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Greening the WTO
EGA, tariff concessions and policy likeness

Petros C. Mavroidis and Damien J. Neven

European University Institute
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Abstract

This paper considers the APEC and EGA agreements which grant tariff concession through HS classifications beyond the six digit level ("ex outs") in favour of "green" goods and discuss how these initiatives fit into the WTO legal regime. Even if the practical significance of the APEC agreement should not be overestimated as it involves modest tariff concessions over a subset of goods which are not heavily traded, these agreements involve a paradigm shift to the extent that they use tariffs concessions negotiated on a plurilateral basis as a policy instrument to meet public policy concern, instead of making market access conditional on meeting national regulations. We find that there is a tension between the current definition of likeness for the enforcement of MFN provisions and the use of ex outs and a risk that improved market access for ex outs could be seen a de facto discrimination. One way out of this conundrum is to define likeness in terms of policy rationales.

Keywords

WTO, APEC, EGA, Tariffs, Terms of Trade, ex outs

JEL Classification: K40

1 Introduction[1]

This paper focuses on the recent (plurilateral) initiatives to reduce tariffs on "environmentally-friendly" or "green" goods. There are two iniatives on this front; first, the APEC (Asian Pacific Economic Cooperation) initiative which involves a voluntary reduction of tariffs across 21 WTO members[2] and 54 products categories at the 6 digit level of the Harmonized system (HS), and second, the EGA (Environmental Goods Agreement) in which a number of other WTO members attempt to include tariff reductions on the APEC list of products in their schedules of concessions.

In these agreements, participating countries create new subcategories of products that are meant to be environmentally friendly (so called, "ex outs") within HS categories and provide lower tariffs for these products. For instance, a new subcategory labeled solar heaters was introduced among the category of 'instantaneous or storage water heaters' (HS 841919). The tariff applied to this subcategory is lower than the tariff applied to others goods in the six digit category, reflecting the objective to encourage the imports of environmentally friendly goods. APEC target was to ensure that signatories would reduce duties for the listed goods to maximum 5% ad valorem.

APEC members have now, in large part, implemented the agreed tariff reductions and apply them on a most favored nation (MFN) basis. The EGA negotiations are, at the time of writing, still inconclusive.

The APEC and the EGA might represent a paradigm shift with respect to the way in which public policy concerns are dealt with in the WTO.

The GATT discipline was, for all practical purposes, a tariff bargain with insurance against concession erosion that might arise because of domestic regulations, possibly reflecting legitimate public policy concerns. Tariffs would be curbed through 'tariff bindings' (tariff concessions), a promise to the effect that the level of tariffs would not increase above and beyond a multilaterally agreed threshold. Concession erosion would be adressed by the commitment that domestic policies, e.g., policies applied to domestic goods and imported goods after customs clearance, should be applied in nondiscriminatory manner. Since domestic policies were unilaterally defined (as opposed to tariffs that were multilaterally negotiated), nondiscrimination would guarantee that trading nations would not be in position to provide domestic goods with an advantage beyond that embedded in tariff protection. For instance, domestic policies in favor of

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[2] Australia, Brunei, Canada, Chile, China, Hong Kong, Taiwan, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Thailand, USA, Vietnam

the environement should not discriminate in favor of domestic goods[3].

Hence, whereas environmental protection normally takes the form of regulation for which trading nations have discretion subject to the discipline of non discrimination, the APEC and the EGA approaches it through tariff preferences.

The paper is organised a follows. Section 2 provides further background on the APEC and EGA agreements. Section 3 provides an overview of the outcome of APEC negotiations. We find that there are only 14 countries (out of 21) for which the APEC agreement is relevant as some countries had nothing to adjust in the first place and some others did not implement any change. We also find that the share of trade affected by the concessions is very small, mostly because the 54 products concerned by the agreement are not heavily traded. Second, focusing on these products, we find that the tariff preference granted under the agreement are on average quite modest. This does not come as surprise given that outstanding tariffs are generally rather low. Still, there is a great disparity across countries; Mexico is outlier with a (trade weighted) average reduction of tariffs in excess of 10%. Korea and to a lesser extent Vietnam, Russia, Canada and China have also granted significant concessions. At the other extremes, the concessions are negligible for the US (as well as the Philippines and Indonesia).

Section 4 discusses how the APEC and EGA agreements fit into the WTO system. We discuss alternative options for legalizing them and the current legal status of these agreements. We find that there is a tension between the current definition of likeness for the enforcement of MFN provisions and the use of ex outs. There is also a risk that improved maket access for goods coming under ex outs could be seen a de facto discrimination. One way out of this conudrum is to define likeness in terms of policy rationales. Section 5 concludes.

2 Background on APEC and EGA negotiations

As mentioned above, the APEC and EGA negotiations involve the definition of tariffs beyond the six digit level. The approach towards the level of tariff concessions has changed since the early GATT days. Some WTO members continued negotiating at the HS six-digit level, where tariff lines are expressed in a 'regulation-neutral' manner. Others nevertheless, have stopped doing so. Indeed, the post-Tokyo round era marks the widespread negotiation of concessions at the eight-, ten-, or twelve-digit level. At first, it was the European Union (EU) and the United States (US) that had adopted this approach. Many industrialized countries, members of the OECD (Organization of Economic Cooperation

[3]Nonviolation complaints is an additional, GATT idiosyncratic, element that protects concessions, allowing affected trading nations to request compensation for lost (expected) trade resulting from otherwise GATT-consistent measures. The rationale for this legal instrument was that the GATT contract was (necessarily) incomplete, and a number of policies that had not found their way into the contract explicitly could (negatively) affect the value of tariff concessions. The best example of successful nonviolation complaints concerns litigation against subsidies, an instrument that only gradually came under the multilateral disciplines.

and Development) have since emulated the attitude of the trans-Atlantic partners. Article 3.3 of HS allows for subclassifications of the six-digit harmonized classifications of all goods:

> Nothing in this Article shall prevent a Contracting Party from establishing, in its Customs tariff or statistical nomenclatures, subdivisions classifying goods beyond the level of the Harmonized system, provided that any such subdivision is added and coded at a level beyond that of the six-digit numerical code set out in the Annex to this Convention.

Subclassifications can be unilateral (the majority of times so far), plurilateral or multilateral. The negotiation of the APEC list is the first plurilateral effort. Importantly, however, the subcategories are not (so far) harmonised, so that different countries have different subcategories. Countries can thus express their societal preferences through elaborate tariff lines instead of regulation. The original (pre-EGA) unilateral recourse towards elaborate classifications is to some extent paradoxical, as the whole purpose of the 'Brussels Nomenclature', and the Harmonized System (HS) that it led to, was to introduce a common language to describe goods on which tariff concessions would be subsequently negotiated. It was felt nevertheless, that a balance had to be struck between uniform tariff descriptions, and "breathing" space for those trading nations that produced wider range of goods and their varieties. The APEC and EGA negotiations are an application of the possibility offered through Article 3.3 of HS.

Vossenaar (2014) and (2016) provides a very comprehensive discussion of the negotiation of the APEC list of environmental goods. The 21 APEC members essentially pledged that the tariff imposed on various environmental goods would not exceed 5% by the end of 2015. The APEC negotiators worked on the basis of HS commitments and had to devise ex outs, that is, subheadings that covered environmental goods only out of a wider category, which as mentioned above, might differ across countries[4]. The APEC tariff reductions have not, at the moment of writing, been incorporated into national schedules. Nevertheless, APEC members already apply them on voluntary basis. As already stated supra, they are applied on MFN-basis[5].

[4] The full list of products covered, as well as the ex outs, that is the products that come under the HS 6 headings that qualify as environmental goods is accessible in https://www.apec.org

Since ex outs are usually expressed at the eight-digit level, their numbering might differ across national schedules. The reader will have to compare national descriptions of the eight digit headings in order to evaluate commensurability of concessions entered. On the overall level of duties, see Bown and Irwin (2016). Hoekman and Mavroidis (2017) explain the modalities of scheduling.

[5] According to the APEC reports, the commitments for Thailand and Malaysia are still under considerations. Will not consider these two countries any further. See 2016 APEC Economy Progress in Implementing their Commitments to Reduce Tariffs on the 54 Products in the APEC List of Environmental Goods to Five Percent by the End of 2015, 2016 CTI Report to Ministers.

In 2014, 14 WTO members (counting the EU as one[6]) initiated the EGA negotiations. The number of negotiators has now risen to 18, representing 46 members. Negotiations were supposed to be completed by December 2016. Recently, the two co-chairs, Mike Froman (US), and Cecilia Malmstrom (EU), issued a statement to the effect that negotiations had failed to conclude. The process is now frozen but it does not mean that EGA has been abandonned and negotiators are contemplating the next steps[7]. Failure to conclude the EGA though, has not led to revocation of the APEC concessions, which continue to apply. EGA negotiators followed the APEC model of "ex outs", as Santana (2015) explains in his account of the first phase of talks.

Finally, it is striking that the APEC ex outs have been used to enhance environmental protection at home by improving access to "green" goods but not to enhance environmental protection abroad. To provide but an illustration: there are tariff lines for solar heaters (as per the APEC list), but no tariff lines for the manner in which solar heaters have been produced in the exporting market. So, even if a foreign country produces solar heaters in the most environment-unfriendly manner, it will still receive a low tariff for exporting an environmental good to Home. APEC countries, in other words, do not appear to be concerned about the environmental incidence of externalities at the production level but solely at the consumption stage. This feature could, of course, change in the future, as the negotiations is still ongoing, and more ex outs can always be devised.

3 The outcome of the APEC agreement

This section discusses the outcome of the APEC agreement. Table 1 reports on the mean, standard deviation and median of the tariffs imposed by the 21 countries participating in the APEC before (in 2015) and after the agreement in the 54 product categories concerned by the agreement[8]. It is immediately apparent that the agreeement is irrelevant for Hong Kong (China), Japan, Peru and Singapore as these countries did not impose any tariff for the products concerned prior to the agreement. Table 2, which reports the change in the mean and standard deviation in tariffs following the commitments, reveals that Australia, New Zealand and Brunei did not make any change to their tariffs. Hence, there are only 14 countries for which the APEC agreeement is at all relevant. The highest reductions in average tariffs are found in Chile, China, Korea and Mexico, with a reduction of roughly one percentage point. Russia (0.59) and Taiwan (0.27) have an intermediate reduction in tariffs. The reduction is

[6] Counting the UK as part of the EU.

[7] There is potentially a lot at stake. For instance, the USTR estimates trade in environmental goods to approximate $1 trillion in 2015 prices. The New Zealand Foreign Affairs and Trade Ministry estimates that trade in environmental goods will rise up to $3 trillion by 2020.

[8] Descriptive statistics are computed over all independent tariff lines, including ex outs for boh years. As mentioned above, the tariff commitments of Malaysia and Thailand are still under negotiation.

negligible in the US, The Philippines and Vietnam. In any event, the reduction in the average tariff is very modest.

Table 1:

	Mean 2015	Std.Dev. 2016	Median 2015	Mean 2016	Std.Dev. 2016.1	Median 2016
Australia	2.600	2.520	5	2.600	2.520	5
Brunei	1.970	2.450	0	1.970	2.450	0
Canada	0.360	1.350	0	0.260	1.150	0
Chile	6	0	6	5	0	5
China	5.010	5.680	5	3.990	4.290	5
Taiwan	1.950	2.740	0	1.680	2.300	0
Hong Kong	0	0	0	0	0	0
Indonesia	5.060	2.160	5	4.970	2.050	5
Japan	0	0	0	0	0	0
Korea	6.130	3.290	8	5.170	3.030	5
Mexico	3.570	6.090	0	2.600	4.940	0
New Zealand	3.110	2.440	5	3.110	2.440	5
Peru	0	0	0	0	0	0
Philippines	1.660	1.790	1	1.560	1.510	1
Papua New Guinea	0.270	2.020	0	0.090	0.670	0
Russia	1.040	2.150	0	0.450	1.350	0
Singapore	0	0	0	0	0	0
USA	1.580	2.320	0	1.510	2.180	0
Vietnam	0.380	1.680	0	0.270	1.070	0

Table 2:

	Difference Mean	Difference Std.Dev.
Australia	0	0
Brunei	0	0
Canada	0.100	0.619
Chile	1	0
China	1.030	3.428
Taiwan	0.270	1.361
Hong Kong	0	0
Indonesia	0.090	0.678
Japan	0	0
Korea	0.960	1.400
Mexico	0.960	2.840
New Zealand	0	0
Peru	0	0
Philippines	0.090	0.519
Papua New Guinea	0.180	1.348
Russia	0.590	1.771
Singapore	0	0
USA	0.070	0.366
Vietnam	0.110	0.750

These averages can however conceal significant disparities at the product level. A list of the HS categories and ex out for which the members have provided a reduction in tariffs can be obtained upon request. We observe important individual reductions in China (up to 30 percentage points for one product, a reduction of 20 percentage point for another products and roughly 10 percentage points for another two). Mexico has reduced tariffs by 10 percentage points for as many as 22 ex outs. Russia has a tariff reduction of 7.5 percentage points for three products.

Table 3 considers the significance of the products for which concessions have been made. We do not have trade data the level of the ex outs but only at the HS 6 level. Hence, we assume that whenever a concession has been granted for an ex out within an HS6 category, the concession applies to the overall value of trade within the HS category. This is a very conservative assumption which biases upwards our assessment of the significance of the concessions. We observe

that the product category in which concessions have been made account for less than six percent of overall imports in all countries concerned[9].

Table 3: Overall imports impacted by tariff reduction, as percentage of total imports

Country	% tot imports
Canada	0.117
Chile	2.53
China	2.53
Indonesia	0.041
Korea	5.995
Mexico	2.298
Philippines	0.027
Russia	1.114
USA	0.058
Vietnam	0.18

In order to further assess the significance of the concessions offered by the members, we consider, for each member, the value of imports for which it has provided a concession as a percentage of the value of trade on which concessions could have been granted in the context of the agreeement. This is measured by the value of trade for which the import tariffs were strictly positive in 2015. The results can be found in table 4, which also reports the weighted average reduction in the tariff (namely the reduction in tariffs, in percentage points, weighted by the share of the value of imports that the product accounted for in 2015 in total imports of products in the APEC list for which tariffs were strictly positive).

We observe that Korea and Mexico have made important concessions. The former has reduced (trade weighted) tariffs by 5 percentage points on almost all goods under the agreement. Mexico has granted a 11% (trade weighted) reduction in tariffs for roughly 70% of its imports. Chile provides a very modest (1%) reduction over all categories. Russia provides a moderate reduction (2.5%) over 50% of its imports and China a 1% reduction over 26% of its imports. At the other extreme, the concessions of the US are symbolic.

Finally, we consider whether the concessions have been concentrated in particular product category. Table 5 (available upon request) presents the overall import values and trade weighted reductions in tariffs per HS category.

We observe that there are few product categories for which both the trade weighted reduction in tariffs and overall trade is significant. Taking a 3% trade weighted reduction in tariffs and overall trade in excess of a billion as thresholds, we see that the impact is significant only for "Water filters" (8421.21), "Wind

[9] We consider overall imports of the products in which concessions have been made and not only the imports from the APEC members as tariff reductions are applied on a MFN basis.

Table 4: Total tariff reductions

Country	% of volumes for nonzero 2015 tariffs	Weighed average reduction in tariffs
Canada	30.64	1.212
Chile	100	1
China	26.41	1.044
Indonesia	1.37	0.136
Korea	96.55	5.204
Mexico	69	11.914
Philippines	2.65	0.194
Russia	48.83	2.569
USA	1.52	0.082
Vietnam	23.28	3.432

Powered electric generating sets" (8502.31 and 8502.39) an" Optical measuring and checking instruments" (9031.49). Overall, one should thus not overestimate the aggregate significance of the APEC agreement.

4 APEC and EGA in the WTO

This section discusses how the APEC and EGA initiatives fit into the WTO. We first discuss the options that the members of EGA faced in order to legalise the agreement within the WTO. We subsequently focus on the option that was adopted and discuss the legal status of the tariff commitments under these agreements.

4.1 Alternative options to insert EGA into the WTO

In principle, the negotiating members of the EGA could implement tariff preferences in favour of environmentally friendly goods through (i) a plurilateral agreement (ii) a free-trade area (FTA) or by (iii) simply applying on MFN-basis whatever preferences they had granted one another.

FTA was no option, assuming the negotiating partners wanted to observe their WTO obligations. FTAs are GATT-consistent only if they liberalize substantially all trade. This condition was inserted because, as Grossman and Helpman (1995) have argued, otherwise world of MFN à la carte could develop: WTO members would be allowed to deviate from MFN even for one HS six-digit classification. The goods featured in the APEC/EGA lists do not meet this condition by any stretch of the imagination.

Plurilateral agreements are scarce[10]. The EGA would have been easier to negotiate in a plurilateral context, since only like-minded players would have participated anyway. Plurilateral agreements do not create rights and do not impose obligations on non-participants (Article II.3 of the Agreement establishing the WTO). Extension of benefits to non-participants would depend on new applicants successfully negotiating their accession to the agreement, under the terms eventually provided for in the EGA. Had all large players decided to participate anyway, a number of outsiders would have been keen to join, in light of the market advantages associated with entry.

Nevertheless, for a plurilateral agreement to be implemented, the membership has to vote in favour by consensus (Article X.9 of the Agreement establishing the WTO). A negative vote could not have been discarded: producing environment-friendly goods is likely to involve increases in fixed cost of production. Small developing countries might find it hard to compete, especially if environment-friendly production involves paying royalties to buy technology. Anticipating a negative vote, probably, participants in the EGA discarded that option.

The only option left was thus to declare ex ante that the product of their negotiation would be extended to all on MFN-basis. By opting for the MFN option, the framers of the EGA did ipso facto away with Article II.3 of the Agreement Establishing the WTO. Rights are now created for non-participants, without corresponding obligations. Extending MFN benefits, and accepting widespread free-riding was anyway not that costly as the bigger markets had agreed to participate as original members and most of the environment-relevant technology was anyway in the hands of the original EGA members.

This option is however not totally risk free. To understand this risk, it is important to explain the logic behind the HS classification as the backbone of tariff liberalisation.

4.2 The role of the HS classification in the GATT/WTO

As mentioned above, the GATT-think involves, hard disciplines on border measures (instruments) reduced through reciprocal commitments (see Baldwin, (1970)). Softer disciplines are imposed on domestic measures aiming to avoid evisceration of disciplines imposed on border measures: behind the border policies would be unilaterally defined and, to the extent they shifted costs across national border, would have to abide by the non-discrimination principle. Adherence to this integration recipe guarantees that unilateral measures would not be burdening imported goods more than they would burden domestic, competing goods. Non discrimination served as an insurance policy against concession erosion. Thus, trading partners would maintain their incentive to continue negotiating their tariff down, safe in the knowledge that the outcome of their negotiation would not be undone through subsequent unilateral actions beyond their control.

Tariff liberalization is predicated on some common understanding of the

[10] See Hoekman and Mavroidis (2015) for a discussion of plurilateral agreements.

goods traded. This is exactly what the HS, the Harmonized System, is supposed to do. It provides an agreed classification of goods from an aggregate (two-digit), to a dis-aggregated (six-digit) level.

The World Customs Organization (WCO) is in charge of updating the classifications striving to develop a taxonomy that everyone finds useful. This is a challenge, as names of goods correspond to national, often idiosyncratic preferences.

Because factors affecting preferences differ across different societies, preferences across countries are asymmetric. The degree of differentiation is in direct correlation with the degree of heterogeneity across societies. As the WTO has almost the same membership with the United Nations, one can expect a significant dispersion of preferences so that goods will thus, often, be described in different manners.

The WCO must do away with national preferences. To do that, it is naturally led to describe goods in a way that does not reflect idiosyncratic preferences. This leads to descriptions that are overwhelmingly functional, instead of descriptions that insists on one characteristic of goods that might or might not be its quintessential element. A spade is called a spade, instead of spade produced with fair-labour standards, or in environment-friendly manner. What is fair-labour standards, or environment-friendly production, might have different meaning across societies.

GATT-Think is thus predicated on an HS that describes goods in environment-neutral manner. GATT members remained of course, free to advance their societal concerns through domestic, behind the border measures that they had to apply in non-discriminatory manner. The GATT (and the WTO) after all is about harmonization of conditions of competition within, and not across market (see Horn and Mavroidis (2004)).

4.3 Legality of "ex outs" expressing national preferences

Over the years, as mentioned above, some trading nations moved to eight- or more digit classifications. They did so in unilateral manner. Article 3.3 of HS allows them to do so, provided that national descriptions are sub-classifications of HS entries. Two questions arise. First, what is a sub-classification, or better, when is sub-classification legitimate? And second, and related to the first, can a WTO member introduce criteria or characteristics in a tariff classification that correspond to behind the border societal preferences?

Preferences can of course, in principle, be expressed through border as well as domestic measures. In the GATT-world the second solution was privileged simply because, as we have stated above, tariff concessions could only be exchanged against a common language describing goods. Since pro-environment or pro-labour standards were not common across participants, the common description of goods had to be based on functional properties of described goods. This was the advantage of the HS classification, and this is why it was privileged, and provided the basis for tariff concessions in the GATT-world.

Domestic policies, that had to observe non-discrimination, would emerge against the background of tariff concessions expressed in regulation-neutral terms. Recall, and this is the key, tariff concessions take place following reciprocal negotiations to this effect. Nothing of course, stops WTO members from negotiating at the eight- or higher digit level, if their national classifications observe Article 3.3 of HS. Assertion of national preferences will thus arise at the border when negotiations take place at at the eight- or higher digit level.

The APEC/EGA initiatives involve the assertion of preferences at the border. However, the very fact that a product classification is inserted into a schedule does not make it ipso facto legal under WTO law. The Appellate Body report on EC-Bananas III has made it unambiguously clear that the legality of schedules of concessions can be challenged after the end of the negotiations. This view rests on two grounds. First, from a practical perspective, it is probably a quixotic test to expect a consensus decision on the legality of each and every concession at the end of a trade round across players with divergent incentives. Second, and more substantially, allowing WTO members to pronounce on the legality of their own actions violates the letter and the spirit of Art 23.2 DSU. This is the quintessential provision of DSU to the extent that it explains that the WTO is third party compulsory adjuction system ("*nemo judex in causa sua*"). There is thus, no guarantee that the concessions granted under APEC/EGA are lawful, and thus they can be challenged before the WTO.

What could the argument be, in case a challenge has been mounted? Assume Home and Foreign produce an environment-friendly and -unfriendly good, and that the two goods compete in the market of an EGA signatory where Home faces say a 5% tariff, and Foreign a 10% tariff. Foreign challenges the measure arguing the two goods are like so that the EGA and its ex outs violate the MFN principle. How would a panel address the issue?

It is very likely that a panel would conclude the products are like. The reasons are as follows; the concept of likeness that is relevant is likeliness under Art 1 (MFN, in particular for custom's duties) and the case law of the AB has defined likeness under Art 1 in terms whether goods belong to the same 6 digit classification. In Japan-Alcoholic Beverages, which was a dispute under Art III of the Gatt, the AB defined likeness in this way. The panel on Japan–SPF Dimension Lumber, which was a dispute under Art I of GATT, provided an explicit acknowledgment of the relevance of tariff classification as the dominant criterion to establish likeness (§§ 5.11–12). One can also expect that the analysis of likeness under Art III to be more "expansive" (see Hudec (2000)). It is striking in this respect that the AB in Japan-Alcoholic beverage did not deviate from its approach under Article I of GATT. Since here we deal with a border instrument, two goods that come under the same 6 digit classification, will thus in all likelihood, be judged like goods. Under the premise following from the case law of the AB that goods at the same 6 digit are like, goods belonging to different 8 digit levels which are subdivisions of the same 6 digit, are thus like because they share the same 6 digit classification.

The fact that products belonging to different 8 digit subdivisions should be recognised as like has two consequences. First, it calls into question the moti-

vation of the EGA members to attempt to distinguish between these two goods in first place; there is a disconnect between the attempt to differentiate between goods and the fact that they will be recognised as like from a legal perspective. Second, it raises the prospect that differential market access granted to two goods belonging to different 8 digit classification will be discriminatory. The issue is not de jure discrimination (which requires differentiation by origin) but de facto discrimination. This would arise for instance if the ex out were defined in such a way as providing better market access for some countries. If de facto discrimination was found, the approach of the EGA to reflect preferences by granting better access for ex outs would be deemed unlawful.

One way out of this policy conundrum is to understand likeness under Art 1 in terms of its policy dimension for classification beyond the 6 digit level. A definition of likeness in terms of a policy dimension however requires an assessment of whether the policy dimension is authentic or a means to discriminate. This assessment can be undertaken by importing elements from Art XX of GATT, TBT or SPS. For instance, a test can be formulated in terms of necessity or consistency.

WTO members concerned could of course, also invoke Article XX of GATT to justify their measures. The problem with this approach though, is that it does not respond to the question "why allow for sub-classifications as per Article 3.3 of HS, if eventually, they will be judged inconsistent with Article I and II of GATT, and will have to be justified through recourse to Article XX of GATT"? Furthermore, this approach does not provide an end to the discussion, as complaints might multiply, and each time WTO courts will be asked to pronounce on the consistency of a different (or even the same) sub-classification with multilateral rules. Our solution takes case of the problem once and for all.

This approach would actually be similar to that advocated by the AB in EC Tariff Preferences. In this case, the AB did not accept any policy intervention to justify differential tariff treatments but only those policies relying on objective criteria. Although the AB did not define "objective criteria", the idea must have been that this requirement would guarantee that benefits could not be targeted to specific recipients. Consequently, no question of de facto discrimination could arise.

It is also worth noting that the question of a possible challenge of the EGA construct with respect to national treatment does not arise. It is simply immaterial whether the importing state produces or not one of the two (or any of the two) types of goods. National treatment will not be violated anyway as it covers only internal measures. This obligation applies only after goods have been cleared through the customs.

However, the better market access provided to green goods produced abroad also affects the relative positions of environmentally unfriendly (brown) goods produced domestically and those produce abroad. The lower tariff on foreign green goods acts like a tax on foreign brown goods and foreign producers will have an incentive to switch production towards green goods. There is no equivalent measure for domestic production. Domestic producers of brown goods will

face a stronger competitive pressure from the foreign producers of green goods but this effect is likely to be weaker than the effect felt by foreign producers of brown goods (to the extent goods produced abroad are closer substitute to one another than goods produced in different countries). As a consequence, domestic producers of brown goods benefit from a more favourable treatment that producers of foreign brown goods.

5 Concluding Remarks

This paper has argued that while the APEC and EGA agreements involve a shift in the way in which policy preferences are expressed in the WTO, they are not immune from a challenge in terms of MFN provisions. These initiatives are still remarkable in a number of respects.

First, these initiatives involve a change of paradigm with respect to the motivation underlying the determination of tariffs. The prevailing view is that tariffs are determined within the GATT/WTO as an exchange of market access which improves on the outcome of unilateral tariff setting which otherwize optimise the terms of trade. Each country reduces tariffs below what would be (unilaterally) optimal for some imports in exchange for a reduction of the tariff that trading partners would apply to its exports. The APEC and EGA intiatives introduce environmental protection as another motivation when deciding on the level of tariffs. They thus improve market access for a class of goods that signatories believe should be traded on preferential terms. But nothing would prevent to modulate tariffs according to other public policy concerns.

When setting their tariffs, APEC signatories were not thinking only of their terms of trade, but also in terms of environmental protection. In fact, for some participants like China, with substantial bargaining power, it seems that the latter motive dominated the former, since it did not receive major tariff concessions from its partners with significant market power. Indeed, the United States made only insignificant tariff concessions, as we have seen in this paper. This observation, in and of itself, casts doubt as to whether the terms of trade theory[11], eloquently used as the framework to explain the GATT (where tariff classifications were expressed in terms void of any regulatory content) is the only relevant framework in a world where the level of tariffs agreed is often the expression of mixed motives (in our case, environmental concerns, as well as the continuing strive to improve terms of trade).

Even from the narrower perspective of tariff preferences, these initiatives are significant. Up until then, tariff preferences were granted mostly in favour of developing countries and did not involve any form of regulatory conditionality. Indeed, some WTO members occasionally implemented tariff preferences conditional on regulation. The litigation on EC-Tariff Preferences, where the EU conditioned tariff reduction upon adoption of policies to combat production and trafficking of drugs is a case to the point. The APEC/EGA initiative nev-

[11] See Bagwell and Staiger (2002).

ertheless, goes much beyond and is not confined to preferences for developing countries. It is preferences for all that produce environmental goods.

Second, it is remarkable that policy preferences are expressed collectively. In the context of the traditional approach, policies preferences are expressed trough domestic regulations, without explicit coordination across members (at least in the WTO), reflecting the fact that the WTO regime was conceived in temrs of negative integration. The APEC and EGA initiatives by contrast involve some coordination on the expression of policy preferences (at the very least with respect to the list of goods subject to the agreement). Twenty-one WTO members so far have expressed a joint preference and it is a remarkable instance in which the provision of a public good takes place through trade instuments.

Third, it is also worth noting that the EGA/APEC initiatives are not multilateral and from that perspective are part of a trend. Indeed, since the advent of the WTO, there has not been any successful multilateral tariff negotiation. More generally, except for the Agreements on Aid for Trade, and Trade Facilitation, two initiatives largely designed towards helping with development efforts of the developing countries members of the WTO, there has been no successful multilateral negotiation for over twenty years now under the aegis of the WTO. The various initiatives that were successfully concluded (like the Agreements on Information Technology, ITA I, and ITA II), were de facto plurilateral agreements. Participants agreed to negotiate even though the whole membership was not in agreement to do so, and did not seek for authorization to implement their results (as they should under the relevant provisions concerning plurilateral agreements). They simply went ahead and did so when a critical mass of members had locked in tariff concessions (so as to reduce the potential for free-riding), and further agreed to implement their results on nondiscriminatory (MFN) basis. As Hoekman and Mavroidis (2015) explain, the increasing heterogeneity of the WTO membership has had an impact on the number of multilateral agreements that can plausibly become credible negotiating items at the WTO.

Viewed from this perspective, the APEC/EGA initiative is thus part of a recent trend to negotiate among few. Arguably, APEC/EGA goes one step further than ITA I & II, since the original signatories did not even condition the extension of the trade advantages on an MFN-basis upon first guaranteeing that a critical mass of producers had acceded to their arrangement. This is of course a disturbing trend which raises questions about the role of the WTO. These questions are however beyond the scope of this paper.

References

[1] Bagwell, Kyle, and Robert W. Staiger. 2002. The Economics of the World Trading System, MIT Press: Cambridge, Massachusetts.

[2] Baldwin, Robert E. 1970. Non-tariff Distortions in International Trade, Brookings Institution: Washington, DC. Bown

[3] Chad P., and Douglas A. Irwin. 2016. The GATT's Starting Point: Tariff Levels circa 1947, in Manfred Elsig, Bernard Hoekman, and Joost Pauwelyn, (eds.), Assessing the World Trade Organization: Fit for Purpose? Cambridge University Press: Cambridge, UK.

[4] Grossman, Gene M., Henrik Horn, and Petros C. Mavroidis. 2013. Domestic Instruments, pp. 205-345 in Henrik Horn and Petros C.

[5] Mavroidis (eds.), Legal and Economic Principles of World Trade Law, ALI, The American Law Institute Reporters' Studies on WTO Law, Cambridge University Press: New York City.

[6] Hoekman, Bernard M., and Petros C. Mavroidis. 2017. MFN Clubs and Scheduling Additional Commitments in the GATT: Learning from GATS, European Journal of International Law, 28: 387-407.

[7] Hoekman, Bernard M., and Petros C. Mavroidis.2015. WTO à la carte or WTO menu du jour? European Journal of International Law, 26: 319-343.

[8] Horn, Henrik and Petros C. Mavroidis. 2011. To B(TA) or Not to B(TA)? On the Legality and Desirability of Border Tax Adjustments from a Trade Perspective, The World Economy, 34: 1911-1937

[9] Hudec, Robert E. 2000. 'Like Product': The Differences in Meaning in GATT Articles I and III, pp. 101–23 in Thomas Cottier and Petros C. Mavroidis, Regulatory Barriers and the Principle of Non-discrimination in World Trade Law, University of Michigan Press: Ann Arbor, Michigan.

[10] Mavroidis, Petros C. 2016. The Regulation of International Trade, Volume I and II, MIT Press: Cambridge, Massachusetts.

[11] Neven, Damien J. 2001. How Should Protection be Evaluated in Article III GATT Disputes? European Journal of Political Economy, 17: 421–44.

[12] Santana, Roy. 2015. Options for Defining Products Covered by the Environmental Goods Agreement, BioRes 9:5: ICTSD, Geneva (available at https://www.ictsd.org/about-us/roy-santana)

[13] Shubik, M. and R. Levitan, (1980), Market structure and behavior, Cambridge MA, Harvard University Press

[14] Vossenaar, René. 2014. Securing Climate Benefits in the Environmental Goods Agreement, BRIDGES, December 8, 2014, ICTSD: Geneva, Switzerland.

[15] Vossenaar, René. 2016. Reducing Import Tariffs for Environmental Goods: the APEC Experience, ICTSD: Geneva, Switzerland.

Appendix

Author contacts:

Petros C. Mavroidis

Columbia Law School and University of Neuchâtel
Edwin B. Parker Professor of Law at Columbia Law School
Jerome Greene Hall, Room 734
435 West 116th Street
New York, NY 10027

Email: pmavro@law.columbia.edu
Email: Petros.Mavroidis@unine.ch

Damien J. Neven
Graduate Institute of International and Development Studies, Geneva

Email: Damien.Neven@graduateinstitute.ch