrimination (see in particular pp. 149–150). *Gaines/Olsen/Sørensen* also present the approach adopted in several chapters of the book that WTO law should develop towards EU law, but express their doubts toward its feasibility and even desirability (p. 15). They rightfully state the reasons for this: different ambitions in the EU (internal market, political union, legislative competences) and WTO. It is, however, irritating when the WTO is called a "legislator" (p. 17) as no legislative competences have been transferred to it (maybe apart from Art. VI GATS). Admittedly, the WTO judicial branch is tempted to step in this gap and, like any judicial organ, has a limited lawmaking function.

After the first chapter making up Part I, the contributions are grouped in three more parts: Part II and Part III address horizontal issues of institutions, decision making and core liberalisation disciplines, whereas Part IV is dedicated to vertical, sector-specific issues.

Part II deals with the "Framework" within which trade liberalisation both in the EU and the WTO takes place. It addresses structural, institutional issues of the legislative and judicial decision-making in both organisations. *Amin Alavi*'s article "Negotiating in the shadow of good faith" explores the institutional settings of legislative and judicial decision-making in the EU and WTO with a view to their respect for good faith. *Alavi* rightly identifies pivotal structural differences between the EU and the WTO: the strong position of the European Commission, the focus of negotiations in the EU on problem solving in contrast to the mere negotiation mandate under the WTO, and the WTO's dependence on consensus to which, however, a higher chance for legitimacy is attributed (pp. 40–42). *Jan Wouters*, *Dominic Coppens and Dylan Geraets* explore "The influence of general principles of law" in EU and in WTO law. They show that the role of general principles within EU and WTO law is considerably different as general principles in EU law can form the basis for subjective rights, for exceptions from fundamental rules or for challenges to EU acts, whereas general principles in the WTO only guide the interpretation of its law and can never be used to challenge domestic measures. Hence, the differences between WTO law as part of international law and EU law as a unique corpus of law become very tangible. Subsequently, *Bugge Daniel* analyses the role of financial sanctions in fostering compliance in each system. The underlying institutional structures differ considerably as financial sanctions in the post-litigation phase are imposed by the Court of Justice of the EU, whereas financial sanctions in WTO law are provided for in the procedures prescribed in Article 22 of

the Dispute Settlement Understanding which formally grant the decision making power to the Dispute Settlement Body which however automatically adopts the request by the complainant. Hence, enforcement becomes a bilateral matter (p. 97). The final piece in the Framework part of the book is *Pieter Jan Kuijper's* thorough study on the European Court of Justice and the WTO Appellate Body (pp. 99–137), which again highlights the many facets of commonalities and differences. Both institutions perceive themselves as courts, and this self-perception needs more confirmation in the WTO system. But their role is distinct as the CJEU can function as a constitutional court, whereas the AB is limited to the application of WTO and related international law for the settlement of disputes. This reacts to their conceptions for example regarding methods of interpretation of their applicable law or regarding their relationship to international law, not to mention direct effect or individual rights. Here, *Kuijper* perceives the reason for tensions between EU and WTO law (p. 136).

Part III comprises the four chapters dealing with analyses of core horizontal issues of substance: *Thomas Cottier* and *Matthias Oesch* tread the concept of non-discrimination as a "leading principle" (p. 142) of both EU and WTO law ("Direct and indirect discrimination in WTO and EU law"), followed by *Karsten Engsig Sørensen*'s thoughts on non-discriminatory trade restrictions ("Non-discriminatory restrictions on trade", pp. 176–202). The compatibility of trade and social objectives is the topic of the homonymous chapter by *Sanford Gaines and Birgitte Egelund Olsen* (pp. 203–233). *Johan van de Gronden* concludes Part III with a comparative investigation of services trade ("The freedom to provide services", pp. 234–257).

The comparison of the interpretation and application of the non-discrimination obligation in EU and WTO by *Cottier/Oesch* shows that the different ambitions and levels of integration are mirrored in a different operation of non-discrimination (p. 173) even though the starting point of the basic essence of non-discrimination is the same. The authors rightfully are aware of the need for placing the assessment of non-discrimination within the broader issue of policy space available to WTO or EU members as the different systems address functionally comparable issues under different headings (e.g. whereas in the EU, the CJEU accepts implicit, inherent justifications—which the WTO Appellate Body hardly does—WTO law integrates the need for allowing non-trade concerns by peculiar notions and debates about likeness or PPMs, see pp. 149, 159, or by debating the concept of non-discrimination itself; the latter aspect unfortunately has not been dealt with by *Cottier/Oesch* even though some Appellate Body reports give rise to it). Apart from commonalities, the chapter highlights differences, such as the full realisation of non-discrimination in fiscal matters in the EU as Article 36 TFEU does neither apply to Article 110 TFEU nor to Article 30 TFEU, in contrast to the general applicability of Article XX GATT (pp. 149, 162), the strong constitutional impact in EU law transforming non-discrimination into a ban against any excessive product regulation (p. 166), or the treatment of PPMs in EU law to the effect that EU Member States enjoy greater leeway in product differentiation. *Cottier/Oesch* state the counterintuitive character of the latter difference as one should expect

WTO law to offer more leeway to the States insofar (p. 174). *Cottier/Oesch* hence postulate that the WTO must open up for a recognition of more policy goals (p. 175). Indeed, there are clear indications to that effect in some Appellate Body reports' analyses of the "no less favourable treatment" requirement.

Karsten Engsig Sørensen's subsequent chapter explores the move of EU law's free movement provisions towards a broad review also of non-discriminatory restrictions under EU law and compares this to the reluctance under WTO law. The hesitant approach in the WTO can easily be explained by the high interferences with domestic regulation which reviewing also non-discriminatory measures entails. Article XI GATT has been construed in the GATT Tuna Panels and in the WTO *US—Shrimp* case as a tool against non-discriminatory measures, and the Gambling reports' understanding of Article XVI GATS can be counted to this context as well. SPS and TBT rules explicitly address non-discriminatory measures. *Sørensen* shows the limitation the *Keck* decision brought as certain types of national measures no longer fall under the scope of review. The conclusion that the development in the EU had been reversed and that EU and WTO law had moved closer (p. 201), seems exaggerated. *Sørensen* himself has underlined the many differences between the two systems, for example with regard to the actual application of the proportionality test or the burden of proof.

Sanford E. Gaines and *Birgitte Egelund Olsen* focus their chapter on trade and social objectives on a comparison of the interpretation and application of Article 36 TFEU and the *Cassis* like implied exceptions, on the one hand, and Article XX GATT/Article XIV GATS on the other, with some occasional reference to the SPS Agreement when addressing animal life and health issues. This of course reflects only part of the rules relevant for assessing the balance between trade and social objectives.[1] *Gaines/Olson* underline the differences of the two systems, such as the introduction of Court-made exceptions in EU law (which however has found some limited replication by the Appellate Body, as mentioned above), the use of the chapeau of Article XX as the "chief constraining factor" (p. 213) or the treatment of PPMs (pp. 226 et seq.). Some aspects of a comparison of the exceptions in WTO and EU law lack mention (the debate about exterritorial scope of Article XX GATT and the turn in the interpretation of the itemised exceptions in Article XX GATT from a narrow to a broad reading, going hand in hand with more recent attempts to expand the acceptable justifications by opening up the concept of public morals or the non-exhaustive list in Article XX(d) GATT, a development which is only briefly alluded to at p. 230). The alleged convergence in proportionality assessment between EU and WTO law (pp. 211–212, 215, 229, but see pp. 231–232) appears precipitate, all the more as previous studies on WTO proportionality[2] remain unnoticed. Insofar, the statements by *Sørensen* in the preceding chapter (p. 201)

[1] See for a list of relevant trade rules Schefer (2010), pp. 269–277; for a highly detailed analysis Conrad (2011), pp. 115–117.

[2] E.g. Van den Bossche (2008), p. 283; Andenas and Zleptnig (2007), p. 371. See also Cheyne, in the reviewed volume, p. 309 (325, fn. 89).

seem more accurate. Again, *Gaines/Olsen* convincingly state the existence of numerous similarities and differences and remind of the different structures and goals. In particular their observation of "free movement" parlance in EU law in contrast to free trade under WTO law is meaningful. The WTO dispute settlement about the EU seal ban finally mentioned by the authors as an occasion where different assessments in EU and WTO might come to light, has recently been decided by the Panel in a way which basically recognises the justification of the EU ban, but criticises discrimination in the exceptions to the ban (WT/DS400/R, WT/DS401/R). Hence, the chapeau of Article XX GATT, and the comparable inherent assessment under Article 2.1 TBT Agreement, confirmed its character as chief constraining factor again.

The last horizontal chapter of Part III addresses the development of services trade in the EU and in the WTO. *Johan van de Gronden* categorises the relevant EU case law development in four stages which culminate in the insertion of good governance concerns by the case law (pp. 240–244). *Van de Gronden* then traces core elements of the GATS. Particular focus is placed, first, on services of public interest where he recommends WTO law to follow the relevant ideas in EU law so that conferring exclusive rights is permissible as long as there is competition for it in which providers from everywhere can participate. Second, the author proposes good governance concepts such as the review of domestic measures for consistency and systematic coherence applied by the CJEU in its proportionality assessment to be adopted by the Appellate Body in necessity review, pp. 255–256. Hence, despite considerable differences in the conception of services trade in the two systems, he pleads for some lessons learnt in EU law to be transferred to WTO law.

These four chapters make up the analysis of the core disciplines of non-discrimination, market access and general exception provisions both in EU and WTO law whose further development is pivotal for the path the two systems may follow in their future development. The material presented shows that because of the significant differences, the WTO cannot be expected to adopt a similar rigorous approach to market access and non-discriminatory barriers to trade as in the EU. The core development in the EU insofar was, besides legislative harmonisation, the dynamic role of the CJEU in interpretively transforming the original non-discrimination disciplines into bans against any impediment to trade. The corollary of this approach was the need to enlarge the justification space for domestic measures which the Court finally accepted in *Cassis de Dijon*. Hence, one can learn that as soon as trade liberalisation disciplines open up for addressing non-discriminatory restrictions, the need for an enlarged room for *manoeuvre* for justifying domestic measures taken by the Member States for the sake of non-trade concerns follows. This lesson has not been recorded in the four chapters of Part III. Neither have they explicitly addressed that such developments have entered WTO law as the SPS and the TBT disciplines go beyond non-discrimination obligations requiring trade restrictions not to be more burdensome than necessary (see Article 2.2 TBT and Article 2.2 SPS Agreement), and at the same time provide for a non-exhaustive list of justifications in Article 2.2 TBT Agreement. In the view of the reviewer, the new approach discernable in the two agreements has its

repercussions also on non-discrimination and market access rules in GATT/GATS. At least some Appellate Body reports show that the no less favourable treatment requirement became subject to considerations about legitimate public policy aims, as has previously taken place in the likeness debate ("aims and effects test"). Hence, such opening up for additional policies—beyond those in Article XX GATT/Article XIV GATS—may lead to an interpretive transformation of WTO non-discrimination disciplines into restrictions also against non-discriminatory measures, albeit to a limited extent. Here, one has to recollect the considerable differences between EU and WTO law stressed in the four chapters which warns against imitating such developments in WTO law. One has to add here that because of these differences, EU non-discrimination provisions have left far behind the basic idea of equality. Still, the focus and rationale of WTO non-discrimination is significantly different from EU-non-discrimination as the EU follows a positive market integration concept and is no longer based on equality of competitive conditions but on an internal market with undistorted flow of the goods/services produced under the most competitive conditions associated with a redistribution of regulative powers among EU Member States. As a consequence, equality and equal conditions of competition may no longer be the starting point for an analysis of EU non-discrimination rules, and hence neither for their comparison to WTO non-discrimination disciplines.

Part IV collects the remaining nine chapters dealing with sector-specific issues such as the treatment of technical regulations, consumer labelling, State aid and subsidies, public procurement, protection of intellectual property or anti-dumping and safeguard practices. As the comparative approach of the book is continued, these chapters give an account of approximation of the approaches or even solutions in both systems. Hence, the studies will disclose issues where either EU law needs to be brought in conformity with WTO law because of its compliance obligation or where there is need of adaptation of the one system to the other.

The article by *Karsten Engsig Sørensen* ("Technical regulations and their notification", pp. 261–287) compares the general disciplines on technical measures in both the EU and WTO. The analysis shows that banning discriminatory treatment which takes place in both systems is not sufficient to counteract trade restrictions. Technical regulations differ, and the mere difference may turn out to be trade restrictive. Hence, disciplines also in WTO law prohibit non-discriminatory regulations unless justified by legitimate objectives. While divergent rules may be harmonised by EU legislative acts, such way of harmonisation is not feasible for the WTO which instead provides for obligations which push States to comply with international standards, p. 267. The remainder of the chapter is dedicated to the notification procedures which allow for monitoring the necessity of intended technical regulations and thus contribute to the reduction of trade barriers. *Sørensen* convincingly proves that the EU notification procedures are more effective, all the more because they are subject to private enforcement, p. 286, and finally proposes that the WTO notification process should be tailored closer to the EU model. *Pernille Wegener Jessen*'s contribution ("Rules on state aid and subsidies", pp. 288–308) highlights the differences and commonalities of the notions of State

aid or subsidies law in EU and WTO and their respective enforcement systems. Her analysis proves that the EU policy is more lenient because of the existence of justification provisions so that State aids legal under EU law might still be objectionable under WTO law. Hence, she advices WTO law to open up space for justifications. One may remind, however, that actionable subsidies in WTO law are not *per se* illegal. Further circumstances must be present before subsidies may actually become subject to countermeasures in WTO law, see Article 5 SCM Agreement.

Ilona Cheyne addresses the important legislative tool of consumer labelling requirements ("Consumer labelling in EU and WTO law", pp. 309–332). The comparison underlines the considerable convergence of EU and WTO law despite the diverse approaches and the very limited number of rules on this complex regulatory problem in WTO law. *Cheyne* analyses in detail the most relevant rule of Article 2 TBT Agreement and the debate about TBT coverage of non-product-related PPMs which meanwhile appears to have implicitly been approved of by the Appellate Body.[3] The role of implicit and explicit justifications for Articles 2.1 and 2.2 TBT Agreement has also been subject to recent AB reports.[4] Her final conclusions recommend the WTO to be guided by solutions at the EU level.

Helle Tegner Anker ("The precautionary principle and beyond", pp. 333–359) presents an exploration of core elements of a common understanding of the precautionary principle in EU and WTO law. The author shows that the idea of risk assessment envisaged in Article 5.1 SPS Agreement became an important instrument in the EU's determination of precautionary measures, so that mere ethical concerns may not allow for precaution even under EU law (pp. 347, 349 and 356). *Anker* also diligently examines the SPS disciplines on science and their application in particular in the Hormones disputes where the AB finally softened the Panel's approach, pp. 345–346, as well as the current state of GMO related decision making in the EU. Recently, the EU again had to adopt a decision about a GMO maize developed jointly by DuPont and Dow Chemical after the CJEU[5] had clarified the relevant rules to be followed under EU law for the authorisation of GMO crops and after the General Court had declared that the Commission must submit to the Council a proposal for a decision on the authorisation of the cultivation of these crops.[6] Recently as well, the General Court annulled the Commission's authorisation of the GMO Amflora potato in 2010 for breach of procedural rules.[7]

[3] WTO, report of the Appellate Body, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 183 et seq.

[4] WTO, report of the Appellate Body, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, para. 169 et seq.; WTO, report of the Appellate Body, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, para. 211.

[5] CJEU, *Pioneer Hi Bred Italia*, C-36/11.

[6] GC, *Pioneer Hi-Bred International v Commission*, T-164/10.

[7] GC, *Hungary v Commission*, T-240/10.

The contribution finally invites to reconsider the role of ethical or other non-scientific concerns in the decision-making about GMOs.

The title of chapter 14 written by *Michael Steinicke* directly reflects the question pursued: "Government procurement – can the WTO learn from the EU regime?" (pp. 360–384). *Steinicke* explains the core elements of government procurement rules in the EU and WTO and then traces the areas in which the WTO should learn from EU experiences, such as in electronic procurement (where he points to the precursor of the meanwhile adopted GPA 2012), certain tendering procedures, or regarding issues usually deemed outside procurement such as concession contracts and in-house provision.[8]

An area of potential clash between EU and WTO law is the EU customs law which is looked at in the contribution "Customs Law: the challenge of non-centralised customs administrations in the EU" by *Carsten Willemoes Jørgensen*. Customs law is subject to intensive international harmonisation and to interpretive endeavours by the Appellate Body as *Jørgensen* demonstrates with regard to classification, valuation and origin of goods for customs purposes. Hence, these may result in contradictions to approaches by the CJEU which the author scrupulously records. *Jørgensen* investigates the relevant WTO dispute settlement reports and compares their statements with pertinent utterances by the CJEU. Concluding, he comments on the tension between uniformity requirements concerning customs administration (Article X:3 GATT) and decentralised EU customs administration.

Matthew James Elsmore's contribution "Comparing regulatory treatment of intellectual property at WTO and EU level" (pp. 412–439) compares the pertinent legal framework for IPR of the EU and the WTO along the themes of history, influence by the WIPO, variance in IPR standards, gaps in both systems, and effects of TRIPS for the EU. Overall, the chapter shows that EU IPR standards have to be assessed, with all due caution, as going beyond the requirements of TRIPS, but with possible shortcomings on the enforcement side (pp. 436–437). The contribution concludes with an invitation for further research, concerning e.g. the application of TRIPS compared to that of EU IPR law. In his postscript the author hints to the debate about ACTA's compliance with EU law. From then, ACTA finally got its quietus from the European Parliament.

Laura Rovegno and *Hylke VandenBussche* present a rather economic analysis of the EU anti-dumping practices in view of relevant WTO rules ("Anti-dumping practices in the EU: a comparative analysis of rules and application in the context of the WTO", pp. 440–466). They first explore five peculiarities of EU anti-dumping law, i.e. the requirement of community interest, the cumulation of effects, the lesser duty rule, the high burden on non-named exporters, and the enforcement by a single agency system. The main focus of the chapter, however, is a thorough economic analysis of the EU anti-dumping practices with regard to its use by the EU, its outcomes, and the countries targeted and the sectors involved. The authors present

[8] These issues have recently been dealt with in great detail by Wang et al. (2011), p. 252.

the conclusion that the EU practice was in conformity with the "WTO general framework" (pp. 464–465). The analysis would have benefited from considering the WTO dispute settlement reports where specific EU anti-dumping measures and some of its rules were found not in conformity with WTO law.[9]

The final contribution by *Henrik Andersen* on "EU safeguards applications and WTO law" (pp. 467–490) investigates the EU practice on the escape clauses provided for in the EU Import Regulation and compares it to the exigencies of relevant WTO rules, in particular Article XIX GATT and the accompanying Safeguards Agreement, focusing on issues of substance. *Andersen* proves that although the EU rather follows a power-oriented approach, safeguards are very rarely applied (p. 472). The paper then proceeds to the exploration of the exact meaning of the WTO requirements for safeguards, considering relevant WTO dispute settlement reports, given that there are divergences between Article XIX GATT and the Safeguards Agreement, but also uncertainties created by WTO Panels and the Appellate Body. Simultaneously, the author assesses the pertinent EU practice, showing that while the EU rules themselves are in conformity with WTO law, the EU practice does not always correspond to WTO Panels' and Appellate Body's interpretation. *Andersen* finally advises the Commission to better its argumentation.

The research carried out in the volume clearly demonstrates that despite some commonalities and limited convergence, the differences between the EU and the WTO system, both institutional and legal (e.g. because of the dynamic role of the CJEU, the transfer of legislative powers to the EU allowing for true harmonisation instead of mere coordination and cooperation, its ambition as a political union) are extremely significant and that the two systems cannot and should not be expected to develop in the same direction. This view is shared even by authors who express the expectation that the WTO can learn from some EU approaches. The editors and the authors of the book are to be applauded for their differentiated, nuanced analyses. In the end, the strength of the book does not only lie in the high quality of its individual chapters, but in this welcome overall assessment which warns against short-circuited, flawed demands for convergence and mutual imitation of the two systems. The themes not addressed in the book, the differences in the assessment of specific issues dealt with in several chapters, such as the similarity or not of the proportionality test, and some novel developments in the WTO case law in the area of inherent justifications and non-discriminatory restrictions not sufficiently reflected in the book give cause to further research for which the results in this book are a very reliable starting point.

[9] See WTO, report of the Appellate Body, *European Communities—Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141/AB/R; WTO, report of the Appellate Body, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R; WTO, report of the Panel, *European Union—Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R.

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Christian Heidfeld, Die dezentrale Durchsetzung des WTO-Rechts in der Europäischen Union

Nomos, 2012, Schriftenreihe Europäisches Recht, Politik und Wirtschaft (Band 365); ISBN 9783832973926

Christian Pitschas

1. The abovementioned book was authored by *Christian Heidfeld* under the supervision of Professor *Armin Hatje* and accepted as a doctoral thesis by the law faculty of the University of Hamburg in 2011. As indicated by its title, the book addresses the *decentralised* enforcement of WTO law in the European Union (hereinafter EU or Union). *Heidfeld* emphasises that his thesis attempts to demonstrate the extent to, and the manner in which, WTO law can be enforced in a decentralised manner in the Union (p. 37). This topic is not entirely new, as is attested also by the literature relied on by *Heidfeld* for his research, but his thesis explores the issue in more detail than previous publications. Consequently, his thesis makes a very valuable contribution to a better understanding of the interlinkage between WTO law and the domestic legal orders of WTO members, in particular the legal order of the Union where the situation is more complex because the Union's legal order is intertwined with the domestic legal orders of its Member States and both the EU and its Member States are WTO members.[1]
2. The author divides his book into six sections, as follows: (1) the notion of, and preconditions for, a decentralised enforcement of international treaties concluded by the EU within the Union (p. 40 et seq.); (2) the parameters of WTO law for its decentralised enforcement in the domestic legal orders of WTO members (p. 55 et seq.); (3) the binding nature of WTO law in the EU (p. 121 et seq.); (4) the applicability of WTO law in the EU and the consequences for its decentralised enforcement (p. 137 et seq.); (5) procedural possibilities for

[1] On the parallel WTO membership of the EU and its Member States see most recently Herrmann and Streinz (2014), p 587 (620 et seq., 633 et seq., 663 et seq).

C. Pitschas (✉)
Rue de l'Arquebuse 10, 1204 Genève, Switzerland
e-mail: pitschas@msbh.de

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enforcing WTO law in the EU in a decentralised manner (p. 306 et seq.); and (6) the functional link between centralised and decentralised enforcement of WTO law (p. 325 et seq.). Because of the book's main theme, the fourth section is key and, consequently, the most comprehensive one. It builds on the groundwork laid down by the first three sections while the fifth and sixth sections address specific issues arising in connection with the decentralised enforcement of WTO law in the EU.

3. In the first section, *Heidfeld* defines the notion of "decentralised enforcement" which is of paramount importance for his investigation. He explains that the enforcement of WTO law by WTO members in the framework of WTO mechanisms, especially the dispute settlement mechanism, constitutes *centralised* enforcement (p. 43) whereas the enforcement of WTO law in the context of the domestic legal orders of WTO members constitutes *decentralised* enforcement (p. 44). *Heidfeld* distinguishes between three types of decentralised enforcement in the EU: (1) direct applicability; (2) indirect applicability; and (3) interpretation of Union law in conformity with international treaties concluded by the Union (p. 49 et seq.). In this first section, *Heidfeld* summarises mainly the currently dominant view on this matter, as reflected by the case law of the ECJ and literature, without breaking any new ground.
4. The second section of *Heidfeld's* thesis investigates whether: (1) WTO law is suitable, in principle, for its decentralised enforcement; (2) WTO law requires its decentralised enforcement in the internal legal order of WTO members; and (3) WTO law enables the decentralised enforcement with respect to other WTO members. Based on a review of several agreements annexed to the WTO Agreement,[2] he concludes that WTO law is, in principle, suitable to be applied, directly or indirectly, in the internal legal orders of WTO members (p. 68). Regarding the question of whether WTO members are obliged to apply WTO law in their domestic legal orders, *Heidfeld* finds that the WTO Agreement neither requires nor forbids its direct applicability in the domestic legal orders of WTO members (p. 76); the same conclusion applies to the agreements annexed to the WTO Agreement (p. 76 et seq., 78 et seq.). Accordingly, the direct applicability of WTO law is to be decided in accordance with WTO members' domestic legal orders (p. 80).

   Further, *Heidfeld* examines whether WTO members are required to indirectly apply WTO law in their domestic legal orders (p. 81 et seq.). In this respect, *Heidfeld* finds that Articles 23 of the SCM Agreement, 13 Anti-Dumping Agreement, 59 TRIPS Agreement and XX of the Government Procurement Agreement call for an indirect applicability of the rules of these agreements in the domestic legal orders of WTO members (p. 100 et seq.). With the exception of Article 59 TRIPS, these provisions prescribe that WTO members establish or maintain (administrative or judicial) review procedures. According to *Heidfeld*,

[2] WTO Agreement refers to the Marrakesh Agreement Establishing the World Trade Organization which includes in its annexes the multilateral and plurilateral trade agreements that underpin the WTO.

it would deprive these procedures of their meaning and efficacy if economic operators could not invoke the relevant rules of the agreements concerned in the course of those review procedures (pp. 96, 99). Yet *Heidfeld* denies that the same rationale applies to other agreements that also require WTO members to establish or maintain such review procedures, for instance Article X:3(b) GATT and Article VI:2(b) GATS (p. 89 et seq., p. 91).

As regards Article X:3(b) GATT 1994, he claims that this provision cannot be interpreted as requiring an internal review procedure that entitles economic operators to have national measures in customs matters reviewed (pp. 89–90). This claim is unconvincing: the wording of this provision is rather clear and, first, imposes on WTO members the obligation ("shall") to "maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures".[3] Second, the purpose of these procedures is the "prompt review and correction of administrative action relating to customs matters". The scope of the words "customs matters" can be deduced from the first paragraph of Article X:1 GATT 1994. Next, *Heidfeld* also argues that a requirement to review national measures in customs matters in the light of relevant WTO rules would come very close to a direct applicability of WTO rules to which WTO members had objected in the Uruguay Round negotiations (p. 90). But if this argument were correct, it would speak against an indirect applicability of those agreements that, according to *Heidfeld*, are indirectly applicable in the domestic legal orders of WTO members (see supra).

As regards Article VI:2(a) GATS, *Heidfeld* advances the same reasons as in the context of Article X:3(b) GATT 1994. But the wording of Article VI:2 (a) GATS is no less clear than that of Article X:3(b) GATT 1994: WTO members are under an obligation ("shall") to "maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures".[4] Also, these procedures have to provide "for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services". The meaning of "administrative decisions affecting trade in services" may be derived from Article VI:1 GATS in conjunction with Article I GATS and the legal definition of "measures by Members affecting trade in services" set forth by Article XXVIII(c) GATS.[5] In addition, *Heidfeld* states that Article VI:2 (b) GATS, the so-called constitutional carve-out, would militate against a requirement to indirectly apply the rules of GATS in such internal review procedures. But this argument is misconstrued because said provision does not enable WTO members to transform the obligation imposed by Article VI:2 (a) GATS; rather, Article VI:2(b) GATS only provides for an *exception* from

[3] See WTO, report of the Appellate Body, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, paras. 302-303; see also Tietje (2009), p. 145 (172).

[4] See Krajewski (2008), paras. 15 et seq.

[5] See also WTO, report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, para. 220.

the requirement imposed by lit. (a). The scope of the requirement to indirectly apply WTO law in the domestic legal orders of WTO members thus appears to be considerably wider than *Heidfeld* contemplates.

5. The third section examines the binding character of WTO law in the EU. This relatively brief section sketches the origin of the WTO Agreement as a *mixed* agreement given that the EU and its Member States shared the competences in the area of the common commercial policy before the entry into force of the Lisbon Treaty (p. 122 et seq.). As a consequence, the decentralised enforcement of WTO law was split between the EU and its Member States in accordance with their spheres of competence (p. 131). Since the entry into force of the Lisbon Treaty, the EU has the exclusive competence in the area of the common commercial policy[6] and thus the *entire* WTO Agreement, including its annexes, has become part of the internal legal order of the Union (p. 134); consequently, the decentralised enforcement of WTO law in the Union's legal order is a matter to be decided by the latter (p. 136).
6. The first three sections lay the foundation for the fourth and principal section of *Heidfeld's* thesis. Here, he analyses the ways and means for a decentralised enforcement of WTO law in the legal order of the EU (p. 137 et seq.). Logically, he starts with the *direct* applicability of WTO law in the Union's legal order and restates the relevant case law of the ECJ pursuant to which WTO law is not directly applicable in the Union's legal order (p. 140 et seq.). Unfortunately, though, *Heidfeld* refrains from reviewing critically this case law because numerous publications have already done so (p. 139, footnote 446). Nonetheless, it would have been more appropriate to consider whether the Court's reasoning is sound given that it forms the backbone of his subsequent argumentation.

   With respect to the *indirect* applicability of WTO law in the EU, *Heidfeld* undertakes a thorough review of the Nakajima case law of the ECJ (p. 186 et seq.). He comes to the conclusion that under this case law the legality of Union acts is assessed in light of WTO law (p. 204); this amounts to an indirect application of WTO law because the Union acts whose legality is assessed serve the purpose of implementing WTO rules (p. 205). *Heidfeld* then proceeds with an analysis of the criteria that underlie said case law and finds that it does not offer a clear guideline as to how to interpret these criteria (p. 219 et seq.). Therefore, he develops his own interpretation of these criteria (p. 221 et seq.). He postulates that WTO law is indirectly applicable in the EU only if two conditions are met: (1) WTO law contains an obligation to assess the legality of WTO

[6] However, an exception applies to transport services by virtue of Article 207(5) TFEU. It follows that agreements relating to transport services have to be concluded as mixed agreements even if transport services is only one subject matter covered by the agreement in question, see ECJ, Opinion 1/08, ECR [2009] I-11129, para. 163. Therefore, the 2012 protocol amending the Agreement on Government Procurement would have had to be concluded as a mixed agreement by the EU and its Member States, see Pitschas (2014), p. 255 (263–264). This issue will also become relevant in the context of the Trade in Services Agreement (TISA) which is currently being negotiated by a handful of WTO members, including the EU.

members' domestic measures in light of WTO rules, and (2) the Union has implemented the obligation concerned in its legal order (pp. 221–222). In accordance with the findings in the second section, he takes the view that Articles 23 SCM Agreement, 13 Anti-Dumping Agreement, 59 TRIPS Agreement and XX Government Procurement Agreement stipulate such an obligation (p. 223), but as was pointed out above, other agreements annexed to the WTO Agreement, such as the GATT and GATS, arguably also contain such an obligation.

In the last part of the fourth section, *Heidfeld* addresses the interpretation of the legal acts of the Union or the Member States in conformity with WTO law (p. 270 et seq.). He points out that secondary Union law and domestic law of Member States have to be interpreted in conformity with WTO law, to the extent possible, but the ECJ has not yet clearly delineated the boundaries of that obligation (p. 275). He believes that this obligation is limited in that it must not induce a direct applicability of WTO law or a derogation of the secondary Union law in question (pp. 292–293). Concerning the relationship with the direct or indirect application of WTO law, *Heidfeld* posits that the latter are subsidiary to the interpretation of secondary Union law in conformity with WTO law (p. 296).

7. In the fifth section, *Heidfeld* provides an overview of the procedural possibilities, in particular for economic operators, to seek a decentralised enforcement of WTO law in the EU (p. 306 et seq.). In the sixth and last section, he assesses the functional relationship between the centralised and decentralised enforcement of WTO law (p. 325 et seq.). While both serve to ensure a legal order's efficacy, the decentralised enforcement also serves the interests of economic operators by giving them a tool for the protection of their interests (p. 330). In this context, *Heidfeld* ponders the intriguing idea whether a preliminary reference procedure at WTO level could be established *de lege ferenda* (p. 341 et seq.). This procedure would be an instrument for interpreting WTO norms at the request of WTO members' (review) bodies, thereby supporting the decentralised enforcement of WTO law in the domestic legal orders (p. 341). Such a procedure would lead to more legal security and help to consistently apply WTO law in the domestic legal orders (p. 344). Although these benefits are hardly deniable, in theory, under the current circumstances—characterised by a stalemate of the DDA negotiations, an increasing strain on the dispute settlement mechanism and a growing trend towards a fragmentation of the multilateral trading system—there is currently and in the foreseeable future no appetite whatsoever among the WTO membership for establishing such a procedure, apart from the fact that the WTO Secretariat's staff serving the dispute settlement mechanism would have to be considerably increased to make such a procedure workable in practice. These practical considerations are not addressed, though.
8. *Heidfeld* has written a very thorough thesis on the various types of decentralised enforcement of WTO law in the EU. It is somewhat regrettable that he does not undertake a more critical review of the ECJ's case law regarding the direct applicability of WTO law in the Union legal order. Also, his stance on the indirect applicability of WTO law overlooks that agreements other than the SCM

Agreement, Anti-Dumping Agreement, TRIPS Agreement and Government Procurement Agreement contain obligations to assess the legality of WTO members' national measures in light of WTO rules. Nonetheless, his thesis makes a highly valuable contribution to the topic at hand and deserves to be read by anyone interested in WTO law and its applicability in the EU's legal order.

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Yuval Shany, Assessing the Effectiveness of International Courts

Oxford University Press – International Courts and Tribunals Series, 2014; ISBN 9780199643295

Christian J. Tams

Two years after Greg Shaffer and Tom Ginsburg have proclaimed an 'empirical turn in international legal scholarship', empirical research is very much en vogue among international lawyers, but continues to be perceived as a 'new frontier'. By contrast, scholarship on international courts and tribunals has been en vogue for a few decades now. It is not a new field by any means, and yet the focus of inquiry is changing—towards a fuller analysis of the functions and agendas of international courts and tribunals, which are no longer seen just as dispute settlers, but also (or even primarily) as law-enforcers, law-makers, norm entrepreneurs, review agencies, etc. Yuval Shany has been a key figure in this move towards such a fuller analysis; his research has done a lot to broaden our understanding of the many functions of international courts and tribunals. With his new book, he now seems to take his own empirical turn, and readers are encouraged to follow him on this path.

At the outset, however, Shany reveals to his readers that they should not judge a book by its title. Rather than assessing effectiveness according to one or more of the usual indicators—compliance with decisions, usage rates, impact on the conduct of parties—he puts forward a 'conceptual framework to analyze questions about the effectiveness of international courts, which could serve as the basis for future research programs' (p. 4). Put differently, the book's focus is not on *whether international courts are effective,* but on *how their effectiveness should be assessed.*

In the first half of the book, Shany sets out his conceptual framework, which is indeed (as is noted early on) 'sophisticated and complex' (p. 6). In essence, Shany proposes to gauge effectiveness not against fixed variables (impact, compliance, etc.), but according to a more flexible criterion, viz. that of 'attaining the goals set by the mandate provider'. Put differently, an international court is effective if, through its operation, it meets the expectations of States and organisations that set

C.J. Tams (✉)
School of Law, University of Glasgow, 5-9 The Square, Glasgow G12 8QQ, UK
e-mail: christian.tams@glasgow.ac.uk

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them up. This is, both, a surprising and refreshing methodological turn. It allows Shany to tap into a rich (and previously largely untapped) body of social sciences scholarship on 'goal-based approaches' to measuring the performance of institutions. As Shany is serious in engaging with this scholarship, his analysis centres around categories that may not be overly familiar to readers with a legal background—from 'mandate providers' to 'goal ambiguity' (which comes in four different versions) and the distinction between 'ultimate' and 'intermediate goals'. All of this means that this book is not one for light reading. But the goal-based approach is indeed considerable more differentiated than other models of measuring effectiveness.

Most importantly, it suggests that effectiveness cannot be measured across the board, by applying one criterion for all courts, and that in fact, compliance with judgments may not be the most instructive indicator, if only because it favours 'low-aiming' courts rendering timid judgments. Instead, according to Shany, assessing effectiveness is a 'meticulous, institution-specific endeavor [that] requires identification of the goals designated by a particular international court's mandate providers' (p. 37). While this makes for a nuanced analysis, Shany to some extent levels the playing field by postulating four 'generic goals': in his view, all international courts are set up to support an existing set of norms, to facilitate the settlement of disputes, to strengthen the institutional regime of which they form part, and to legitimise the exercise of public authority. If nevertheless, assessing the effectiveness of international courts is a 'meticulous and institution-specific endeavor', then it is because the relative weight of the generic goals varies, and they are complemented by 'idiosyncratic goals' particular to a particular institution.

So how can it be assessed whether courts attain these differentiated goals? Outcomes of judicial activity—the impact of a court's operation on the outside world—are no doubt crucial. But as they are difficult to measure, Shany also proposes to rely on certain proxy categories: the legal powers of courts and tribunals, their structure, the procedures available to them. This analytical move widens the range of indicators that can be used to gauge effectiveness: rather than outcomes as such, 'proxies for outcomes' such as jurisdiction, independence, resources are relied upon, and whilst outcomes are difficult to quantify, their proposed proxies may be easier to assess. At the same time, the use of proxy categories introduces an element of abstraction: a court possessing a wide margin of jurisdiction does not necessarily make use of it; or indeed, States setting up a court may not have wanted it to be all that independent, which a goal-based analysis would have to capture. Thus, proxy categories need to be used with caution.

The methodological re-orientation brought about by Shany's goal-based approach has considerable potential, but comes with risks, too. As for its potential, it clearly points a way out of stale debates about compliance, which is very difficult to measure; and it comes with analytical tools that permit for a fuller, richer assessment of how courts perform. At the same time, it may over-emphasise the role of mandate providers: does it not turn courts into permanent hostages of States that set them up—can it capture the reality of bold courts that become assured in their jurisprudence and over time expand their influence? More pragmatically, there

is a risk that, while moving beyond simplistic categories, the goal-based approach gets lost in sophistication. If the goals designated for a particular court are too many, if they conflict, and if the mandate providers do not indicate hierarchies between them—in short: if mandate providers set up courts either without clear mandates, or based on mixed motives—a conceptual framework relying on mandate providers may struggle to deliver reliable results.

To some extent, the second half of the book—comprising five chapters, applying the goal-based approach to existing international courts, co-authored by Shany and various associates involved in the research project—illustrates this risk. Five prominent dispute settlement systems (ICJ, WTO, ICC, ECtHR and ECJ) are scrutinised: their goals identified, proxy indicators assessed and outcomes evaluated. Each of these chapters is exciting in its own right, but for readers of this Yearbook, the treatment of the WTO dispute settlement system may be of particular interest. In it, Shany and Sivan Shlomo-Agon identify no less than seven goals for which the 'mandate providers' during the Uruguay Round decided to set up the WTO dispute settlement system in its present form: to provide security and predictability to the world trading system; to contribute to the functioning of the WTO regime; to help maintain (or restore) a balance of benefits between WTO members; to legitimise the WTO as an institution and the norms on which it is based; to induce compliance with WTO obligations; and to facilitate the positive settlement of disputes over unilateral sanctions. These goals are manifold and can conflict; but if judged by Shany's proxy factors (structures, procedures), the WTO dispute settlement system seems rather well equipped to attain them. Its jurisdictional powers are considerable, especially compared to courts requiring parties to opt into their jurisdiction. While integrated into an institutional framework, panels and Appellate Body enjoy sufficient levels of independence and impartiality. Their legitimacy is often questioned—both by contracting parties wary of judicial activism and by a wider public concerned about the accommodation of public interests in world trade law,—but Shany and Shlomo-Agon point to satisfactory compliance rates and the gradual opening up of the dispute settlement system to *amici curiae* to put this criticism in perspective. As for the outcomes of the WTO dispute settlement system, Shany and Shlomo-Agon, unsurprisingly, discuss compliance rates; but they also flag concerns about the impact of dispute resolution on developing countries and highlight the reduction in unilateral trade sanctions. Overall, their assessment suggests that the WTO is relatively effective in attaining some of its goals. However, existing empirical studies 'disclos[e] only a partial account of the [WTO dispute settlement system's] effectiveness. Further research is needed in order to attain a broader understanding of its performance' (p. 222). This is an honest assessment, but also a little anti-climactic.

As has hopefully become clear, if judged by its title, this book makes for a surprising read. But it is a welcome surprise, and an enriching one. The conceptual framework set out is indeed 'sophisticated and complex', and it is presented in a tightly argued and dense manner. In applying the model, the book illustrates the strengths and problems of the conceptual 'goal-based' framework. The analysis of particular courts is nuanced and differentiated. Yet as the mandate providers may

have designated rather too many overlapping and competing goals, there is a risk of getting lost in complexity. Perhaps the model is too sophisticated to be applied in depth to five different courts. Shany and his research associates seem aware of this risk; hence frequent caveats (such as the one quoted above) and suggestions for further study. All things considered, perhaps this book should be seen as a prologue to a new, and higher, level of engagement with effectiveness. The conceptual framework is unfolded in remarkable detail. It can now be debated, and future studies may perhaps offer opportunities to test and to refine it, and to apply it in a fuller manner.

Part V
Publications on International Economic Law 2013–2014

Publications on International Economic Law 2013–2014

This chapter shall provide an overview of publications in the field of international economic law during 2013 and 2014. This selection cannot and does not claim to be complete but it gives an impression of the diversity and variety of topics shaping the large body of international economic law and its recent developments.

Aggarwal, Vinod K./Govella, Kristi (eds.): *Linking Trade and Security – Evolving Institutions and Strategies in Asia, Europe, and the United States*, Springer, New York 2013

The volume explores the relationship between trade and security by analysing how they influence each other. The focus is on Asia as a region where trade and security policy are currently very much in a state of flux. However, the volume also compares the EU and US practices regarding the interrelationship of trade and security policies. Case studies offered in this project include the World Trade Organization, the Association of Southeast Asian Nations, ASEAN Plus Three, the East Asia Summit, the Asia-Pacific Economic Cooperation forum, the Shanghai Cooperation Organization, and bilateral preferential trade agreements.

Albrecht, Eike/Schmidt, Michael/Mißler-Behr, Magdalena/Spyra, Simon P. N. (eds.): *Implementing Adaption Strategies by Legal, Economic and Planning Instruments on Climate Change*, Springer, Berlin 2014

The volume provides the reader with different ideas, approaches and tools with respect to the adaptation to climate change in certain countries and regions. The contributions thereby not only address (existing) legal instruments, but also examine

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the implementation of economic instruments and planning tools, and their development.

Anderson, Kym (ed.): *Measuring WTO's Contributions to Global Economic Welfare*, Elgar Publishing, Cheltenham 2014

The volume gathers empirical studies evaluating the national as well as global impacts on welfare through multilateral trade liberalisation spurred by the GATT/WTO. It includes contributions on the effects of WTO accessions, trade facilitation initiatives and the TRIPS Agreement.

Antoine, Rose-Marie: *Confidentiality in Offshore Financial Law*, 2nd edition, Oxford University Press, Oxford 2014

Focusing on confidentiality and disclosure obligations in offshore financial law the book also examines related issues such as the right to privacy. It analyses key legislation in offshore jurisdictions, considering the relevant treaties. The second edition holds a new chapter on Tax Information Exchange Agreements, considers the emerging FATCA initiative, the EU Savings Directive and the G20 measures and covers upgraded anti-money laundering regimes as well as confidentiality and disclosure rules for United States offshore financial entities.

Baetens, Freya/Caiado, José (eds.): *Frontiers of International Economic Law: Legal Tools to Confront Interdisciplinary Challenges*, Brill Academic Publishers, Leiden 2014

Combining both the general theory of international economic law and answers to practical questions with today's global interdisciplinary challenges, the volume structures the contributions as follows: facing economic crises and uncertainties, confronting environmental challenges, considering human rights and development objectives, and finally, regulating energy transit and new technologies.

Bardhan, Ashok/Jaffee, Dwight M./Kroll, Cynthia A. (eds.): *The Oxford Handbook of Offshoring and Global Employment*, Oxford University Press USA, New York 2013

The Oxford Handbook of Offshoring and Global Employment addresses the question of how globalisation, economic growth and technological developments interact to impact employment. It presents analyses and viewpoints from both developed and developing countries, from all continents. The contributions cover both manufacturing and services sectors.

Berger, Allen N./Molyneux, Philip/Wilson, John O. S. (eds.): *The Oxford Handbook of Banking*, 2nd edition, Oxford University Press, Oxford 2014

The book covers topics of research in banking in different parts of the world and has a strong policy orientation. The second edition not only updated topics from the first edition but introduced new chapters on banking in Africa, competition in banking, complexity and systemic risk, corporate governance in banking, liquidity creation, market discipline in financial markets, securitisation, shadow banking, sovereign debt crises, and supervision of systemically important banks.

Bings, Sophie Luise: *Neuordnung der Außenhandelskompetenzen der Europäischen Union durch den Reformvertrag von Lissabon: Mit Fokus auf ausländische Direktinvestitionen und Handelsaspekte des geistigen Eigentums*, Nomos, Baden-Baden 2014

The monograph addresses the competences of the EU on Foreign Direct Investment under Art. 207(1) of the TFEU. It examines the scope of the powers transferred and the respective legal consequences, focusing on existing bilateral and multilateral treaties of EU Member States. Further, it considers procedural changes and the EU's obligations under Art. 21 TEU regarding its external action.

Bjorklund, Andrea K. (ed.): *Yearbook on International Investment Law & Policy 2012–2013,* Oxford University Press USA, New York 2014

The *Yearbook on International Investment Law & Policy 2012–2013* covers the 2012–2013 trends in international investment agreements, the Foreign Direct Investment (FDI) trends, and the challenge of investment policies for outward FDI, as well as a review of 2012 international investment law and arbitration. It further includes essays from the *Symposium on Sustainable Development and International Investment Law: Bridging the Divide* and general articles, such as on the role of municipal laws in investment arbitration, the status of State-controlled entities under international investment law, the US and the Trans-Pacific partnership (TPP) and on the regulation of FDI in Bolivia.

Blair, Roger D./Sokol, D. Daniel (eds.): *The Oxford Handbook of International Antitrust Economics*, Oxford University Press USA, New York 2014/2015

The two-volume handbook provides a multidisciplinary approach to developments in antitrust policy over the past 60 years from both economics and law perspectives. It further offers some ideas about future directions of antitrust scholarship and policy.

Bonnitcha, Jonathan: *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*, Cambridge University Press, Cambridge 2014

The monograph proposes a new framework for identifying and evaluating the costs and benefits of differing levels of investment treaty protection. The results are then applied to evaluate the levels of protection for foreign investors implied by different interpretations of the fair and equitable treatment and indirect expropriation provisions of investment treaties. Evaluating arguments in favour and against

investment treaties it is proposed that the 'economic' justifications for investment treaty protections are much weaker than is generally assumed and as such, the 'economic' objectives of investment treaties do not inevitably contravene 'non-economic' objectives.

Bonzon, Yves: *Public Participation and Legitimacy in the WTO*, Cambridge University Press, Cambridge 2014

The book considers the limits and potential of public participation mechanisms by advancing a conceptual framework which distinguishes the four 'implementation parameters' of public participation: the goal, the object, the modalities, and the actors. It analyses the institutional structure of the WTO and its different types of decisions, and suggests specific amendments to existing WTO arrangements on public participation.

Bown, Chad P./Pauwelyn, Joost (eds.): *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement,* Cambridge University Press, Cambridge 2014 (paperback edition)

The volume assesses the law, economics and politics of trade sanctions in WTO dispute settlement. The contributions offer analyses of the legal rules on permissible WTO retaliation as well as assessments of the economic rationale and calculations behind the mechanism. They further address the question of how the system can effectively work also for small countries as well as what could be learned from related fields such as remedies for non-compliance in investment arbitration and competition or anti-trust regimes.

Brown, Chester (ed.): *Commentaries on Selected Model Investment Treaties*, Oxford University Press, Oxford 2013

The volume provides an article-by-article commentary on Model BITs of 19 jurisdictions. Thereby, the contributions focus on the analysis of each State's investment treaty practice, examining the historical development of the State's Model BITs and the treaty negotiations. This practical illustration is complemented by giving consideration to the relevant investment treaty arbitration decisions.

Bruszt, Laszlo/McDermott, Gerald A. (eds.): *Leveling the Playing Field: Transnational Regulatory Integration and Development*, Oxford University Press, Oxford 2014

The volume gathers contributions from various disciplines that provide a comparative examination of transnational integration and development. It delivers analyses of different issues, including food safety, manufacturing, telecommunications, finance, as well as labour and environmental rights. The contributions identify mechanisms that can serve to promote transnational integration settlements as well as broad based domestic institutional and economic upgrading.

Buchmüller, Christian: *Strom aus erneuerbaren Energien im WTO-Recht: Zur Vereinbarkeit von Einspeisevergütungssystemen und Quotenmodellen mit Zertifikatehandel mit dem WTO-Recht*, Nomos, Baden-Baden 2013

The monograph examines the compatibility of domestic instruments to support the generation of electricity from renewable energies with the law of the World Trade Organization. The instruments commonly applied by States tend to discriminate against foreign power producers and are thus scrutinised under the relevant WTO provisions.

Carmody, Chi/Garcia, Frank J./Linarelli, John (eds.): *Global Justice and International Economic Law: Opportunities and Prospects*, Cambridge University Press, Cambridge 2014 (paperback edition)

The volume compiles and reflects the results of a symposium held at Tillar House, the American Society of International Law headquarters in Washington, DC, in November 2008. It offers viewpoints from philosophers, legal scholars and economists approaching the topic of international economic law from the perspective of rights and justice, focusing on distributive justice.

Chen, An: *The Voice from China: An CHEN on International Economic Law,* Springer, Berlin 2013

The volume offers 24 selected articles on international economic law and the international economic order from the author that have been published over the past 30 years. They provide an insight into the author's personal views on these issues rooting in the particular Chinese situation. The articles are grouped along six major topics, including the jurisprudence of contemporary international economic law, China's strategic position on contemporary international economic order issues and contemporary Chinese practices on international economic disputes (case analysis).

Choudhury, Barnali: *Public Services and International Trade Liberalization: Human Rights and Gender Implications*, Cambridge University Press, Cambridge 2014 (paperback edition)

In the course of continuing public services liberalisation this book examines the resulting implications in light of human rights and gender concerns. It foremost relies on a legal approach but also makes use of case studies, empirical research and gender theories.

Cimoli, Mario/Dosi, Giovanni/Maskus, Keith E./Okediji, Ruth L./ Reichman, Jerome H. (eds.): *Intellectual Property Rights: Legal and Economic Challenges for Development*, Oxford University Press, Oxford 2014

The volume depicts the role of intellectual property rights in developing countries. It is maintained that contrary to the general assumption innovation rates do not increase with stricter IP rights. On the contrary, they often hinder imitation and

innovation diffusion in developing countries. The contributions then turn to discuss various policy measures to reform the existing system, considering areas such as the non-patentability of scientific discoveries and the reduction of the depth and breadth of IPR patents.

Collins, David: *The BRIC States and Outward Foreign Direct Investment*, Oxford University Press, Oxford 2013

This book addresses the relatively recent phenomenon of outward foreign direct investment (FDI) from the large emerging market countries. It focuses on the BRIC States (Brazil, Russia, India, and China) and on the services sector, in particular telecommunications, finance, and transport and also considers the States' commitments under BITs, the GATS, the IMF and the World Bank. The book proposes a multilateral investment treaty to protect FDI in services which would enhance ISDS legitimacy and the recognition of public policy objectives.

Conrad, Christiane R.: *Processes and Production Methods (PPMs) in WTO Law: Interfacing Trade and Social Goals*, Cambridge University Press, Cambridge 2014 (paperback edition)

The monograph depicts and examines the major legal problems revolving around PPMs in WTO law. It contextualises these problems within the ongoing debate and considers economic and regulatory background. It advances a new approach based on the objectives and established economic rationales of the WTO Agreements.

Coppens, Dominic: *WTO Disciplines on Subsidies and Countervailing Measures: Balancing Policy Space and Legal Constraints*, Cambridge University Press, Cambridge 2014

The monograph examines not only the rationale behind subsidisation through governments but also behind the willingness to restrict this policy space. This is done by an analysis of the SCM Agreement and the Agreement on Agriculture, going back to their historical origins. In this analysis the book also includes the relevant case law and proposals during the Doha Round.

Cremona, Marise/Hilpold, Peter/Lavranos, Nikos/Staiger Schneider, Stefan/Ziegler Andreas R. (eds.): *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann*, Brill Academic Publishers, Leiden 2013

The volume gathers contributions in honour of Professor Ernst-Ulrich Petersmann. The articles address the fields of international economic law, international constitutional law/transnational constitutionalism, EU law and human rights. The articles aim to consider structural issues of law as well as recent developments, particularly in international economic law.

Dann, Philipp: *The Law of Development Cooperation: A Comparative Analysis of the World Bank, the EU and Germany*, Cambridge University Press, Cambridge 2013

The book analyses the normative structures and conceptual questions of development cooperation. It illustrates the growing pervasion of development cooperation by legal rules which makes it no longer purely a matter of politics, economics or ethics. It depicts the rules of development cooperation which are utilised to approach the institutional law dealing with the process, instruments and organisation of this cooperation. The monograph thus provides a comparative study on the laws of foreign aid and discusses how accountability, autonomy, and human rights can be maintained while combating poverty.

Depreeuw, Sari: *The Variable Scope of the Exclusive Economic Rights in Copyright*, Wolters Kluwer, The Hague 2014

The monograph addresses the question of the scope of copyright protection under current international and European law, including the WIPO Copyright Treaty and the Computer Programs Directive, the Directive on Satellite and Cable, the Database Directive and the Information Society Directive and their interpretation by the European Court of Justice. It delineates the reproduction right and the rights of communication to the public. Particular regard is given to the influence of technologies on the definition of the protected act and to the exploitation of the work.

Diebold, Nicolas F.: *Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS*, Cambridge University Press, Cambridge 2014 (paperback edition)

The monograph turns to examine the concept of "like services and service suppliers" in GATS rules on non-discrimination. In light of the sparse amount of WTO jurisprudence on this issue the book addresses the legal questions around "like services and service suppliers" through contextualisation and comparison, *inter alia* comprising the GATT, NAFTA, BITs and EC law. The analysis thereby considers "less favourable treatment" and regulatory purpose as additional elements of non-discrimination.

Douglas, Zachary/Pauwelyn, Joost/Viñuales, Jorge E. (eds.): *The Foundations of International Investment Law: Bringing Theory into Practice*, Oxford University Press, Oxford 2014

The volume delineates the various theoretical foundations of international investment law and arbitration and analyses the perceived failings of the system. The book illustrates that divergent conceptual ways to approach international investment law directly influence the outcomes in investment awards. It further depicts that the growing number of legal principles of international investment law

and its increasing relevance nonetheless leave international investment law and arbitration subject to continuous change.

Drabek, Zdenek/Mavroidis, Petros (eds.): *Regulation of Foreign Investment: Challenges to International Harmonization*, World Scientific Publishing Company, Singapore 2013

Examining international rules on foreign direct investment and the crucial challenges to international harmonisation of those rules, the book takes particular regard to disputed and contended issues in this area. It evaluates the prospects for introducing global rules on FDI by examining the role of national and international legislation, regulatory issues like technology transfer, environment, and sovereign wealth funds and further approaches theoretical and practical issues.

Eckardt, Melanie Nadine: *Die Entwicklung des Individualrechtsschutzes im internationalen Investitionsschutzrecht*, Nomos, Baden-Baden 2014

The monograph examines the development of individual rights beyond human rights in international investment law. Starting point is the position of the individual in general public international law from which it draws conclusions regarding international investment law. It aims to create a conceptual framework regarding individual rights of investors and examines if BIT provisions create individual rights of investors or if they merely benefit from rights between the parties of the treaties.

Eger, Thomas/Oeter, Stefan/Voigt, Stefan (eds.): *Economic Analysis of International Law: Contributions to the XIIIth Travemünde Symposium on the Economic Analysis of Law (March 29–31, 2012)*, Mohr Siebeck, Tübingen 2014

The volume offers contributions on a wide variety of topics from the debate on the economic analysis of international law. These issues include the legitimacy of customary international law, internet privacy, private military contractors, the fight against piracy, the International Criminal Court and so-called land grabbing.

Espósito, Carlos/Yuefen, Li/Bohoslavsky, Juan Pablo (eds.): *Sovereign Financing and International Law: The UNCTAD Principles on Responsible Sovereign Lending and Borrowing*, Oxford University Press, Oxford 2013

The contributions in this volume analyse the UNCTAD principles for responsible sovereign lending and borrowing practices that were developed in response to the global financial and economic crisis. They analyse the UNCTAD principles' legal and economic framework as well as their financial and institutional consequences. It is contended that general principles of international law already form a basis on which principles for sovereign financing can be developed and that the UNCTAD principles correspond with them.

Fan, Kun: *Arbitration in China: A Legal and Cultural Analysis*, Hart Publishing, Oxford 2013

The book sheds light on the question of how the internationalisation of arbitration practice and local traditions of dispute resolution influence each other. China, with its historic tradition of non-confrontational means in settling disputes serves as example. The monograph thereby provides a multidisciplinary, theoretical analysis as well as practical considerations.

Faull, Jonathan/Nikpay, Ali (eds.): *Faull and Nikpay: The EU Law of Competition*, 3rd edition, Oxford University Press, Oxford 2014

The volume delineates EU competition law with special regard to the law and policy that apply in practice. The third edition introduces a new chapter on pharmaceuticals, covering, *inter alia*, dominance in abusive conduct cases and competition between manufacturers of generic medicines. The volume also holds new separate chapters on communications and media and expanded the chapters on mergers and cartels.

Feichtner, Isabel: *The Law and Politics of WTO Waivers: Stability and Flexibility in Public International Law*, Cambridge University Press, Cambridge 2014 (paperback edition)

The monograph illustrates the procedural and substantive requirements for granting waivers and examines issues of judicial review and interpretation of waivers. It systemises GATT and WTO waiver practice and offers a typology of waivers, i.e. individual exception, general exception and rule-making instruments. It further assesses the waivers' capability to provide flexibility and adaptability in public international law in general and WTO law in particular.

Foltea, Marina: *International Organizations in WTO Dispute Settlement: How Much Institutional Sensitivity?*, Cambridge University Press, Cambridge 2014 (paperback edition)

The monograph addresses the role of international organisations in WTO dispute settlement drawing from WTO jurisprudence. Particularly, it examines the roles of the IMF, WIPO, WCO and WHO. In WTO adjudication they can be given weight by means of the Vienna Convention rules of interpretation. The examination in this book draws conclusions regarding the level of institutional sensitivity of the WTO adjudicator towards the respective organisations.

Gantz, David A.: *Liberalizing International Trade after Doha: Multilateral, Plurilateral, Regional, and Unilateral Initiatives*, Cambridge University Press, Cambridge 2013

With the background of a practical standstill in the Doha Development Round, this book outlines alternative ways to promote further trade liberalisation, either among some WTO members or even on a global level. Such possibilities include "plurilateral" trade agreements, new or revised regional trade agreements covering both goods and services, and liberalised national trade laws and regulations in the WTO member nations.

Garcia, Frank J.: *Global Justice and International Economic Law: Three Takes*, Cambridge University Press, Cambridge 2013

The book proposes a way to evaluate, construct and manage international trade that is based on norms of economic justice, comparative advantage and national interest that is built around truly consensual trade negotiations and the kind of international economic system they would structure. It assesses three ways to conceptualise the issue of trade and global justice, drawing from Rawlsian liberalism, communitarianism and consent theory.

Gathii, James Thuo: *African Regional Trade Agreements as Legal Regimes*, Cambridge University Press, Cambridge 2013 (paperback edition)

The monograph offers an examination of the legal framework governing African regional trade integration. It assesses trade liberalisation in each region, the financing of RTAs, their trade remedy and judicial regimes, and how well they meet the requirements of Article XXIV GATT. The book further addresses monetary unions, intra-African regional integration as well as non-African regions such as the Economic Partnership Agreements with the European Union.

Gervais, Daniel (ed.): *Intellectual Property, Trade and Development*, 2nd edition, Oxford University Press, Oxford 2014

The volume illustrates the interrelations of intellectual property and trade rules in economic and social development. The second edition introduces new chapters on access to educational resources and innovation in the developing world, the use of traditional knowledge as a source of innovation, TRIPS, TRIPS Plus and developments across the whole of South Asia.

Hallwood, Paul: *Economics of the Oceans: Rights, Rents and Resources*, Routledge, Oxon/New York 2014

The monograph analyses ocean uses from a law and economics perspective. Topics addressed in the book include ocean governance, the economics of oceanic resource exploitation, offshore oil, coral reefs, shipwrecks and maritime piracy.

Van Harten, Gus: *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration*, Oxford University Press, Oxford 2013

The book offers an empirical, theoretical and doctrinal assessment of publicly-available awards to explore how arbitrators have exercised their authority and illustrates why international arbitration should be restrained by the same mediating factors limiting domestic judicial review. It maintains that arbitrators have been somewhat indulgent in their attitude towards States in comparison to the restraint typically exercised by national and international courts.

He, Juan: *The WTO and Infant Industry Promotion in Developing Countries: Perspectives on the Chinese Large Civil Aircraft*, Routledge, Oxon/New York 2014

The book examines how developing countries are challenged, how they improve and foster their industrial structure and trade composition, and focuses on the issue of infant industry promotion under the legal framework of WTO treaty and case law. China's regulatory measures to build up a large civil aircraft supplier serve as an example to analyse the key trade agreements relevant to infant industry promotional policies and practices. It is argued that the WTO rules do not provide developing countries with sufficient regulatory space to encourage new and technologically advanced areas of production and trade.

Kamperman Sanders, Anselm (ed.): *The Principle Of National Treatment In International Economic Law – Trade, Investment and Intellectual Property*, Elgar, Cheltenham 2014

The book explores the principle of national treatment across different fields of international economic law. It covers international trade law, international investment law and intellectual property law. From a multidisciplinary perspective the book examines the commonalities and disparities of the principle between the different fields.

Kennedy, David/Stiglitz, Joseph E. (eds.): *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century*, Oxford University Press, Oxford 2013

Drawing from the experiences of the Chinese market economy the volume explores ways that could serve other countries to achieve equitable and sustained development. It thereby provides a critique of the predominant law and economics doctrines that have globally shaped legal doctrines and institutions. The volume further aims to assess which institutional arrangements, including legal systems, are most likely to promote development.

Kjos, Hege Elisabeth: *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law*, Oxford University Press, Oxford 2013

The monograph analyses national and/or international law that arbitral tribunals apply on the merits to settle disputes between foreign investors and host States. It thereby not only draws from the relevant jurisprudence but also from the legal instruments and scholarship regarding arbitral practice. Because the arbitrators of an arbitral proceeding are free in designating the applicable law and also in light of the hybrid nature of the legal relationship between investors and States, the book concludes that there is a considerable interaction and interdependence of the national and the international legal regimes in investor-State arbitration.

Lang, Andrew: *World Trade Law after Neoliberalism: Reimagining the Global Economic Order*, Oxford University Press, Oxford 2013 (paperback edition)

The book addresses the perceived tension between free trade and human rights, delineating and critically examining the assumptions informing the debate. It offers an overview of the trade and human rights debate and puts forward a new approach that involves the WTO as a forum which provides the expert knowledge and informal relationships that drive States in their international economic relations.

Lee, Yong-Shik (ed.): *Microtrade: A New System of International Trade with Volunteerism Towards Property Elimination*, Routledge, Oxon/New York 2013

The volume addresses "Microtrade" as international trade on a small scale, based primarily on manually produced products using small amounts of capital and low levels of technology available at a local level in lesser developed countries. It examines the theory, application and legal framework regarding microtrade. It contends that microtrade, if it is effectively administered on a global scale, can contribute to ending extreme poverty.

Mangan, Mark/Reed, Lucy/Choong, John: *A Guide to the SIAC Arbitration Rules*, Oxford University Press, Oxford 2014

The book offers a commentary on the SIAC Arbitration Rules and also compares the 2007, 2010 and 2013 SIAC Rules to those of other major arbitral institutions. It considers Singapore law when it is relevant as well as SIAC awards, the views of the Secretariat and materials not previously published, such as the *travaux préparatoires* of the 2010 SIAC Arbitration Rules Drafting Committee. Pertinent documents are added, including SIAC Practice Notes and the SIAC Code of Ethics for Arbitrators.

Mattli, Walter/Dietz, Thomas (eds.): *International Arbitration and Global Governance: Contending Theories and Evidence*, Oxford University Press, Oxford 2014

The volume provides a theoretical approach to global private justice, a debate that is usually rather practice-oriented, technical, and promotional and very much informed by inside analyses. It places international arbitration in the context of global governance and addresses issues like legitimacy and constitutional order and justice beyond classical nation State institutions.

Mavroidis, Petros C.: *Trade in Goods*, 2nd edition, Oxford University Press, Oxford 2013 (paperback edition)

The book provides an analysis of the WTO agreements on trade in goods from an economic and legal perspective. The second edition includes all WTO agreements concerned with trade in goods and also explores the "new generation" agreements such as the TBT and the SPS agreement as well as plurilateral agreements.

Mendez, Mario: *The Legal Effects of EU Agreements*, Oxford University Press, Oxford 2013

The monograph examines the legal effects of EU concluded treaties, highlighting the significance of this area of law for the Member States' constitutions. The EU has so far concluded more than 1,000 treaties and the book undertakes to analyse their impact on the legal order of the EU and that of its Member States, *inter alia*, by examining over 300 cases involving private parties, Member States, and institutions. A PDF version of this book is available for free in open access via www.oup.com/uk as well as on the OAPEN Library platform, www.oapen.org.

Mercurio, Bryan/Ni, Kuei-Jung (eds.): *Science and Technology in International Economic Law: Balancing Competing Interests*, Routledge, Oxon/New York 2013

The volume gathers contributions that examine the status and interaction of science, technology and international economic law. They cover issues such as investment law, international trade law, and international intellectual property and analyse the place of science and technology in the development of international economic law. The book assesses how international trade and investment regimes utilise science and technology, and whether they do so fairly and with a view to broader public policies.

Narlikar, Amrita/Daunton, Martin/Stern, Robert M. (eds.): *The Oxford Handbook on The World Trade Organization*, Oxford University Press, Oxford 2014 (paperback edition)

The volume aims to provide a comprehensive and interdisciplinary understanding of the tasks of the WTO, its procedures, achievements and problems, and how it might cope with some critical challenges.

Nikol, Ralph/Bernhard, Thomas/Schniederjahn, Nina (eds.): *Transnationale Unternehmen und Nichtregierungsorganisationen im Völkerrecht*, Nomos, Baden-Baden 2013

The volume examines the role of transnational corporations (TNCs) and non-governmental organisations in influencing the classical subjects of international law and thereby shaping international law and its application. The volume focuses on the legal challenges regarding the responsibility of TNCs for human rights violations but also covers issues of international investment law.

Okediji, Ruth L./Bagley, Margo A. (eds.): *Patent Law in Global Perspective*, Oxford University Press USA, New York 2014

The volume analyses and reviews developments in national patent laws and efforts to reform the global patent system, taking regard of existing geopolitical interests. Topics include the role of patent law in economic development, the efficacy of patent rights in facilitating innovation, limitations and exceptions to patent scope and protection (including exhaustion, compulsory licensing, and research exceptions), patents on plants and other living organisms and the impact of emerging economies on global patent system governance.

Ostrove, Michael/Salomon, Claudia/Shifman, Bette (eds.): *Choice of Venue in International Arbitration*, Oxford University Press, Oxford 2014

The volume delineates strategic considerations in choosing the seat of arbitration by providing a comparative examination of 20 venues including the major global seats. It not only offers practical considerations but also explores the history of and development in these seats.

Patel, Kiran Klaus/Schweitzer, Heike (eds.): *The Historical Foundations of EU Competition Law*, Oxford University Press, Oxford 2013

The book sets out the foundations of European competition law drawing from its history and development during the 1980s. It thereby illustrates the internal developments and external influences that shaped this area of law and historically contextualises the current debates on a legal reform of EU competition law. It further considers the role the European Court of Justice has played in establishing the protection of competition as one of the pillars of the common market.

Pauer, Nada Ina: *The Single Economic Entity Doctrine and Corporate Group Responsibility in European Antitrust Law*, Wolters Kluwer, The Hague 2014

The monograph analyses and evaluates relevant ECJ cases and Commission pronouncements to determine whether current practice under the single economic

entity doctrine provides an appropriate and effective enforcement of this aspect of European competition law. It also illustrates the underlying policy considerations and ways to include global elements in effective enforcement of European competition law.

Perry-Kessaris, Amanda (ed.): *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext,* Routledge, Oxon/New York 2014 (paperback edition)

The volume delineates the analytical, empirical and normative elements that distinguish socio-legal approaches to international economic law both from each other, and from other approaches. It takes particular regard of the substantive focus of socio-legal approaches, contending that they not only consider the text but also context and, often, subtext.

Pettis, Michael: *The Great Rebalancing: Trade, Conflict, and the Perilous Road Ahead for the World Economy*, Princeton University Press 2013

The monograph undertakes to examine the underlying reasons for the ongoing economic crisis and its effects on the world economies. It contends that distorting policies that led to severe trade imbalances propelled the financial crisis. The book further predicts a critical rebalancing of the world economies by analysing the Chinese, European and US economic policies.

Phelan, William: *In Place of Inter-State Retaliation: The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies*, Oxford University Press, Oxford 2014

The book examines the European Union as a distinctive form of international organisation from a legal and political science perspective. It focuses on the lack of inter-State retaliation within the European legal order that plays a crucial role in the enforcement of obligations in other inter-State trade regimes such as the World Trade Organization. The monograph puts forward that the effectiveness of Europe's special form of legal integration is promoted by intra-industry trade, parliamentary forms of national government, and European welfare States.

Piérola, Fernando: *The Challenge of Safeguards in the WTO*, Cambridge University Press, Cambridge 2014

The monograph depicts the safeguard mechanism in the multilateral trading system. It depicts its historical and conceptual foundations and delineates the different requirements to impose safeguard measures as well as the conduct of safeguard investigations. It analyses the case law of WTO panels and the Appellate Body and makes practical propositions for the resolution of complex issues which

have arisen in practice and also takes regard of the difficulties that companies face in such situations.

Posner, Eric A./Sykes, Alan O.: *Economic Foundations of International Law*, Harvard University Press, Cambridge 2013

The book offers a framework to approach the problems of exchange of goods and ideas among nations, cross-border pollution, global warming, and international crime. It does so from a rational choice perspective and describes conditions under which international law can either be successful or fail.

Sacerdoti, Giorgio/Acconci, Pia/Valenti, Mara/De Luca, Anna (eds.): *General Interests of Host States in International Investment Law*, Cambridge University Press, Cambridge 2014

The volume explores the tensions that can arise vis-à-vis the rights of investors when States take measures to maintain their financial stability, stimulate economic development or promote their non-economic interests (such as health, the environment and food security). It offers an analysis of these issues in light of the case law of arbitral investment tribunals and other international courts, and illustrates how cross-fertilisation between trade and investment can serve the resolution of conflicts.

Salacuse, Jeswald W.: *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*, Oxford University Press, Oxford 2013

The book undertakes to put forward a comprehensive method of analysis for examining the law governing foreign investment. It considers all three bodies of applicable law, i.e. national laws of both the host country and the investor's home country, contracts between the investor and the host country or among investors and their associates and international law, consisting of applicable treaties, customs, and general principles of law. The book analyses their content and illustrates how they interact and when they potentially conflict.

Santa Maria, Alberto: *European Economic Law*, Wolters Kluwer, 3rd edition, The Hague 2013

The book provides an analysis of the interrelations between issues like the right of establishment and the free provision of services by business companies, the harmonisation of company laws and the regulation of international trade, with due regard of the role of the European Court of Justice in the development of European economic law. The third edition considers developments in the course of the economic and financial crisis in the European Union and contends that either

profound, constitutional reforms aimed at renewing the European Union in the collective imagination have to be established or the EU runs the risk of becoming merely an economic community with a far-from-ideal single market where individuals and enterprises are guaranteed nothing beyond the four basic freedoms.

Sauvant, Karl P. (ed.): *Yearbook on International Investment Law & Policy 2011–2012*, Oxford University Press USA, New York 2013

The volume outlines recent trends and developments in the global international investment law and policy field. It further provides a discussion on regulatory and policy developments regarding FDIs in extractive industries, focusing on the scope of protection afforded by international investment treaties.

Schill, Stephan W.: *The Multilateralization of International Investment Law*, Cambridge University Press, Cambridge 2014 (paperback edition)

The monograph examines the function of most-favoured-nation clauses, the possibilities of treaty-shopping and the impact of investor-State arbitration which relies on precedent and other multilateral approaches to treaty interpretation in the seemingly fragmented field of international investment law. It puts forward that despite of its large basis in BITs, international investment law evolves into a multilateral system of law based on converging principles of investment protection which supports the functioning of the global market economy.

Schropp, Simon A. B.: *Trade Policy Flexibility and Enforcement in the WTO: A Law and Economics Analysis*, Cambridge University Press, Cambridge 2014 (paperback edition)

The monograph addresses trade policy flexibility mechanisms in the WTO, which are designed to deal with contractual gaps in the WTO agreements, and complementing enforcement instruments in case of unlawful extra-contractual conduct. It analyses how contractual incompleteness, trade policy flexibility mechanisms, contract enforcement, and WTO members' willingness to cooperate and to commit to trade liberalisation interrelate and puts forward a reform agenda to overcome the weaknesses of the current system.

Shan, Wenhua/Su, Jinyuan (eds.): *China and International Investment Law: Twenty Years of ICSID Membership*, Brill Academic Publishers, Leiden 2014

The volume examines current issues of international investment law and arbitration in interaction with China. It takes special regard to ongoing negotiations of bilateral and regional investment treaties, including the TPP, TTIP and also covers China's BIT negotiations with the EU and USA.

Sprankling, John G.: *The International Law of Property*, Oxford University Press, Oxford 2014

The monograph explores the emergence of international property law. It thereby considers international human rights law, indigenous rights, foreign investment law, intellectual property, the law of the sea, and airspace law. The book puts forward that an international right to property should be recognised and distinguishes five elements of ownership: acquisition, use, destruction, exclusion, and transfer.

Struck, Christian: *Product Regulations and Standards in WTO Law*, Wolters Kluwer, The Hague 2013

The monograph examines the rules on harmonisation within the World Trade Organization Agreement on the Application of Sanitary and Phytosanitary Measures. It puts forward a scheme for the harmonisation of public and private regulations and standards to reduce non-tariff barriers to trade.

Trakman, Leon/Ranieri, Nicola (eds.): *Regionalism in International Investment Law*, Oxford University Press USA, New York 2013

The volume offers an outline of foreign direct investment from both academic and practical viewpoints and examines different bilateral, regional, and multinational agreements, focusing on the European Union, Australia, North America, Asia, and China. It addresses issues like global commerce, sovereignty, regulation, expropriation, dispute resolution, describing their development and application in different regions of the world.

Treves, Tullio/Seatzu, Francesco/Trevisanut, Seline (eds.): *Foreign Investment, International Law and Common Concerns*, Routledge, Oxon/New York 2013

The volume assesses the relationship between foreign investments and common concerns and the potential conflicts between the interests of the investor and of the host State. It approaches the problem from an international law perspective and gives special consideration to the role of the main international development banks in resolving the tensions between the interests of foreign investors with the protection of common concerns, such as the environment, human rights and labour rights.

Van Grasstek, Craig: *The History and Future of the World Trade Organization*, WTO Publications, Geneva 2013

The book delineates the roots of the trading system, membership and management of the WTO, trade negotiations and the development of coalitions among the

membership, and the WTO's relations with other international organisations and civil society. It further addresses the WTO's dispute settlement rules, the rise of regional trade agreements and the launch and evolution of the Doha Round.

Villalta Puig, Gonzalo: *Economic Relations between Australia and the European Union: Law and Practice*, Wolters Kluwer, The Hague 2014

The monograph provides an examination of the law and policy of trade and investment between Australia and the EU, two major trading partners whose economic relations are not governed by an economic integration agreement. It analyses, *inter alia*, the Partnership Framework Agreement between Australia and the EU, the Mutual Recognition Agreement, the Wine Agreement, and other sectoral agreements between Australia and the EU, the economic constitutions of Australia and the EU and their judicial interpretation. The book argues for the necessity of a trade and investment agreement to remove the agricultural tariffs and quarantine requirements and to harmonise the regulatory divergences that impede bilateral trade.

Wöss, Herfried/San Román Rivera, Adriana/Spiller, Pablo/Dellepiane, Santiago: *Damages in International Arbitration under Complex Long-term Contracts*, Oxford University Press, Oxford 2014

The book addresses the legal, financial, and economic implications of damages in international arbitration in the application of different rules of law on damages and loss of income (UK, US, France, Mexico, Germany, CISG and UNIDROIT Principles). It employs a step-by-step approach for the application of the but-for method and its relationship to loss, causation and the measure of damages and makes reference to ICC, UNCITRAL and ICSID cases and unpublished awards in which the authors were involved.

Yilmaz, Müslüm (ed.): *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members*, Cambridge University Press, Cambridge 2013

The volume explores the judicial review mechanism of the importing country utilised by importers that are confronted with trade remedies, i.e. anti-dumping, countervailing and safeguard measures. It analyses how the judicial review process has performed and reviews the experiences in the domestic courts of the 21 WTO members that are the biggest users of trade remedies.

Zillman, Donald N./McHarg, Aileen/Bradbrook, Adrian/Barrera-Hernandez, Lila (eds.): *The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage*, Oxford University Press, Oxford 2014.

The volume offers an interdisciplinary study into the law applicable to the production, transmission, and storage of energy underground, covering issues like ownership, the impact on the environment, and the need to provide compensation for any damage caused. It explores the challenges posed to the existing legal framework both at the international level and in various national jurisdictions by new developments such as fracking, geothermal energy, underground electrical activity, and carbon capture and storage.