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EU PREFERENTIAL TRADE AGREEMENTS: COMMERCE, FOREIGN POLICY AND DEVELOPMENT ASPECTS



Edited by David Kleimann



INTERNATIONAL TRADE OBSERVATORY
AND
RELEX WORKING GROUP



EU Preferential Trade Agreements: Commerce, Foreign Policy, and Development Aspects

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Robert Schuman Centre for Advanced Studies

Global Governance Programme

International Trade Observatory

Department of Law

Working Group on EU External Relations

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Abstract

This e-book compiles the written contributions prepared by the speakers of an EUI conference titled ‘Global Europe: The New Generation of EU Preferential Trade Agreements’. The conference took place on May 14-15, 2012, on the EUI premises in San Domenico di Fiesole. It was organized by the EUI Working Group on EU External Relations Law, under the auspices of Professor Marise Cremona and Professor Petros Mavroidis, with generous support provided by the EUI’s Global Governance Programme and the Academy of European Law.

The e-book is divided into four parts. In the introductory part, David Kleimann provides a perspective on the European Commission’s efforts to implement the ‘Global Europe’ strategy and outlines the domestic and external challenges that EU leaders face in this process.

Part II is devoted to crosscutting issues that generally apply to contemporary PTAs. Against the background of the most recent wave of regional and inter-regional economic integration, Petros Mavroidis argues that the relevance of the WTO for international trade liberalization and rule making is fading. Patrick Messerlin, secondly, considers the various domestic motives for the negotiation of PTAs and identifies the actors that play important roles in the political economy processes associated with the negotiation and conclusion of PTAs. Jean-Pierre Chauffour and David Kleimann, third, examine key economic, institutional, and policy challenges that arise in the course of PTA implementation processes in developing countries and derive a number of recommendations that aim at more effective and development oriented PTA implementation.

Part III then turns to several of topics that shed light on specific aspects of EU PTA negotiations and their domestic ratification. For starters, Adrian van den Hoven contends that the EU is now moving toward a PTA negotiation approach that is more than ever geared towards the achievement of reciprocity of mutual commitments with partner countries. Maria Joao Podgorny, secondly, reflects on the role of the European Parliament in the area of EU trade and investment policy and provides a perspective on the process of inter-institutional cooperation between Parliament, the European Commission, and the Council with regard to the ratification of EU PTAs. Elisabeth Roderburg, third, argues the case for deep transatlantic economic integration between the EU and the United States. Jakob Cornides, fourth, explains how and why the European Commission seeks to export EU intellectual property protection standards to third countries through plurilateral and bilateral trade agreements.

In Part IV of this e-book, four authors devote particular attention to the question of how the European Union seeks to achieve non-commercial objectives through the negotiation of PTAs. Isabelle Ramdoo and Sanoussi Bilal provide a critical reflection on the EU’s approach to the negotiation of Economic Partnership Agreements (EPA) with African countries and assess the merits of this endeavour for the promotion of economic development and regional integration in Africa. Lorand Bartels, secondly, examines how the EU, by means of ‘human rights clauses’ and sustainable development chapters in its PTAs, implements its obligation to ensure that its external activities respect human rights and pursue the objective of promoting sustainable development. In a related contribution, Fabiano de Andrade Correa considers the extent to which EU trade agreements have increasingly included procedural and substantive sustainable development provisions in its PTAs.

Keywords

EU Common Commercial Policy, Global Europe, trade, investment, preferential trade agreement

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Part I – An Overview

‘Global Europe’: Quo Vadis?

David Kleimann*

Abstract

In 2006, the European Commission launched its ‘Global Europe’ trade and investment strategy. At its core, the ‘Global Europe’ strategy aims at the conclusion of ‘deep and comprehensive’ preferential trade agreements (PTA) with partner countries and regions that are of great economic and strategic importance to the European Union. Today, ‘Global Europe’ arguably makes for the most promising and dynamic area of EU external action, providing the credible prospect that European commercial and foreign policy interests will be advanced through a new generation of EU PTAs in the coming years. Against this background, this introduction to this e-book on EU PTAs outlines the origins of ‘Global Europe’ and takes stock of the progress that has been made since 2006. Furthermore, the paper presents the main external challenges that the European Commission, as the mandated EU negotiator, faces with respect to the substance and process of negotiations. Third, the author discusses the potential impact of the ‘Global Europe’ agenda on the WTO centred multilateral trading system. The paper closes with a discussion of the domestic challenges that EU leaders may face when it comes to the adoption of ‘Global Europe’ PTAs by the European Council and the European Parliament in Brussels and Strasbourg. Throughout this paper, it is argued that the merit of ‘Global Europe’ PTAs cannot only be measured by reference to the coverage and depth of its hard legal commitments and mutual concessions. Any such assessment must take a close look at the institutional provisions that these agreements entail. ‘Global Europe’ PTAs, as modern economic integration agreements and cornerstones of EU External Action, ought to include innovative institutional mechanisms that facilitate effective PTA management, implementation, and dispute settlement, as well as the progressive negotiation of additional integration measures in the future.

I. Introduction

Following the release of the ‘Global Europe’ strategy¹ and the end of the European moratorium on bilateral trade negotiations with commercially meaningful partner countries in 2006, policy-makers in Brussels have significantly expanded and diversified the EU external trade negotiation portfolio. Since then, the European Commission has initiated a wide range of negotiations with important trade and investment partners such as South Korea, Canada, India, several ASEAN member states, as well as – most recently – Japan, the United States, and Morocco. Adding to the longstanding efforts to advance EU foreign policy objectives through the negotiation of trade agreements with lesser developed countries, the Commission, in 2010, declared that “the latest generation of competitiveness-driven Free Trade Agreements is precisely inspired by the objective to unleashing the economic potential of

* David Kleimann is a Researcher at the Law Department of the European University Institute in Florence, an Associate Research Fellow at ECIPE in Brussels. The author gratefully acknowledges helpful comments received from Petros Mavroidis and Lisa Brandt. All remaining errors are the author’s alone. As a coordinator of the EUI Working Group on EU External Relations Law, the author co-organized an EUI conference titled “Global Europe? The New Generation of EU Preferential Trade Agreements”, which took place on May 14-15, 2012, in Florence. This volume compiles the written contributions that the speakers prepared for the conference.

¹ European Commission (2006): *Global Europe, Competing in the World – A Contribution to the EU’s Growth and Jobs Strategy*, European Commission Communication, External Trade, Brussels. Available at: http://trade.ec.europa.eu/doclib/docs/2006/october/tradoc_130376.pdf

the world's important growth markets to EU trade and investment.”² But while the underlying rationale for the negotiation of EU preferential trade agreements (PTA) is now more than ever grounded on commercial motives, the entry into force of the Lisbon Treaty in December 2009 has - with the empowerment of the European Parliament on trade policy matters - arguably enhanced the political dimension of EU trade and investment policy formulation.

This paper examines several key aspects of the ‘Global Europe’ agenda and provides for an outlook for the coming years. Section II briefly reviews ‘Global Europe’s’ origin and its economic rationale. Section III outlines the main challenges that the European Commission – as the Union’s negotiator – currently faces with respect to the substance and process of ongoing and prospective PTA negotiations. Section IV then turns to a discussion of the potential impact of the ‘Global Europe’ agenda on the WTO centered multilateral trading system. Section V presents the domestic challenges that EU leaders may face when it comes to the adoption of ‘Global Europe’ PTAs by the European Council and the European Parliament in Brussels and Strasbourg. Section VI provides an outlook and concludes the paper. Throughout this paper, it is argued that the merit of ‘Global Europe’ PTAs cannot only be measured by reference to the coverage and depth of its hard legal commitments and mutual concessions. Any such assessment must take a close look at the institutional provisions that these agreements entail. ‘Global Europe’ PTAs, as modern economic integration agreements and cornerstones of EU External Action, ought to include institutional mechanisms that facilitate effective PTA management, implementation, and dispute settlement, as well as the progressive negotiation of additional integration measures in the future.

II. The Origin of ‘Global Europe’ and its Economic Rationale

At the time of its release, ‘Global Europe’ responded to a growing awareness among policy-makers in Brussels and EU Member States’ capitals that European commercial interests would not be satisfied by the outcome of the protracted WTO Doha Round negotiations at the WTO. What negotiators and policy-makers demanded, but could not receive from third country negotiators within the multilateral framework, was substantial access for EU goods and services to the new growth markets in South and East Asia as well as Latin America. Moreover, the increasing fragmentation of production through the development of international supply chains created the necessity for common approaches to competition, standards, investments, intellectual property rights, and other ‘behind the border’ policies. The rationale for common disciplines in these policy areas is to decrease trade costs and to enhance the legal security of international production networks.³ As a result, these ‘21st century trade’ issues were rising up the list of priorities of EU businesses and governments.⁴ WTO Ministerial Conferences in both Cancun (2003) and Hong Kong (2005), however, considerably frustrated EU hopes that the Doha Round would ever deliver on any of the EU’s key objectives. At both summits, major rifts between the positions of developed and larger developing countries surfaced and left EU negotiation targets out of reach.⁵

² European Commission (2010): *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Towards a comprehensive European international investment policy*, COM (2010)343, final Brussels, 7.7.2010.

³ Baldwin, Richard (2010): *Economics*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): ‘Preferential Trade Agreement Policies for Development – A Handbook’, World Bank, Washington D.C.

⁴ On the importance of adapting trade policies to the realities of international supply chains, see: Hoekman, Bernard & Jackson, Selina (2013): *Reinvigorating the Trade Policy Agenda: Think Supply Chain!*, VOXeu column, 21 January 2013. Available at: <http://www.voxeu.org/article/reinvigorating-trade-policy-agenda-think-supply-chain>

⁵ For an overview of Doha Round negotiation dynamics and major events, see: Kleimann, David and Joe Guinan (2011): *The Doha Round: An Obituary*, European University Institute Global Governance Programme Policy Brief, Issue 1/11, Florence, June 2011. Available at: <http://www.eui.eu/Projects/GGP/Documents/Publications/PolicyBriefs/PolicyBrief20111.pdf>

The release of the 'Global Europe' communication one year after Hong Kong then marked a consequent strategic shift. By ending the EU's PTA moratorium, which the Commission had put in place in 1999 to underpin its commitment to the Doha agenda, the EU *de facto* started to turn its back on the Doha Round. Officials in Brussels and policy-makers in Member States' capitals nevertheless continued to pay lip service to WTO negotiations. Less than two years later, following the eventual collapse of Doha talks in Geneva in July 2008, the Commission's Directorate General for External Trade already went as far as to consider options for PTA negotiations with all major OECD economies. To be sure, this radical reorientation had previously been deemed an absolute taboo, given the clouds that bilateral engagements among the richest economies would have casted over the Doha agenda.

Ever since 2006, the European Commission, backed by a trade-oriented coalition of EU Member States in the Council, has spared no efforts to meet the 'Global Europe' objective of creating economic growth through 'deep and comprehensive' integration with the commercially most attractive regions of the world. These efforts are mirrored in the large number of ongoing and proposed negotiations with respective target governments as well as in early signs of success, notably the conclusion of state-of-the-art agreements with South Korea and Singapore.

Arguably, the Commission's commitment to the execution of the Global Europe strategy has rendered external trade and investment policy the Union's most dynamic and the most promising area of EU external action and provides for a credible prospect of advancing both European commercial as well as geopolitical interests. At the same time, the Commission, as the institutional driving-force of Europe's PTA agenda, is now confronted with a number of formidable external and domestic challenges that it will have to tackle on the road to success. These challenges are discussed in the remainder of this paper.

III. External Challenges to the 'Global Europe' Agenda

Above all, EU negotiators have been running out of bargaining chips vis-à-vis the lesser developed of their desired negotiation partners. Europe's generally low tariff protection and relatively open public procurement market leave Commission officials with little to offer to their counterparts. The list of EU offensive interests, however, is massive. It ranges from the liberalization of tariffs, services, investment, and government procurement to regulatory reforms of partner countries' regimes governing customs, competition, intellectual property rights (IPR), product quality control, labour rights, and environmental protection. As a result of this unfavourable exchange rate, several developing country partners, particularly in Southeast Asia, have proved to be considerably reluctant to join the EU at the negotiation table in the first place.

Four of the authors contributing to this e-book have zoomed in on specific items of the Commission's negotiation agenda. While **Patrick Messerlin** gives an overview of the EU's unfinished tariff reduction agenda, **Jakob Cornides** provides a European Commission perspective on the EU's efforts to advance IPR protection in third countries through the negotiation of comprehensive PTAs. Moreover, **Lorand Bartels** and **Fabiano de Andrade Correa** discuss the scope and depth of sustainable development chapters in EU PTAs.

Given the long list of EU demands and its fading ability to offer concessions in return, the Commission decided to complement its ambitious PTA strategy through several more defensive elements that are designed to (re-)gain leverage over a number of developing countries' governments that had initially shied away from a negotiation engagement. "Reciprocity", as **Adrian van den Hoven** demonstrates in his contribution to this e-book, is the new watchword when it comes to tackling difficult negotiating partners through EU market foreclosure.

For instance, the European Commission's 2011 proposal for a revised scheme of non-reciprocal trade preferences for developing countries showcased its intent to exclude several important emerging

economies from preferential tariff treatment.⁶ The revision of the EU's Generalized System of Preferences (GSP), which will come into effect in 2014, will entirely strip several upper-middle income countries of their traditional preferential status. Moreover, the new scheme provides for product graduation criteria, which eliminates preferential treatment for many developing countries on a product-specific basis. Among those that will be affected by the reform are several governments with which the Commission currently negotiates or aims to negotiate PTAs in the future, including Argentina, Brazil, India, Indonesia, Malaysia, the Philippines, Thailand, and Vietnam. In turn, the elimination of these preferences provides EU officials with new bargaining chips, which they can utilize at the bilateral negotiation table. Moreover, the prospect of losing EU preferential tariff treatment has increased incentives for the affected country governments to reconsider EU courtship for the launch of negotiations. Thailand, having committed to PTA negotiations with the EU at the end of 2012, can be regarded as the most recent 'victim' of this strategy.

Regaining leverage, by the same token, is also at the core of the recent Commission proposal on government procurement.⁷ The regulation would allow EU Member States to exclude bids from companies located in countries that are not parties to the WTO Government Procurement Agreement (GPA) and do not grant EU producers access to public procurement markets comparable to EU practices.

The persuasive power of (the withdrawal of) EU market access concessions, however, is likely to find its limits in the political and economic costs that emerging and developing countries' governments associate with the domestic implementation of the EU's 'deep and comprehensive' PTA negotiation template. As with every commercially meaningful trade agreement, sector specific economic adjustment costs that result from reciprocal market opening are the price to pay for a net economic welfare increase. Secondly, comprehensive market access concessions for goods, services, and investment, as well as bilaterally agreed rules on government procurement, intellectual property, and competition can considerably limit the amount of policy space that developing countries' governments have at their disposal. Such policy space can be instrumental in directing the development process of the domestic economy, for instance by shielding infant industries from foreign competition. Third, the domestic implementation of deep integration PTAs can confront middle and low-income developing countries with enormous institutional, financial, and political obstacles. As **Jean-Pierre Chauffour** and **David Kleimann** argue in this e-book, such domestic structural impediments to effective implementation often merit a gradual approach to the design of customized deep integration obligations. Tailor-made institutional design can - if based on country-specific structural contingencies - help to avoid overloading partner countries' reform agendas and the inefficient diversion of institutional, financial, and political resources.

The dangers that derive from overburdening the developing country partner, to be sure, are manifold. They range from eventual frustration of EU stakeholders' expectations about partners' (sometimes predictable) non-compliance, over inefficient prioritization of resource dedication in the resource scarce environments of developing countries, to the creation of adversarial rather than cooperative bilateral relationships with the partner countries.⁸ Presenting oneself as a firm negotiator

⁶ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No. 732/2008. Available at: http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150025.pdf

⁷ European Commission (2012): Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM (2012) 124 final, 2012/0060 (COD), Brussels, 21.3.2012. Available at: http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149243.pdf

⁸ For a general discussion of this notion, see: Hoekman (2010): *North-South Preferential Trade Agreements*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C.

in European economic interest is certain to receive immediate stakeholder applause at home, particularly so in the dire times of economic crisis. The long-term implications of excessive EU demands, however, have the potential of poisoning economic relations with the new high-growth regions of the world – such as Southeast Asia –, which are of utmost geopolitical and economic importance in the long run.

The negotiation of Economic Partnership Agreements (EPA) with African countries in the past ten years may hardly be comparable to the dynamics of 'Global Europe' negotiations for various reasons. However, the experience can provide EU negotiators with valuable lessons that generally apply to the consequences of a potentially overambitious agenda and the necessary balancing between short-term commercial objectives and the EU's long-term strategic interests in a cooperative relationship with the partner countries. In their contribution to this e-book, **Isabelle Ramdoo** and **Sanoussi Bilal** take stock of the EPA process up until today and conclude on important lessons that can be learned from this process.

Several of the EU's 'Global Europe' negotiation partners in South and Southeast Asia - as a result of their assessment of domestic economic adjustment costs; of the policy space required for the promotion of economic development; and of their own implementation capacities - may come to the conclusion that they are currently not prepared to sign up for the comprehensive hard legal obligations foreseen in EU PTA template. Difficulties in negotiations with India and Malaysia are the current prime examples of this scenario.

Should the EU Trade Commissioner decide to settle for less than envisaged in certain cases - and the EU-Korea PTA sets the self-imposed standard here - the Commission will be confronted with a two-fold challenge. At a technical level, it will have to ensure that the eventual agreements contain dynamic elements, so-called 'living-agreement' instruments, which allow for the continuous expansion of the agreements' hard legal provisions over time and link domestic reform progress in partner countries to the development of tailor-made rule-making. Varying combinations of soft law, the establishment of bilateral institutional fora for economic and regulatory cooperation, as well as the provision of technical and financial assistance can set significant incentives for the gradual institutional and economic modernization in the partner country, with a view to the joint development of hard legal rules and the achievement of further economic integration in the long run.⁹ At the political level, the Commission will have to communicate to EU businesses and other stakeholders that 'deep and comprehensive' integration à la Global Europe means very different things in different contexts. Management of expectations early on will be critical in the attempt to avoid the alienation of domestic constituencies and stakeholders whose political support will be needed when it comes to the legislative adoption of these agreements in Brussels and Strasbourg. A recent Commission communication to the Council demonstrates that the Commission has already started this process.¹⁰

The engagement with large developed partner countries - such the U.S., Japan, and Canada - confronts EU negotiators with a very different set of realities and challenges. For starters, the degree of *de facto* economic integration between these economies has already reached very high levels, border protection has largely been dismantled, institutional capacities on all sides are strong, and economic cooperation among the partners has been well rehearsed over the past decades. As a result, the respective sensitivities, the remaining impediments to trade flows, as well as partners' institutional machineries are well known by all parties. The trade barriers that these negotiations will thus have to tackle are to a large extent those that have proved to be the most resistant to removal in the past, such as agricultural market access in Europe and Japan as well as numerous non-tariff barriers on all sides,

⁹ For a comprehensive introduction and discussion of this notion, see: Hoekman (2010): op. cit.

¹⁰ European Commission (2013): *Trade – A Key Source of Growth and Jobs for the EU*, Commission Contribution to the European Council of 7-8 February 2013, Brussels. Available at: http://ec.europa.eu/commission_2010-2014/president/news/archives/2013/02/pdf/20130205_2_en.pdf

ranging from diverging product standards over incompatible technical regulations and the regulation of services sectors to different approaches to food safety regulation.

Comprehensive economic integration of the largest OECD economies through EU PTAs with the U.S. and Japan has been estimated to result in substantial benefits.¹¹ In her contribution to this e-book, **Elisabeth Roderburg** presents the benefits that could result from the recently launched negotiations of Transatlantic Trade and Investment Partnership agreement (TTIP).¹² At the same time, however, the practical challenges and obstacles to successful integration of the largest and most advanced economies of the world are massive. They shall be briefly examined, with reference to TTIP negotiations, in the following paragraphs.

First, the generally low average border protection figures on both sides in fact hide a number of remaining tariff peaks, which protect sensitive sectors. As **Patrick Messerlin** explains in his contribution to this e-book, these tariff peaks are, in political economy terms, upheld by deeply entrenched vested interests. In other words, it should be recalled that there are important reasons why these tariffs are still in place, notably due to successful special interest lobbying. The attempt to eliminate these tariff peaks will likely be met by vigorous opposition from the affected industries and eventually involve some painful political costs.

Secondly, many of the technical and regulatory barriers to trade that these ‘mega-PTAs’ are supposed to remove exist due to the prevalence of diverging policy preferences, which shape both the modalities of the regulatory process as well as the substantive outcomes of regulation. The convergence of such preferences is extremely difficult to achieve as they are anchored in the regulatory cultures of the partner countries and legitimized by multilevel political processes. To be sure, such systemic and cultural issues are all but new. In the case of the transatlantic partners, negotiators on both sides have sought to remove associated trade irritants in a variety of different bilateral fora over the past two decades – however, with modest success. Asking a U.S. trade negotiator how he would clean a chicken before exporting it to the European Union may result in some insights to the pains that were suffered in this process.

The technical solutions, too, are, in principle, well known. The two basic alternate instruments for the elimination of regulatory bottlenecks are the harmonization of regulatory processes, regulatory substance, and standards, on the one hand, and the negotiation of mutual recognition agreements (MRA) for regulatory content or conformity assessments, on the other. Harmonization is often said to be more difficult to achieve than MRAs. However, the negotiation of MRAs similarly requires a minimum degree of convergence of regulatory processes, content, or conformity assessments. As such, the value of sectoral MRAs, as an alternative to harmonization, may often be overestimated.

Third, given the complex polity of the economies involved, the alteration of regulatory processes and outcomes in the name of bilateral convergence requires the involvement of various domestic stakeholders and political decision-makers at different levels. But domestic regulatory agencies and legislators frequently hold strong interests in retaining regulatory and enforcement powers at the national or sub-national level. Stakeholders, moreover, such as the affected industries, may shy away from the short-term costs associated with the adaptation of production to new regulatory regimes. Adaptation costs are particularly high for smaller enterprises, which benefit from less scale economies.

¹¹ For an overview of the benefits deriving from an EU-Japan FTA, see: Lee-Makiyama, Hosuk (2012): Upholding Europe’s Mandate on Trade, ECIPE Policy Brief No. 11/2012, Brussels. Available at: http://www.ecipe.org/media/publication_pdfs/PB201212.pdf . On the same topic, see: Messerlin, Patrick (2013): The much needed EU pivoting to East Asia, Asia-Pacific Journal of EU Studies, Vol. 10 (2). Available at: http://www.academia.edu/3046385/The_Much_Needed_EU_Pivoting_to_East_Asia

¹² On the same topic, also see: Erixon, Fredrik (2012): *Transatlantic Free Trade – An Agenda for Jobs, Growth, and Global Trade Leadership*, Centre for European Studies, Brussels. Available at: http://thinkingeurope.eu/sites/default/files/publication-files/transatlantic_free_trade.pdf.

Consumers and voters, finally, may express legitimate opposition to a different regulatory process or standard.

As a result of such complex interest configurations, a top-down imposition of new regulatory regimes in the name of transatlantic market integration is not an option and doomed to political failure. Rather, negotiators at the 'top' should initiate or strengthen existing regulatory dialogues between stakeholders and decision-makers on both sides and link these processes to integration objectives and bilateral for a that are provided for by the respective PTA. The institutionalization of such dialogues hence gives the accord a 'living agreement' dimension, which horizontally links both parties' deliberation and regulatory processes with each other at the 'bottom' and vertically connects these processes with the policy objectives and institutions that are bilaterally formulated and established at the 'top'.

In individual sectors, such as automotives, medical appliances, and pharmaceuticals, the necessary transatlantic stakeholder dialogues have already been established and may generate some early deliverables for the TTIP. The coverage of these regulatory dialogues can and probably will be expanded to include other priority sectors. In a good number of areas, however, the gaps are well known to be too wide to bridge. The most famous examples include the regulation of meat production (hormones treated beef) or the marketing of genetically modified organisms (GMO), whereas these long-standing trade irritants are only the tip of the iceberg of cultural differences in regulatory approaches and preferences. Generally speaking, common regulatory processes, content, conformity testing and certification is likely to be easiest to achieve in innovation sectors (e.g. electric cars, nanotechnology, internet based commerce), where both partners are still in the early stages of hammering out their respective regulatory frameworks.

In sum, apart from the enthusiasm expressed by representatives of export sectors, the announcement of TTIP negotiations has been met with large amounts of scepticism among observers in Brussels and elsewhere.¹³ This scepticism responds to the failure of political decision-makers and regulators on all sides to achieve enhanced market integration in the past decades for the reasons outlined above.

So what is different now, compared to past initiatives? There are three immediate responses that come to mind. First, as a result of the breakdown of multilateral trade negotiations, the pace of economic liberalization and integration around the globe is and will not be negotiated at the WTO headquarters in Geneva for the rest of this decade. To the contrary, governments now find themselves in a process of competitive liberalization, in which the success of their bilateral and plurilateral liberalization and integration initiatives determines the breadth of additional commercial opportunities for the businesses they represent or, if expressed negatively, the extent to which these businesses will be excluded from such opportunities. Leaders on both sides of the Atlantic have recognized this reality and are, in consequence, seeking to negotiate bilateral and plurilateral PTAs with economically and strategically important countries and regions.

In turn, secondly, the design of respective negotiation strategies is not only a way of building stronger economic ties with targeted partner countries, but also a means of excluding competitors that are not willing to make WTO-plus liberalization and integration commitments, neither multilaterally nor bilaterally. As such, the 'all but China' PTA strategy pursued by the transatlantic partners also finds its manifestation in the negotiation of TTIP, the EU agreements with ASEAN countries, and the U.S. led Transpacific Partnership (TPP) initiative. If these initiatives yield commercially meaningful results, they will create trade diversion that will be costly for Chinese businesses and other emerging economies that fail to negotiate similar preferences with the EU, the U.S., and their partners.

¹³ For a particularly pessimistic view, see: Sapir, André (2013): *The Transatlantic Trade and Investment Initiative – Hope or Hype?* Bruegel blog, Brussels, 5 March 2013. Available at: <http://www.bruegel.org/nc/blog/detail/article/1034-the-transatlantic-trade-and-investment-initiative-hope-or-hype/>

Moreover, the exclusion of China from ‘Global Europe’ PTAs and the TPP, which could ultimately create WTO-plus trade rules, aims at coercing China to adapt its commercial practices to 21st century trade rules and standards that are negotiated by the West. Setting the rules of the game, to be sure, gives EU and U.S. businesses an additional competitive edge over their Chinese competitors and reinforces the longstanding Western leadership in shaping economic integration processes.

The critical importance of the overall objective – i.e. the shaping of the 21st century world economic order in accordance with Western political and commercial interests - results in the presumption of a third difference between past and present transatlantic integration efforts: given the contemporary context of geopolitical multipolarity, the stakes of Western international economic strategies have rarely been higher. Hence, one may assume that the political capital that leaders are willing to spend in order to guarantee the success of TTIP and other landmark PTAs is now at an all time high. The intent of the Obama administration to acquire a Trade Promotion Authority (TPA) provides for a first indication of this sentiment. If granted by Congress, the TPA would preclude Congressional rights to amend PTAs that are tabled for legislative adoption and only allow for a yes-or-no vote. On the other side of the pond, the EU Trade Commissioner has made clear that he wants to complete negotiations within the comparatively short period of two years, i.e. before his term ends in spring 2015 - presumably to avoid the fragmentation of negotiations and to bring the commitment of his counterpart to a test early on.

To be sure, the challenges are huge. Administrations on both sides will have to fight costly political battles in order to keep special interest advocacy at bay and ought to find innovative legal and institutional solutions to address the challenges posed by complex governance structures and diverging structural contingencies in the partner countries. In this respect, the EU agreements with emerging economies and those with the United States and Japan have one thing in common. The value of these accords will not only be measured in terms of the static hard legal commitments that the parties codify in various areas. Rather, much of the merits of these accords will depend on how they institutionalize the process of ongoing and future liberalization and integration in issue areas that are not ready for detailed hard legal commitments yet.¹⁴ More generally, the long-term viability of 21st century trade agreements will much depend on the bilateral and plurilateral institutional solutions that governments find for the management of continuous integration and implementation processes.

IV. ‘Global Europe’ and the WTO

Another dimension of ‘mega-PTAs’, such as the potential agreements between the EU, the U.S. and Japan, is their impact on the WTO-centred multilateral trading system. Several commentators have argued that bilateral agreements between the biggest economies of the world will render the WTO irrelevant in the areas of market access liberalization and trade rule making, while the organization would only retain its dispute settlement function. This line of thinking frequently concludes in a call for the revival of the Doha Round with a view to generating non-exclusive benefits for the entire WTO membership and the strengthening of the multilateral rule-based system.¹⁵

Unfortunately, such considerations are as commendable as they are illusory. It is true that the latest wave of economic regionalism constitutes a major blow to the core functions of the WTO – including dispute settlement. As **Petros Mavroidis** argues in his contribution to this e-book, “PTAs seem to run away with the trade agenda while the WTO is fighting a rear guard fight to remain at the spectrum of

¹⁴ For an empirical analysis of institutional design chosen in the area of regulatory cooperation mandated by different PTAs, see: Steger, Debra (2012): *Institutions for Regulatory Cooperation in ‘New Generation’ Economic and Trade Agreements*, (38) 4 Legal Issues of Economic Integration (109), Kluwer Law International.

¹⁵ See, for instance: Berger, Axel & Clara Brandi (2013): *The Transatlantic Free Trade Agreement: Think of the Consequences!*, Deutsches Institut fuer Entwicklungspolitik, Bonn. Available at: [http://www.die-gdi.de/CMS-Homepage/openwebcms3_e.nsf/\(ynDK_contentByKey\)/MRUR-95GB7W?Open](http://www.die-gdi.de/CMS-Homepage/openwebcms3_e.nsf/(ynDK_contentByKey)/MRUR-95GB7W?Open)

relevance.” Bilateral and plurilateral liberalization and rule development become the new norm of 21st century economic integration, whereby the value of WTO MFN liberalization and trade rules is increasingly eroded. Contemporary trade disputes are still being litigated at the WTO. Arguably, it is only a matter of time until WTO rules and liberalization commitments are so outdated that they will remain a meaningful benchmark only among those members that have not engaged in WTO-plus preferential liberalization and rule development. As a result, the most prominent future *raison d'être* of the WTO may hence well be to serve as a battleground for trade disputes between the U.S. and the EU on the one side and Argentina, Brazil, China, India, or Russia, on the other.

PTAs are only a second-best solution in many respects – most importantly because they create inefficient trade diversion. It must not be forgotten, however, that Doha Round negotiations did not fail for a lack of trying. As argued elsewhere in greater detail, the roots of failure can be found in the domestic politics of key WTO members on the core mercantilist items of the Doha agenda - manufacturing and agriculture. While some members - notably the U.S. - were not able to live with a low-ambition deal, others – notably China, India, and Brazil – were not prepared to commit to elements of a high-ambition deal, resulting in a fatal mismatch of demands and offers.¹⁶ And as long as domestic political economy dynamics in the relevant capitals do not change dramatically, the current calls for the revival of Doha negotiations belong to the land of wishful thinking.

In response to the warnings of the systemic implications of mega-PTAs, other commentators - and EU Commission officials in particular - currently take pains to sell these agreements as ‘test-labs’ for and a contribution to multilateral liberalization and the development of WTO trade rules.¹⁷ EU and U.S. PTA concessions would be multilateralized - the story goes - once China, India, Brazil and others are ready to match EU and U.S. PTA concessions and are ready to implement associated domestic trade reforms.

The proponents of this view refer to previous waves of preferentialism in the past sixty years, which were frequently followed by a multilateralization of preferential tariff concessions in the GATT and WTO framework.¹⁸ This observation has prompted analysts, and most recently EU Commission officials, to depict international trade liberalization and economic integration as a pendulum that continuously and predictably swings from one side (multilateral) to the other (regional / preferential) and back again.

This historicism, while strangely building on the philosophical foundations built by Hegel and Marx, warrants a good amount of scepticism for three main reasons. First, there has been a dramatic change in the distribution of global economic leverage since the last multilateral trade deal was concluded in 1993. The history of the past sixty years of international trade liberalization and regulation is one of Western dominance. In today’s multipolar world, however, it is at least conceivable that the recently emerged regional hegemon seek to ensure their predominance through competing models of economic integration. These models can be incompatible and mutually exclusive at the global level. In this scenario, international economic integration could well be pursued regionally rather than multilaterally in the long run.

The second reason relates to the dramatic change in the substance of trade regulation and liberalization: first-generation trade barriers such as tariffs and quantitative restrictions are relatively

¹⁶ Kleimann & Guinan (2011): op. cit.

¹⁷ See, for instance: De Gucht, Karel (2013): *The Transatlantic Trade and Investment Partnership – Global Impacts*, Speech 13/343, at the Institute for International and European Affairs, 19 April, 2013, Dublin, Ireland. Available at: http://europa.eu/rapid/press-release_SPEECH-13-343_en.htm?locale=en ; Also see: European Commission (2013): op. cit.

¹⁸ For a concise review of post war preferentialism, see: WTO (2011): *The WTO and Preferential Trade Agreements – From Coexistence to Coherence*, World Trade Report 2011, Geneva. pp51-54. Available at: http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf

easy to dismantle in context of multilateral negotiations because of relatively straightforward modalities of liberalization. This is exemplified by the success of consecutive GATT negotiation rounds. In contrast, bilateral configurations or plurilateral ‘coalitions of the willing’ are evidently better suited to address most of the more complex items on the 21st century ‘supply chain’ trade agenda, such as services and investment liberalization as well as the proliferation of uniform approaches to standards, food safety, and conformity assessments, and regulatory cooperation. Multilateral negotiations – if ‘variable geometry’ is not allowed for – are improbable to yield meaningful results in these areas. This is because of the lowest-common-denominator problem that persists in the context of a highly diverse 157 countries membership and the sometimes unmanageable complexities that the substance of these negotiation items creates in a multilateral setting. And even plurilateral deals have now run out of favour in the Commission as they tend to yield less commercial benefits than bilateral agreements with the same partners. The Commission’s abandonment of EU – ASEAN negotiations and their substitution through bilateral talks with individual ASEAN member states clearly indicates the departure from a past practice that allowed for a trade-off between the substance and ambition of trade accords and the inclusiveness of its membership. The Commission, in other words, is now more than ever concerned about the commercial value of EU trade and investment agreements.

Finally, it is at least questionable whether the mega-PTAs will create role models that can easily be adopted by third countries. Respective negotiations are likely to manifest very specific interest configurations, priorities, policy preferences, and implementation capacities that often do not match those of the countries that are currently being sidelined. The Commission’s efforts to depict the potential transatlantic trade deal as the lighthouse of trade rule innovation certainly resonate well in the ears of sceptics who fear for the erosion of the multilateral trading system. It is all but certain, however, that the agreement will generate more than external competitive liberalization pressures in the areas of tariffs, services, and investment. Given the WTO membership’s failure to deal with the latter two areas in a meaningful way in the past, such pressures are likely to result in bilateral or plurilateral rather than multilateral initiatives involving third countries in the future.

Against this background, and in light of the fast-paced competitive liberalization process that is currently underway around the globe, the Commission’s bilateral negotiation strategy, at a general level, remains highly commendable. ‘Global Europe’ lacks a credible alternative, both in context of the EU’s external economic as well as geopolitical objectives.

V. The Domestic Challenges to the ‘Global Europe’ Agenda

On the domestic front, the Commission will face a number of challenges related to the political process leading up to the adoption and ratification of Global Europe PTAs. Since the entry into force of the Lisbon Treaty in 2009, there has been a lot of white noise surrounding decision-making on trade policy. This is particularly so because the European Parliament (EP) has been given co-decision powers with the Council on trade policy matters. Parliamentary participation in the decision-making process has significantly changed the rules of the game and has rendered trade policy making in Brussels an even more political exercise, as the EP has now become an additional target of all sorts of special interest advocacy. **Patrick Messerlin**’s contribution to this e-book provides for a general analysis of the domestic political economy dynamics associated with public decision-making on PTAs. **Maria-Joao Podgorny**, furthermore, discusses the EP’s involvement in the decision-making processes applying to EU PTAs from an EP - insider perspective.

On a bright note, the EP has played a rather constructive role in the deliberations on the launch of EU–Japan and EU–U.S. negotiations and has generally backed the offensive interests articulated by

the Commission vis-à-vis external trade partners.¹⁹ In that way, the EP has anchored the Commission's negotiation positions domestically, signalling to third country governments that the Commission's hands are tied due to political constraints at home.

Parliament's supportive attitude, however, is somewhat facilitated by one important factor: the adoption of the large number of EU PTAs that are currently under negotiation will be the responsibility of a new Parliament - together with the Council – following the elections in May 2014. Therefore, the political responsibility for the price that Europe will inevitably have to pay for these agreements - in form of economic adjustment costs - will not have to be born by the current members of the European assembly.

As such, the real test for the EU's ambitious trade and investment policy agenda will only come when the large number of agreements that are currently in the pipeline arrive in the Council and Parliament for adoption. As lobbying efforts frequently culminate at the time when legislative files are tabled for decision, MEPs will carefully weigh the political costs and benefits of a 'yes' or 'no' vote. Recent political quarrels related to trade policy decision-making may serve as a foretaste of what is yet to come. The current economic climate appears to have divided the EU, broadly speaking, into a highly competitive northern pro-trade alliance, on the one hand, and a protectionist southern coalition struggling with the impacts of the current economic crisis, on the other.

Along these fault lines, respective political battles have been fought out in the arenas of the Council and the EP, with the Commission in the role of a biased mediator in pursuit of open and but reciprocal trade relations. Examples *par excellence* that showcase the north-south divide on trade issues include the political processes leading up to the adoption of the EU-South Korea PTA by the Council, the adoption of a safeguard mechanism for the EU-South Korea PTA by the EP, and the Commission's initiative to grant flood assistance in the form of tariff preferences on textile products to Pakistan following the natural disaster of 2010.²⁰ Moreover, the reform of the EU's procedural rules for the employment of trade defence instruments by the Commission within the new legal framework for delegated and implementing acts has surfaced similar divisions. A months-long stand-off eventually resulted in a partial victory for the coalition of southern EU Member States (including France), which advocated looser procedural requirements for the use of anti-dumping, safeguard, and countervailing measures against third countries.²¹

By the time that the 'Global Europe' PTAs will be tabled for adoption – i.e. from 2014 on - the newly elected Parliament and the Council will be confronted with the domestic economic and political costs of 'Global Europe' PTAs implementation. In that process, the Commission may well face considerable headwinds blowing in from the European south. At the same time, the Commission will have to develop strategies to keep a number of civil society groups in check whose sometimes highly populist but highly effective policy campaigns were, as **Jakob Cornides** recapitulates in this e-book, instrumental in the process leading to the rejection of the Anti-Counterfeiting Trade Agreement (ACTA) by the EP in 2012.

¹⁹ See: European Parliament resolution of 23 October 2012 on trade and economic relations with the United States (2012/2149(INI)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0388&language=EN> ; European Parliament resolution of 25 October 2012 on EU trade negotiations with Japan (2012/2711(RSP)). Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-398>

²⁰ For a more comprehensive discussion of the political process leading to the adoption of the EU-Korea PTA by the Council and the EP, see: Kleimann, David (2011): *Taking Stock: EU Common Commercial Policy in the Lisbon Era*, CEPS Working Document No. 345, Centre for European Policy Studies, Brussels, April 2011. Available at <http://www.ceps.eu/book/taking-stock-eu-common-commercial-policy-lisbon-era>

²¹ Brandsma, Gijs Jan & Jens Blom-Hansen (2011): *The post-Lisbon Battle over Comitology: Another Round of the Politics of Structural Choice*, EUI Working Papers, SPS 2011/03, Florence. Available at: http://cadmus.eui.eu/bitstream/handle/1814/18440/SPS_2011_03.pdf

VI. Conclusions

The current EU Trade Commissioner is confronted with a large number of formidable challenges associated with the execution of the ‘Global Europe’ strategy, both domestically and externally. The EU Commissioner for external trade, Karel De Gucht, has so far presented himself as a tough chief negotiator following maxim that ‘no deal is better than a bad deal’. This approach is exemplified by his postures in negotiations with Canada²², India²³, Malaysia and the Commission’s general policy stance vis-à-vis China. Time will tell whether the Commissioner is truly willing to sacrifice the conclusion of a number of agreements with key trading partners due to his dissatisfaction with the ambition of EU partner countries.

The Commissioner has roughly two more years left in office to shape his legacy. These two years will be of critical importance for the success of Europe’s strategic orientation in the field of external trade and investment policy. European negotiators are becoming increasingly busy with an EU-Canada PTA that is nearing conclusion; an EU-Singapore PTA in preparation for domestic ratification; EU-Vietnam negotiations well underway; the launch of negotiations with the U.S., Japan, Thailand, and Morocco; EU talks with India and Malaysia in limbo; and the need to bring Indonesia and the Philippines to the negotiation table as soon as possible to avoid the loss of momentum in the region.

To be sure, playing hardball is a commendable strategy for EU officials when dealing with their interlocutors from Canada, the U.S., and Japan. Diplomatic relations with these partner countries are characterized by a high degree of resilience and mutual understanding. In the case of China, moreover, a rigid approach may well be a necessary evil – aiming at the development of a sense of mutual respect at the negotiation table. The Commissioner may, however, eventually decide to opt for a softer and more gradual approach vis-à-vis several developing country partners that are not ready to meet the long list of EU demands at this point in time. A less rigid demeanour towards the EU’s newly emerging trade and investment partners in South and Southeast Asia could help to build cooperative rather than adversarial economic and diplomatic relationships with regions that are of utmost geopolitical importance. Innovative institutional design and PTA management can compensate for a lack of immediate hard legal commitments in some areas of offensive EU interest and provide the opportunity to build strong PTA institutions that lay the foundations for lasting economic partnerships.

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²² Euractiv (2013): De Gucht urges Canada to make extra effort to reach trade deal, 21 February 2013. Available at: <http://www.euractiv.com/trade/de-gucht-urges-canada-extra-effo-news-517999>

²³ Financial Times (2013): India urges new push for EU trade talks, 11 February 2013. Available at: <http://www.ft.com/intl/cms/s/0/b22fd71e-745c-11e2-a27c-00144feabdc0.html#axzz2SRVagvaL>

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Part II

The Domestic Political Economy, PTA Implementation, and the WTO

Gone with the Wind?

The Diminishing Relevance of the WTO to Preferential Trade Agreements

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Abstract

The WTO Membership is at pains trying to conclude the Doha Round while we witness a proliferation of preferential trade agreements (PTAs). Even more worrisome is the increasing discrepancy of the two agendas (preferential, multilateral): it seems that trading nations prefer to address their modern concerns in the context of PTAs and not under the aegis of the World Trade Organization (WTO). The only institutional reaction so far on behalf of the WTO was the 2011 World Trade Report dedicated to the study of PTAs. It is the policy community, nevertheless, that should translate the current worries into concrete responses in order to ensure the continued relevance of the WTO in the shaping of trade policies worldwide.

1. The Argument

PTAs have been proliferating while their disciplining at the WTO-level is becoming illusory. The negotiating record is unclear in this respect, but the original idea probably was to establish some sort of a multilateral review that would decide on whether a notified scheme was GATT-consistent and hence, could be consummated. Over the years, the multilateral review has been severely diluted. Nowadays, the multilateral review is a mere exercise in transparency. Those who wish to challenge the consistency of a PTA with the WTO rules can do so by bringing a complaint before a WTO adjudicating body. For good reasons, there is scarce litigation. Hence, we de facto live in a world where PTAs are not scrutinized.

What has further changed over the years is the content of PTAs: increasingly they deal with issues that do not come under the mandate of the WTO. The question, hence, is not whether the WTO *does* discipline PTAs, but whether it *can* discipline PTAs at all? Of course, to the extent that PTAs deal in part with issues coming under the WTO mandate, this part can be discussed before WTO adjudicating bodies and eventually litigated.

The emerging picture is not very encouraging for the WTO relevance for PTAs: absent re-orientation of the current mandate, the overlap (subject-matter wise) between the mandate of the WTO and PTAs risks shrinking in the foreseeable future; the substantive content of PTAs constitutes the most recent expression of governments' priorities, and, consequently, their subject-matter should be taken seriously by the multilateral institution. The WTO's relevance will be (at least in part) the function of its mandate which, if considered outdated by modern trading nations, will condemn the multilateral institution to oblivion. The other part must have to do with the 'one size fits all' approach of the WTO and how much of a concern this policy prescription is for the trading nations that increasingly seem to look for flexible and customized solutions. This paper focuses on the first issue.

Section 2 discusses the nature of the multilateral review of PTAs. Section 3 deals with the changing mandate of PTAs and the ensuing repercussions for the multilateral review. Section 4 recaps the main conclusions.

^{*} European University Institute. For helpful comments, I thank Jagdish Bhagwati, Chad Bown, Rob Howse, André Sapir, and the participants of the conference 'Global Europe: The New Generation of EU Preferential Trade Agreements' in Florence (May 14/15, 2012).

2. Disciplining PTAs in the WTO

2.1 Two Avenues

PTAs are a legal exception to the MFN clause assuming statutory conditions have been met: those who establish them are thus requested to demonstrate that the statutory conditions have been met. Their demonstration can take place in the context of a multilateral review and/or eventually before the WTO adjudicating bodies, that is, Panels and the Appellate Body (AB). The AB, in its report on Turkey–Textiles, explained the conditions under which this exception can be successfully invoked, and stated in unambiguous terms that the party invoking Art. XXIV GATT to justify deviations from MFN trade carries the associated burden of proof (§58):

First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of subparagraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.

The same is true when those establishing a PTA are called to defend its consistency before the WTO forum entrusted with overseeing PTAs, the CRTA (Committee on Regional Trade Agreements): in the Q&A sessions they will provide all requested information.

The WTO Agreement does not impose a sequence on the examination (first CRTA, then Panels) and does not address the question whether one body should be bound by the findings of the other. If the CRTA concludes by consensus (irrespective whether it concluded on the consistency or the inconsistency of the notified PTA with the multilateral rules), there are good reasons to believe that the Panel subsequently dealing with the issue will follow the opinion reflected in the CRTA. The Panel on India—Quantitative Restrictions, which, dealt with a similar issue¹ held in §5.94 that:

we see no reason to assume that the panel would not appropriately take those conclusions into account. If the nature of the conclusions were binding ... a panel should respect them.

There is, however, no legal compulsion for the Panel to follow a CRTA decision. On the other hand, should the CRTA be bound by a Panel's (and or AB's) decision on the consistency of a PTA with the relevant WTO rules? This seems to be the more likely scenario in light of the time constraints that Panels have to adhere to and the absence of such constraints when the CRTA reviews a scheme. The formal answer has to be, once again, no. The legal effect of the judiciary's decision is not such that it acknowledges the force of *res judicata* (binding any discretion of the CRTA to subsequently deviate from its reasoning/outcome).

2.2 The Multilateral Review

2.2.1 The Original Setting

There is no point in describing in detail the original setting. It suffices to say that PTAs would be notified to Working Parties and subsequent to the CRTA where their consistency would be reviewed. Only on one occasion did members of the multilateral bodies manage to reach a conclusion, accepting that the customs union between the Czech and the Slovak Republics was GATT-consistent.² The substantive consistency of PTAs with the WTO is not, nevertheless, reviewed anymore, as explained immediately infra.

¹ The issue before this Panel was to what extent a Panel dealing with an issue, which had already been decided by the WTO Balance of Payments Committee should follow the decision reached in this Committee.

² For a more detailed discussion see Schott (1989), and Mavroidis (2011).

2.2.2 The Advent of Transparency Mechanism

Since the advent of the Transparency Mechanism on December 14, 2006,³ no discussion on the consistency of particular aspects of the PTA with the multilateral rules has taken place.⁴ The Transparency Mechanism was originally supposed to complement the existing legal arsenal dealing with PTAs; in practice, however, it has not complemented, but substituted the previous arsenal.

It follows that WTO Members that dispute the consistency of a notified PTA with the multilateral rules are left with one option: litigation.

2.3 Litigating PTAs

2.3.1 The GATT Years

During the GATT years (1948–1994), three Panels were established to examine claims relating to the consistency of a PTA with the multilateral rules.⁵ Two reports were issued and they both remain un-adopted. The first of these, the EC—Citrus Panel report, argues in favour of an examination (by Panels) of individual measures only, and, based on this position, refused to pronounce on the overall consistency of the PTA with the multilateral rules:

The Panel noted that at the time of the examination of the agreements entered into by the European Community with certain Mediterranean countries, there was no consensus among contracting parties as to the conformity of the agreement with Article XXIV.⁵

...

The agreements had not been disapproved, nor had they been approved. The Panel found therefore that the question of conformity of the agreements with the requirements of Article XXIV and their legal status remained open.⁶

This report remains un-adopted, and hence, of limited legal relevance.

In EEC—Bananas II, the Panel stuck to the established standard of review (limited review), and held that non-reciprocal preferential arrangements are per se inconsistent with Art. XXIV GATT (§159):

This lack of *any* obligation of the sixty-nine ACP countries to dismantle their trade barriers, and the acceptance of an obligation to remove trade barriers only on imports into the customs territory of the EEC, made the trade arrangements set out in the Convention substantially different from those of a free trade area, as defined in Article XXIV:8(b).

This Panel went on to conclude (§164) that the Lomé Convention (the agreement between the EU and a series of African, Caribbean, and Pacific states) did not meet the requirements of Art. XXIV GATT. This report remains un-adopted as well.⁷

³ WTO Doc. WT/L/671 of December 18, 2006.

⁴ For a typical illustration, see the CRTA report on the FTA between Thailand and New Zealand, WTO Doc. WT/REG207/3 of January 3, 2007.

⁵ The first, after a request by Canada in 1974 in connection with the accession to the European Community of Denmark, Ireland, and the United Kingdom (GATT Doc. C/W/250) was not activated because the parties to the dispute reached an agreement (GATT Doc. C/W/259). The second, led to an un-adopted Panel report in EC—Citrus, GATT Doc. L/5776. The third report is on EEC—Bananas II, GATT Doc. DS38/R of 11 February 1994 which also remains un-adopted.

⁶ GATT Doc. L/5776, dated February 7, 1985, at §4.6 and at §4.10.

⁷ In the WTO-era the AB report on EC – Bananas III reproduced almost *verbatim* this view.

2.3.2 The WTO Years

In Turkey—Textiles, India had argued before the Panel that it had suffered damage as a result of Turkey's decision to erect new barriers to its textiles exports, following the signature and the entry into force of the customs union between the EU and Turkey. India argued that its MFN rights had been impaired as a result. Turkey did not deny that this had indeed been the case (that is, that it had erected new barriers), but invoked Art. XXIV GATT to justify its deviation from MFN. The Panel held that WTO adjudicating bodies are competent to examine PTA-related issues, but should stop short of providing an overall assessment regarding the consistency of a PTA with the WTO. This Panel followed the findings in the Panel report on EC–Citrus (§§9.52-9.53). On appeal, the AB held a different view arguing that those availing themselves of justifying their measures through recourse to Art. XXIV GATT must explain why their PTA is GATT-consistent (§§58-59):

First, the party claiming the benefit of this defense must demonstrate that the measure at issue is introduced upon the formation of a customs union that *fully meets the requirements of subparagraph 8(a) and 5(a) of Article XXIV*. And second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue.

...

We would expect a panel, when examining such a measure, to require a party to establish that both of these conditions have been fulfilled. It may not always be possible to determine whether the second of the two conditions has been fulfilled without initially determining whether the first condition has been fulfilled [emphasis added].

And yet, *although the complainants can profit from a favourable standard of review*, we observe very scarce litigation. The argument is often voiced that the absence of litigation is due to an initial sin: no one wanted to question the wider European integration process by putting into question the GATT-consistency of the ECSC (European Coal and Steel Community). The contracting parties of the GATT, having committed the initial sin (by demonstrating a benign attitude towards European integration), refrained from changing their attitude subsequently, for various reasons.

Mavroidis (2006) provides a survey of possible reasons explaining the benign attitude towards PTAs: he argues that WTO Members would rationally choose not to challenge a PTA since there is a collective action problem;⁸ strategic reasons as well might argue against a challenge since today's outsiders might be tomorrow's insiders; finally, the agency design for WTO adjudicating bodies probably does not inspire challenges of this sort: it would be unrealistic to trust Panelists with questions that the WTO Membership failed to answer after long practice.

2.4 Partial Conclusions: No Disciplining at the WTO-Level

The result of this discussion is that PTAs have remained by and large unchallenged.

3. The Changing Picture of PTAs

3.1 The Data

Horn et al. (2010) examine the subject matter of PTAs concluded by two hubs (EU, US) with various spokes between 1992-2008, and divide their subject-matter (content) into WTO+ ('WTO plus', say tariff cuts beyond the MFN-level), and WTO-X ('WTO extra' issues that do not come under the

⁸ States will incur the full cost of investing in litigation against a PTA (both the financial cost as well as the 'political' cost since they will be alienating other countries' policies choices) and yet all WTO Membership will benefit in case the plaintiff prevails since members of the PTA will have to return to their MFN rates.

mandate of the WTO, say positive integration in fields such as environmental policy, fight against corruption etc.). The WTO-X part of the PTAs is quite substantial. This paper thus suggests that the rationale for going preferential should also be sought in WTO-X type of obligations. There are, of course, other adjacent questions, such as: why would WTO Members prefer to commit specific policies in the realm of PTAs when they have opposed their inclusion in the multilateral agenda. Some theoretical papers start debating this issue, their discussion, however, largely escapes the purposes of this paper, which has a more limited focus.

3.2 The Consequences of the Changing PTAs-Content for the Multilateral Review

The problem is that we lack a test (other than MFN) to measure the consistency of WTO-X provisions with the WTO. Indeed, what can the WTO say about a provision in a PTA where one of the parties promises the establishment of an environmental agency to measure the impact of its policies on environment? This might be a *quid pro quo* for tariff concessions by the other party. Yet, the WTO disposes of no metric to discuss environmental policies other than to review whether they have been applied in non-discriminatory manner

3.3 Partial Conclusions: Limited Relevance

The natural consequence of this observation is that the WTO has limited relevance for the ‘new generation of PTAs’. And the forecast does not look good either: the relevance will be more and more limited as tariffs are being gradually eliminated, provided that the regulatory policies, that PTAs commit signatories to, apply in a non-discriminatory manner.

4. Conclusions

The emerging picture does not look good for the WTO: the umbilical cord linking it to PTAs is becoming more and more loose. PTAs seem to run away with the trade agenda while the WTO is fighting a rearguard fight to remain at the spectrum of relevance. And there are no quick fix solutions either. Assuming the arguments advanced by Antras and Staiger (2012) are wholeheartedly adopted by policy makers and they decide to embark on some positive integration initiatives, the question will still remain whether their endeavour should find home in the WTO or be housed by a smaller group of like-minded nations. Voices start multiplying in favour of using plurilaterals more often, their advantage being that it is easier to multilateralize a plurilateral than a PTA. However, in light of the current wording of the Agreement Establishing the WTO, we are in the dark as to the conditions that can be imposed for the ‘multilateralization’ process to occur.

In short, Bhagwati’s likening of PTAs to termites of the multilateral trading system⁹ might prove true albeit for different reasons: it is their ability to adapt to modern concerns and the inability of the world trading system to do so that must be seriously discussed in the multilateral forum. In other words, the WTO should not be concerned about taming PTAs for there it lacks the effective instruments to do so; it should rather be concerned with the continuing success of PTAs in shaping the trade agenda and see to what extent it can launch similar initiatives compatible with the overall spirit of multilateralism.

⁹ Bhagwati (2008)

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The Domestic Political Economy of Preferential Trade Agreements

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Abstract

Which are the main motives behind PTAs, and the political economy dynamics that such motives generate? These questions are crucial, now that “mega-PTAs”—EU-Japan, EU-US, Trans-Pacific Partnership or China-Japan-Korea—are emerging. They are also interesting because the existing PTAs show three paradoxes. First, they have proliferated between 1992 and 2004 when unilateral and multilateral liberalizations were vibrant. Secondly, they mostly involve small countries, which have a much better negotiating leverage in the World Trade Organization. Finally, large countries have shown much pain at concluding PTAs with small countries, which have very modest (if any) economic effects on their economies. When addressing these questions, this paper relies on the following key proposition. Trade liberalization (multilateral, unilateral, or PTA-based) is only one of the many dimensions of the broader domestic reform agenda required by sustained economic growth. In other words, trade liberalization is not as a goal *per se* for policy-makers. In light of this proposition, the paper examines six potential motives for PTAs: the alleged advantage of faster PTA negotiations; the capacity of PTAs to cope with the “unfinished tariff cuts” agenda; their capability to deliver on the “21st century” trade agenda; their potential to contribute to the broader domestic reform agenda for economic growth; their suitability to be a substitute to WTO deals; finally, their potential to advance foreign and development policy objectives. The final section combines these motives for building various domestic political economy scenarios in large and small countries—giving some interesting clues on the conditions necessary for successful PTA negotiations.

Introduction

The Doha Round is in a “comatose” state. As a result, action in trade matters is increasingly turning to preferential trade agreements (PTAs). A “comatose” Doha Round is likely to change the nature of PTA negotiations in many ways. In particular, it induces the largest economies to negotiate PTAs among themselves – a situation unknown until now. This phenomenon is best illustrated by the EU-Japan PTA talks and negotiations between Japan and the members of the US-engineered Trans-Pacific Partnership (TPP). Against this background, a better understanding of the main motives behind PTAs and the different domestic political economy dynamics that such motives can generate is crucial. This paper focuses on these two points.

In the last fifteen years, three paradoxes have emerged, which reveal the need for a multi-motive approach to the understanding of the negotiation and conclusion of PTAs. The first paradox concerns timing. PTAs have widely proliferated between 1992 and 2004 – precisely when countries were busily implementing unilateral liberalizations and when the multilateral trading system witnessed the successful shift from the GATT regime to the creation of the World Trade Organization (WTO). Why, at a time of flourishing multilateralism, did bilateralism and regionalism re-emerge as an alternative trade policy instrument?

The second paradox is revealed by the counter-intuitive behaviour of many governments of smaller countries, which became visible at the margins of the 2003 WTO Cancun Ministerial. Robert Zoellick, then US Trade Representative (USTR), expressed his surprise about the long list of Trade Ministers from small countries telling him, at the end of this disastrous Ministerial Summit, that they would be

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delighted to come to Washington soon in order to start PTA negotiations with the US. In fact, these Ministers were eager to open bilateral negotiations on topics that, a few hours before, they adamantly rejected within the WTO multilateral framework. As such, why did small country governments push for PTA negotiations so intensely, whereas, by its very nature of the largest possible trade forum, the WTO enhances the negotiating position of small countries vis-à-vis their large trading partners?

The third paradox is illustrated by the increasingly severe difficulties of US chief negotiators to convince Members of Congress to ratify the PTAs that the USTR concluded with (much) smaller partners. Moreover, recent developments indicate that the EU may follow the same track, as illustrated by the discussions surrounding the EU-Morocco agricultural agreement (see section 2 below) and debates over the ratification EU-Colombia PTA in the European Parliament. Why do large countries' negotiators and policy makers face such difficulties at home when the PTAs in question can have only very modest (if any) economic effects on their respective economies? And, should such difficulties be expected in regard of future PTAs among large economies?

When addressing these questions, this paper relies on a fundamental proposition, which seems particularly appropriate in the scenario of economic crises. In sharp contrast to the frequent approach followed by trade officials and experts, who tend to perceive trade policy as a stand-alone policy, this paper conceives trade liberalization (be it multilateral, unilateral, or PTA-based) as only one of the many dimensions of the broader domestic reform agenda that is required in order to achieve economic growth. In short, trade liberalization should be seen as only one element and instrument of the broader domestic reform program – and not as a goal *per se*.

The paper is divided into eight sections. The first six sections examine the various potential motives for the negotiation and conclusion of PTAs: The first section discusses the alleged advantage of faster negotiation and implementation of PTAs in comparison with multilateral negotiations; section 2 scrutinizes the capacity of PTAs to cope with the “unfinished tariff cuts” agenda; section 3 reviews the capability of PTAs to deliver on the “21st century” trade agenda; section 4 assesses the potential of PTAs to contribute to the broader domestic reform agenda for economic growth; section 5 features a discussion of the suitability of PTAs to serve as a substitute to WTO deals; section 6, last but not least, contemplates the potential of PTAs to advance foreign and development policy objectives of any given country. Section 7 then examines the distinct domestic political economy scenarios for both large and small countries on which are linked to these different motives. Section 8 concludes.

Section 1. Faster than the WTO? The rapidity of PTA negotiation and implementation

It is often said that PTAs are faster to negotiate than WTO deals, and that they are more rapidly implemented. If supported by evidence, the “speed factor” could constitute an important motive for negotiating PTAs, and explain the increasing proliferation of PTAs at a time of successful unilateral and multilateral liberalizations. However, the data presented in Table 1 only supports the common presumption that PTA negotiations deliver results faster than WTO negotiations at a first glance. A more thorough examination leads to the conclusion that the ‘speed factor’ does not exist in reality, but only as a perception of trade negotiators. Table 1 presents all US and EU PTAs with common partners (“twin” PTAs): Chile, the Dominican Republic (member of Cariforum and CAFTA-DR), Israel, Jordan, Korea, Mexico and Morocco.

Faster PTA negotiations?

At a first glance, as mentioned above, Table 1 seems to support the claim that PTA negotiations are faster than multilateral negotiation rounds. The average “adoption” period, i.e. the time between the launch of the negotiations and the start of the implementation, ranges from 3 years (US PTAs) to more than 5.5 years (EU PTAs). These periods are definitively shorter compared to the Doha negotiations (12 years by the end of 2012, yet unfinished) and to the Uruguay Round (8 years).

But a more careful reading of Table 1 provides four strong *caveats* on the alleged relative rapidity of PTA negotiations:

Table 1 does not include PTAs negotiations that have failed so far. For instance, the reported EU-Turkey PTA is limited to the customs union “chapter” which is a limited part of the negotiations on Turkey’s accession to the EU. The accession negotiations started in 1987. The Turkish application for EU membership were opened in June 2006, closed in December 2006, reopened in 2007 and are, since then, in limbo. They have been launched for only 13 chapters, all of them (but the one on competition policy) being devoted to routine issues in PTAs (the 22 remaining chapters which have not be opened are not typical components of current PTAs), and only one of them has been successfully closed as of today.

Table 1. The speed factor, selected PTAs

		Launch ne- gotiation [a]	Year of signature	Entry in force	Adoption period [b]	Transition period [c]	Sectoral coverage	
							Agriculture	Services
EU27	Cariforum	2004	2008	[f]	--	10 plus	Yp	Yp
EU27	Chile	1999 [d]	2002	2003	4	10	Yp	Yp
EU27	Egypt	1995 [d]	2001	2004	9	15	Yp (2009)	N
EU27	Israel	1995 [d]	1995	2000	5	--	Yp (2009)	N
EU27	Jordan	1995 [d]	1997	2002	7	12	Yp (1997)	N
EU27	Korea	2007	2010	2011	4	21	Y	Yp
EU27	Mexico	1993	2000	2000	7	10	Yp	Yp
EU27	Morocco	1995 [d]	1996	2000	5	12	Yp (1997)	N
EU27	Turkey	1993 [e]	1995	1996	3	5	Yp [a]	N
US	CAFTA-DR	2002	2004	2006	4	20	Yp	Yp
US	Chile	2000	2003	2004	4	12	Yp	Yp
US	Israel	1984	1985	1985	2	10	Yp	N
US	Jordan	2000	2000	2001	2	10	Yp	Yp
US	Korea	2006	2007	2012	2	15	Yp	Yp
US	Mexico	1991	1992	1994	3	24	Yp	Yp
US	Morocco	2003	2004	2006	3	18	Yp	Yp

Sources: EU Treaties Office Database, USTR website, WTO website.

Notes: [a] Year of the first negotiating round, except mentioned otherwise. [b] Adoption period: time between the launch of negotiations and the year of entry in force. [c] Transition period: maximum number of years scheduled for tariff cuts (the mention “plus” means that this transition period could be extended if felt necessary by the signatories). [c] Year of the EU negotiating Directive (Chile) or of the launch of the Barcelona Process (Egypt, Israel, Jordan, Morocco). [e] Year of launching the negotiations on the customs union. [f] There is conflicting information on the effective implementation of the Cariforum side

- Table 1 does not take into account the “stop and go” pace of a number of the PTA negotiations listed. For instance, the EU-MERCOSUR negotiations have been launched in 1999 before being suspended in 2004, and restarted in 2010, with persistent rumors of suspension since 2011. On the US side, a similar illustration is the Free Trade Area of the Americas (FTAA) negotiations.
- Table 1 shows that adoption periods tend to become longer for the most recent PTAs, suggesting that they face problems similar to WTO negotiations.
- Last but not least, a fair comparison between PTA and WTO negotiations should take into account the coverage of topics. Most PTAs listed in Table 1 cover agricultural goods in a much more limited manner than it was discussed in the Doha Round. In particular, no PTA has imposed (indeed can impose) disciplines on farm subsidies that are one of the most severe obstacles to an economically sound trade in farm and food products. In the case of services, only a minority - 4 out of 11 in the case of EU PTAs - make some notable inroads. Extending the sectoral coverage of the initial PTAs by re-opening negotiations on agriculture and on services has proven extremely

difficult. For instance, despite the fact that Morocco is pursuing a resolute PTA policy, the EU-Morocco Agricultural Agreement (concluded in 2009) is facing a stiff opposition in the European Parliament while the EU-Morocco Aviation agreement (concluded in 2006) is still under provisional application due to the firm opposition of some EU Member States.

Faster PTA implementation?

The second alleged superiority of PTAs compared to the WTO would be the more rapid implementation of PTAs. The average transition period (the time between the first and the last year of implementation) is 10 years for the US PTAs – roughly the transition period set up as a benchmark within the WTO context since the Uruguay Round. However, EU PTAs take 13 years to be implemented.

In addition, transition periods longer than 10 years (up to 23 years) tend to become more frequent in recent PTAs (Korea-Chile, US-Mexico, US-Morocco, US-CAFTA/DR, EU-Cariforum, EU-Korea, etc.). Indeed, this feature casts strong doubts on the actual value of such commitments since a large number of products are likely to be outdated from a technological point of view (and are hence probably not marketed anymore) at the time when they will be ‘liberalized’ under a respective PTA liberalization schedule.¹

Reality vs. perception

The absence of strong evidence to the alleged rapidity of PTA negotiations and implementation suggests the elimination of this motive from the candidate list. However, there is a good reason to retain this motive in light of the domestic political considerations. Notably, it may often be the mere perception of PTA negotiation and implementation speed that may be strong enough to keep policy-makers pushing for PTAs.

That said, the gap between the real world (absence of evidence) and perceptions has a key consequence in domestic political games because it generates or amplifies a rift among policy-makers in a given country:

- on the one hand, top policy-makers (Presidents and Prime Ministers) are likely to look at actual results and will notice a PTA’s failure to deliver political capital in the short run. Unconvinced by the PTA speed factor, they will loose interest in PTAs as a key input to their broader domestic pro-growth agenda.
- on the other hand, trade negotiators, by their nature, are likely to cling to the perception of the speed factor. They are thus likely to propose new PTAs, hoping that at least some of them will eventually deliver some results rapidly, which they can showcase vis-à-vis their political masters.

Section 2. The “unfinished tariff cuts” (UTC) agenda

A second motive for the proliferation of PTAs is the potential of PTAs to address the “unfinished tariff cut” (UTC) agenda, i.e. the reduction of tariffs that have not been eliminated in context of unilateral and multilateral liberalizations yet.

This motive is often rebuffed today on the ground that, after two decades of broad unilateral and multilateral liberalizations, the issue of tariff cuts is now becoming negligible. This view is supported by evidence based on average tariff data. The preference margins delivered by preferential tariff cuts (compared to the MFN tariffs applied on non-preferential imports) are on average small, and increasingly so [WTO Report 2011]. They are modest even for US and EU exporters (2.8 and 4.9

¹ This is not an uncommon feature. Article 115 of the Treaty of Rome was drafted and used in this spirit.

percent respectively), despite the fact that US and EU exporters face relatively higher developing country tariff rates. By the same token, less than 17 percent of world trade remains eligible for tariff preferences [Carpenter and Lendle 2010] and there is no tariff at all on 45-55 percent (China, EU, US) to 80 percent (Japan) of imports of large economies.

However, this evidence misses a key point. Average tariff data hides the bread and butter of trade policies, i.e. the high “peak” tariffs, which also happen to be the largest source of production inefficiency and consumers’ welfare losses and count most for offensive and defensive vested interests. As peak tariffs are generally imposed on a relatively limited range of products, relying on average tariffs dilutes this core aspect of trade policy in the much larger universe of all tariff lines, most of which are of little (if any) relevance for domestic political economy dynamics.

From an economic perspective, there are thus sufficient reasons to carefully examine the UTC agenda and the potential of PTAs to deliver on tariff peak reductions. The following analysis relies on two sources of information: the frequency of the peak tariffs and of the associated trade shares, and the differences between MFN and preferential tariffs.

The UTC agenda: peak tariffs and trade shares

As pointed out above, the crucial aspect of the UTC agenda is the problem of peak tariffs. Tariff peaks decrease consumers’ welfare and reduce domestic producers’ competitiveness - notably domestic producers and consumers of the goods that peak tariffs apply to. In a nutshell, Table 2 gives a sense of the importance of the notion of tariff peaks by highlighting non-preferential and applied tariff rates in the US, the EU, Korea, Turkey, China and Japan, as well as a number of countries / regions that have signed a PTA with the US, the EU, Korea, or Turkey. More specifically, Table 2 presents i.) the distribution of countries’ tariff lines among five categories of applied and non-preferential tariff rates (duty free, 0-5 per cent, 5-10 per cent, 10-15 per cent, >15 per cent) and ii.) the shares of imports associated with these five tariff rate categories.² Thereby, we can get a better sense of the incentive that third countries have to seek the liberalization of tariffs by means of negotiating a PTA.

In addition to the EU and the US as well as select EU and US PTA partner countries, Table 2 presents tariff rate and import data involving Korea and Turkey and their partner countries. This allows us to better appreciate the differences between PTAs involving the two largest economies in the world and those associated with smaller economies. Table 2 makes a distinction between “L” Partners and “S” Partners in order to capture the asymmetry between the signatories – a factor that emerges as critical in domestic political economy dynamics, as demonstrated in section 7 below.

“L” partners are defined as the larger partners in a PTA, and “S” partners as the smaller ones. The US and the EU are always L partners. Korea and Turkey are L partners in some PTAs, and S partners in others.³ The other countries are always S partners. Block A of table 2 presents the information on S partners in order to get a sense of the extent to which the UTC agenda of a PTA with such type of countries could be attractive for L partners. Block B provides the same kind of information on L partners.

² Table 2 is based on the 2009-2010 tariff structures, hence provides insights on the PTA interest as of today, not when the negotiations of these PTAs were opened between 1995 and 2005. In other words, Table 2 underestimates the interest in the UTC agenda (which is not a problem in the context of the paper). This bias does not exist for bound tariff rates, which all date from the Uruguay Round and have not changed since then.

³ Korea has a larger economy than any individual ASEAN country.

For simplicity sake, Table 2 is limited to five tariff categories:

- no duty,
- tariff rates lower than 5 percent that are unlikely to constitute a serious trade barrier *per se*, but that may be the source of red tape in countries with weak customs administration,
- moderate tariff rates (5 to 10 percent),
- significant tariff rates (10 to 15 percent) and
- peak tariffs, defined as those higher than 15 percent (i.e. the tariffs that the Doha Round would have largely eliminated in terms of bound tariffs on industrial goods).

Table 2 allows for two interesting observations on applied tariff rates. First, more than half of the S PTA partner countries, as exhibited in Block A, have a minimum of 18 percent of all tariff lines that fall in the ‘tariff peak’ category. This high share of peak tariffs indicates that a substantial part of S partners’ domestic production is still highly protected, simply because, by their sheer size, small countries can produce only a limited range of products. It is quite possible, against this background, that peak tariffs on 18, 20, or 25 percent of all tariff lines are sufficient to protect the entire domestic production of these countries.⁴ As such, the potential for preferential liberalization in more than half of the S partners covered in Block A is substantial, to say the least.

⁴ The high shares of duty free in some countries such as Jordan or Tanzania are consistent with this interpretation.

Table 2. The unfinished tariff cuts agenda, selected PTAs⁵

Partner L	Partner S	Tariff lines: applied tariffs					Import values (shares)					Tariff lines: bound tariffs				
		duty	tariff rates				duty	tariff rates				duty	tariff rates			
		free	0-5	5-10	10-15	>15	free	0-5	5-10	10-15	>15	free	0-5	5-10	10-15	>15
Block A. Information on Partners S																
EU27	Cariforum [a]	59.5	5.3	5.2	6.2	23.8	7.7	59.9	4.4	6.8	21.2	2.8	0.0	8.6	0.7	87.9
EU27	Chile	0.3	0.0	99.6	0.0	0.1	0.4	0.0	99.6	0.0	0.0	0.0	0.0	0.0	100.0	0.0
EU27	Egypt	7.1	54.2	20.5	0.0	18.2	24.4	52.7	12.6	0.0	10.3	2.8	11.7	8.9	4.1	72.5
EU27	Israel	60.1	0.9	14.3	23.0	1.7	75.8	0.5	12.2	11.3	0.2	9.4	25.8	13.1	10.1	41.6
EU27	Jordan	57.3	3.4	7.7	0.3	31.3	45.1	24.9	5.6	1.0	23.4	7.3	22.1	16.1	8.2	46.3
EU27	Korea	17.3	10.3	63.6	6.9	1.9	38.8	33.8	25.5	1.5	0.4	15.9	7.6	23.2	34.6	18.7
EU27	Mexico	20.7	31.2	12.6	12.7	22.8	39.7	0.7	42.2	5.0	12.4	0.3	0.0	0.6	0.0	99.1
EU27	Morocco	0.0	23.3	43.3	0.0	33.4	4.4	34.8	26.4	0.0	34.4	0.0	0.1	0.4	0.0	99.5
EU27	Turkey	25.9	37.7	26.9	6.1	3.4	39	37.5	18.5	2.2	2.8	3.9	3.7	4.1	10.9	77.4
US	CAFTA-DR [a]	59.5	5.3	5.2	6.2	23.8	7.7	59.9	4.4	6.8	21.2	2.8	0.0	8.6	0.7	87.9
US	Chile	0.3	0.0	99.6	0.0	0.1	0.4	0.0	99.6	0.0	0.0	0.0	0.0	0.0	100.0	0.0
US	Israel	60.1	0.9	14.3	23.0	1.7	75.8	0.5	12.2	11.3	0.2	9.4	25.8	13.1	10.1	41.6
US	Jordan	57.3	3.4	7.7	0.3	31.3	45.1	24.9	5.6	1.0	23.4	7.3	22.1	16.1	8.2	46.3
US	Korea	17.3	10.3	63.6	6.9	1.9	38.8	33.8	25.5	1.5	0.4	15.9	7.6	23.2	34.6	18.7
US	Mexico	20.7	31.2	12.6	12.7	22.8	39.7	0.7	42.2	5.0	12.4	0.3	0.0	0.6	0.0	99.1
US	Morocco	0.0	23.3	43.3	0.0	33.4	4.4	34.8	26.4	0.0	34.4	0.0	0.1	0.4	0.0	99.5
KOR	ASEAN	--	--	--	--	--	--	--	--	--	--	--	--	--	--	--
KOR	Chile	0.3	0.0	99.6	0.0	0.1	0.4	0.0	99.6	0.0	0.0	0.0	0.0	0.0	100.0	0.0
KOR	EFTA [b]	<--92.4-->		<--7.1-->		0.5	<--94.7-->		<--4.9-->		0.4	<--82.7-->		<--16.6-->		0.7
TUR	Egypt	7.1	54.2	20.5	0.0	18.2	24.4	52.7	12.6	0.0	10.3	2.8	11.7	8.9	4.1	72.5
TUR	Israel	60.1	0.9	14.3	23.0	1.7	75.8	0.5	12.2	11.3	0.2	9.4	25.8	13.1	10.1	41.6
TUR	Morocco	0.0	23.3	43.3	0.0	33.4	4.4	34.8	26.4	0.0	34.4	0.0	0.1	0.4	0.0	99.5
Block B. Information on Partners L																
EU27		26.2	38.9	27.2	6.7	1.0	54.8	27.7	11.1	5.6	0.8	28.4	37.2	26.6	6.9	0.9
US		47.5	27.3	17.5	5.0	2.7	48.3	41.1	6.2	0.8	3.6	47.6	26.7	16.7	5.0	4.0
Korea		17.3	10.3	63.6	6.9	1.9	38.8	33.8	25.5	1.5	0.4	15.9	7.6	23.2	34.6	18.7
Turkey		25.9	37.7	26.9	6.1	3.4	39	37.5	18.5	2.2	2.8	3.9	3.7	4.1	10.9	77.4
China		7.8	19.9	46.5	14.3	11.5	48.4	18.2	27.8	2.9	2.7	6.5	18.4	47.1	14.5	13.5
Japan		56.5	25.8	15.0	2.0	0.7	84.0	9.0	5.6	1.2	0.2	55.9	25.7	15.3	2.0	1.1

Source: WTO, World Trade Profiles, 2010 (www.wto.org). Notes: [a] Based on the tariff and import structures of the Dominican Republic, the largest member of both PTAs (half of the Cariforum GDP and one third of the CAFTA-DR PTA). [b] Data for EFTA are the averages of the Norwegian and Swiss tariffs, which make sense if one aggregates the two lowest ranges of tariffs.

Secondly, the potential for preferential liberalization in other S partners listed in Block A (Chile, Israel, EFTA, as well as Korea and Turkey as S partners) is much lower. This observation, however, deserves additional remarks. First, Chile makes for a special case. The uniform Chilean tariff of 6 percent does not allow for high preferential margins.⁶ The same applies to EFTA. These considerations leave potential for substantial preference margins for only three countries: Korea, Turkey and Israel. In the case of Korea, potential preferential margins do not have any significance as Korea has already concluded PTAs with the US and the EU. Any other PTA partner of Korea will only be able to eliminate US and EU preferential margins through the conclusion of a PTA. As a result, there are prospects of significant preferential margins only in the cases of Turkey and Israel, which, however, apply very low tariffs already.

Interestingly, Table 2 also shows that imports associated with the peak tariff category are substantial where a large amount of peak tariffs exist (i.e. where peak tariffs exceed more than 10

⁵ Table 2 does not provide tariff data for ASEAN members, due to the complexity of this agreement.

⁶ This is all the more so because a uniform tariff reduces considerably the risk of red tape associated to tariff dispersion.

percent of tariff lines). In fact, goods imported under peak tariffs exceed 10 percent in half of all S partners. The fact that peak tariffs have not been able to repress the demand for the protected imported goods suggests the existence of a significant potential demand for additional imports by S partners once the tariff peaks are eliminated. This observation has two consequences for PTA negotiations:

- on the one hand, it suggests that there are vested export interests in L partners that are ready to fight for the elimination of S partners' tariff peaks because they could significantly expand their commercial opportunities in S partners' protected markets;
- on the other hand, it also suggests that there are vested interests in the importing S partners, powerful enough (since they have been able to keep such a high protection despite wide-ranging unilateral and multilateral liberalizations) to keep such a high protection in place.

In short, tough negotiations should be expected with regard to peak tariffs, with possibly narrow but aggressive vested interests on both sides. This situation creates strong pressures on the domestic political economy, and hence suggests the need for the involvement of top policy-makers who may have to make tough decisions, and the high likelihood of heated political debates over the pros and cons of the respective PTA.

Turning to Block B which focuses on L partners (including Korea and Turkey when they are the large signatories in the listed PTAs) the UTC agenda on peak tariffs looks, at a first glance, more modest, with only 7 to 8 percent of the tariff lines featuring tariffs higher than 10 percent.

However, this result should be interpreted with the small size of S partners' economies in mind. Large signatories may have (very) few high tariffs, but those tariffs may be enough to hurt the few products exported by small economies. This point has been well documented for developing or least-developed countries since a long time [Laird 2002]. Table 2 covers plenty of such cases, such as EU tariffs on agriculture or cars, US tariffs on chemicals, etc.

Conclusion: The capacity of PTAs to deliver on the UTC agenda

The UTC agenda in terms of peak tariffs is likely to mobilize narrow – offensive and defensive – but aggressive vested sectoral interests. However, this does not mean that the PTAs are successful in addressing the UTC agenda. Indeed, there is evidence that PTAs have had a poor record on addressing the UTC global agenda. Only 10 percent of the tariff cuts implemented between 1983 and 2003 can be attributed to PTAs, compared to 60 percent to unilateral trade liberalizations and 25 percent to the multilateral trade regime [Martin and Ng 2004]. Turning to the UTC agenda in terms of peak tariffs, it is evident that only one-third of the peak tariffs have been cut by PTAs [WTO Secretariat 2012].

These results deserve a final remark. In the case of deep economic crises, PTA signatories could raise the applied tariffs they impose on the imports coming from countries with whom they do not have PTAs up to the bound (MFN) level. In other words, PTAs work as an “insurance mechanism” against unsound trade measures among PTA partners. But this may be at great costs for non-PTA countries since stronger restrictions could be imposed on imports from the non-PTA countries as a way to compensate the absence of restrictions on imports from the PTA partner.⁷

This feature was probably marginal in the minds of the negotiators until the late 2000s. However, it was clearly present in the way the EU and Central European countries shaped the pre-accession Association Agreements of the Central European countries during the early 1990s. The EU and its

⁷ In this respect, PTAs echo the “imperial preferences” of the first half of the 20th century. In fact, there are very different reasons to address the UTC agenda. First is to get preferential access to the partner's markets (offensive approach). Second is to get preferential access for slowing down the entry of new competitors into the partner's markets (defensive approach) – a motive definitively more damaging for the small partners because it intends to “maximize” trade diversion. This seems more recent (it may require the emergence of large new competitors, a recent evolution). Its most recent illustration are the EU PTAs with the African, Caribbean and Pacific countries.

Central European partners were clearly looking at the Association Agreements as a way to make them immune to contingent protection (antidumping) on imports from both sides, at the cost of higher contingent protection against non-European countries. With a prolonging crisis, this highly discriminatory “bilateral binding” achieved by PTAs may become a feature that countries may look after – clearly an undesirable evolution from the perspective of the world trading system.

Section 3. The 21st century trade agenda

The most frequent argument mentioned today for explaining the proliferation of PTAs is their alleged capacity to deal with “non-tariff issues” – the so-called 21st century trade agenda: technical norms for goods, regulatory barriers to trade in services, international investment, intellectual property rights, environment, etc. These issues have become dominant under the pressure of the increasing fragmentation of the supply chains across many countries [Baldwin and Low 2009, Baldwin 2011, Baldwin 2012]. Such a fragmentation is economically valuable since it allows firms to make better use of every country’s comparative advantages.

The Uruguay Round could not address these issues because most of them were still embryonic in the early 1990s since the appropriate information and telecom technologies were not developed enough. The Doha negotiations have been stuck in endless fights over (often ridiculously tiny) tariff cuts, diverting away attention from the 21st century trade agenda.

PTAs therefore remain the only place to address 21st century trade topics. This motive has some attraction, but two pieces of evidence suggest that existing PTAs are still far from addressing the agenda’s substance in a satisfactory way.

The 21st century trade agenda vs. the geographical pattern of PTAs: A mismatch

The 21st century trade agenda does not match the geographical pattern of the existing PTAs in several respects:

- there is a large number of PTAs in regions, such as Africa or Latin America, with very limited value chain networks.
- in 2010, there were only two PTAs between the EU or the US, on one side, and Asia Pacific countries on the other side, although these regions are the two key ends of supply chain networks. Both PTAs involve Korea, and evidence provided below (section 4) suggests that the conclusion of these agreements has been largely driven by Korea’s strategic PTA policy. The US and the EU have mostly dealt with the 21st century trade concerns within NAFTA and within the realm of the accessions of Central European countries to the EU, respectively, both of which have been (much) less effective in building value chain networks.
- future PTAs – e.g. the Trans-Pacific Partnership (TPP) or the EU target countries in East Asia (Japan-EU PTA, ASEAN-EU PTAs, etc.) – do not include China, which is key for most value chains.

Loose fit with the PTA texts

Moreover, the core of the 21st century agenda – norms in goods (sanitary and phytosanitary measures - SPS, technical barriers to trade - TBT) and regulatory issues (government procurement, investment, intellectual property rights (IPRs) and services) – is still marginal in the existing PTA texts.

A first measure of the importance of these topics is the number of words used in the PTAs texts. A modest sample of four PTAs (EU-Cariforum, EU-Korea, US-Korea and US-Mexico) show that less than 3,000, 10,000, 15,000 and 20,000 words are devoted, respectively, to norms (SPS and TBT), public procurement (including the names of the institutions subjected to the PTA disciplines), IPRs

and services. Provisions stated in a few words can be of two types. Either they draw short lists of vague intentions with little impact, if any. Or they reflect an agreement among the signatories on the few basic principles to be enforced in detail in the future. An example of this second case is the Treaty of Rome, which deals with services in 700 words. But, this brevity has required a huge secondary legislative effort (more than 600 EU laws) during the last three decades, which has revealed, sometimes unexpectedly, serious divergences on how to implement the basic principles (the exact treatment of state-owned enterprises or the definition of the notion of “public service”).

Any attempt to distinguish between these two opposite types should take into account the ‘bindingness’ of commitments. Legally binding commitments would speak in favor of the second interpretation (agreements on principles) while their absence would point to the first interpretation (vague intentions). Horn, Mavroidis, and Sapir [2009] have recently developed a measure of the ‘bindingness’ of commitments in EU and US PTAs. Unfortunately, the Horn-Mavroidis-Sapir (HMS) indicators do not make a distinction between different types of legally binding commitments, i.e. those that govern procedures (for instance, provisions on ‘exchange of information’) and those that govern liberalization measures (for instance, provisions on services market liberalization). It seems reasonable to argue that only the second type of legally binding commitments constitute a robust basis for a deep integration interpretation. In other words, the existing HMS indicators are likely to systematically over-estimate the 21st century agenda, which, in fact, does not seem to dominate the existing PTAs.

This conclusion is re-enforced by a thorough analysis of provisions on services in selected PTAs [Adlung and Miroudot 2012]. This analysis provides strong evidence that PTA provisions in services are often GATS “minus”, raising serious concerns on the true achievement of the PTAs in question.

Section 4. The capacity of PTAs to contribute to domestic pro-growth reform agendas

So far, the quest for PTA motives has focused on pure trade issues, notably PTA negotiations and implementation as a faster process or as a better instrument for addressing the UTC and the 21st century agendas. Such a quest does not fully meet the basic proposition set in the introduction: PTAs take their full dimension only if they contribute to the much broader domestic reform agenda of their signatories aiming to boost domestic growth by making domestic firms more efficient. By acceding to foreign markets, domestic firms can operate on markets larger than the pre-reform domestic markets, hence become more efficient by “expanding” their ability to exploit larger scale economies and/or wider varieties of products.

Table 3 captures this dimension with a simple indicator – the PTA “market expansion capacity” defined as the ratio of the GDP of all the signatory’s PTA partners to the signatory’s own GDP. This indicator is based on GDP data because there is a need to get a global perspective, which is not too dependent on the changes of the export and import composition that PTAs result in once implemented. Table 3 provides such indicators on market expansion capacities (columns 3 and 4) for all the PTAs already negotiated by the US, the EU, Korea, and Turkey.

Table 3. PTA market expansion capacity and WTO approximation

	Number of		PTA market			WTO approximation [c]
	PTAs	Partners	expansion capacity			
			ratio [a]	productivity index [b]		
				per PTA	per partner	
All the negotiated PTAs						
EU27	32	58	0.40	0.01	0.00	14.2
USA	16	29	0.37	0.02	0.00	10.7
Korea	12	29	50.22	4.19	0.14	67.2
Turkey	19	30	31.81	1.67	0.06	31.3

Sources: WTO, EU, USTR web sites. Notes: the number of partners does not take into account the signatories of the OCT (EU), GSTP (Korea), PTN (Korea, Turkey), Canada (US) and the Central European Member States (EU).

Table 3 suggests two main observations:

- for the US and the EU, all negotiated PTAs combined have a limited market expansion capacity – 37 and 40 percent of the US and EU initial domestic GDPs. Taking into account the fact that US and EU PTA partners do not fully open all their agricultural and services sectors vastly reduces these estimates, at least by half. Of course, such small market expansion capacities mirror the fact that the US and the EU are the two largest world economies. However, as demonstrated below by using the notion of “PTA productivity”, it also suggests a poorly designed PTA approach by these two countries. Moreover, it has key consequences in terms of the domestic political economy games in small and large countries.
- by contrast, the market expansion capacity of Korea’s and Turkey’s PTAs amounts to large multiples of their own respective GDP (50 times in the case of Korea, 32 times in the case of Turkey). Even if one assumes that the EU and US do not open their agricultural and services sectors to their partners to a significant extent (70 percent of their GDP) the potential contributive capacity of these PTAs remains huge – roughly 16 times in the case of Korea, 10 times in the case of Turkey. Of course, this result mirrors the fact that Korea and Turkey are middle-sized economies having PTAs with the EU, and the US in the case of Korea. But, as shown below by the “PTA productivity” notion, there is a key difference between Korea and Turkey – substantial enough to suggest a very well designed PTA policy for Korea and a much less convincing PTA policy by Turkey.

The notion of a “PTA policy” and its productivity

Table 3 also shows that the highly diverse contributive capacities of PTAs to the broader domestic reform agendas have required the signing of a very different number of PTAs: 32 (EU) 16 (US) 12 (Korea) and 19 (Turkey). Moreover, some of these PTAs involve a large number of partners (for instance, Cariforum, ASEAN and CAFTA-DR): 58 partners (EU) 29 (US) 29 (Korea) and 30 (Turkey).

Combining these differences in terms of PTA numbers and partners with the market expansion indicators suggest the notion of average “productivity” of the PTA approach followed by a given country during a given period (aggregating all the PTAs signed). This productivity is defined as the average market expansion indicator divided by the number of PTAs (or number of PTA partners) signed by a country.

Table 3 shows that US and EU PTAs signed in the past exhibit a very poor average productivity whether expressed in terms of PTAs or PTA partners. This feature reflects an absence of a US and EU

PTA “policy” in the sense that the US and the EU did not make strategic decisions about their negotiation partners from an economic perspective.

Rather, the US and EU appear to have chosen partners on the basis of “ad hoc” motives. More precisely, the US case reflects two unrelated motives behind the US PTA approach: a motive created by the failure of the Free Trade Area of the Americas (PTAs with Colombia, Peru, CAFTA-DR) which was driven by a mix of economic and political considerations, and a motive dominated by the 9-11 events and US foreign policy (Bahrain, Australia, Morocco, Oman, see section 8 for a more detailed discussion). For the EU, the absence of a PTA policy based on economic considerations reflects the fact that the EU’s PTA approach is largely the mere aggregation of traditional EU Member States’ zones of influence and associated interests: France with regard to Africa; Spain and Portugal with regard to Latin America; Germany, Poland and Sweden with regard to Eastern Europe; and France and Italy with regard to the Mediterranean countries, etc.

By contrast, Korea’s and Turkey’s average productivity is significantly higher – indicating that a PTA policy based on clear motives has been designed and implemented. But, there is a key difference in the motive adopted by Turkey and Korea. The motive driving Turkey’s choice of PTA partners is its interest in the Middle East and Mediterranean regions – clearly a political motive with very limited economic impact (as stressed by the low expansion capacity indicators) because most Middle East and Mediterranean economies are small and with limited growth.⁸ By contrast, Korea has deliberately adopted an approach to PTAs driven by economic considerations, by positioning itself as a hub of PTAs with large economies (the EU, the US, China and Japan). In fact, in 2003-2004, Korea set up an “FTA roadmap” based on four core principles, namely (i) multiple-track FTAs, (ii) advanced and comprehensive FTAs, (iii) transparent procedures in preparing FTA policy, (iv) foreign policy considerations in choosing FTA partners [Kang 2010].

Section 5. The potential substitutability to the WTO

Can certain PTA policies – policies meaning a “strategic” vision of PTAs as an engine for boosting a domestic pro-growth reforms agenda – be a substitute to the WTO? This issue is distinct from the alleged ‘speed factor’ that may incentivize the negotiation of PTAs compared to WTO negotiations, as examined in section 2. Here, we define the potential WTO substitutability of the WTO through PTAs as the capacity of a PTA policy followed by a country to deliver access to foreign markets of a comparable magnitude to the one that this country could have expected as a result of successful Doha Round negotiations.

A vague sense of WTO substitutability can be provided by a simple indicator, namely the global size of markets opened by a PTA policy compared to the size of the world markets that a WTO Round would open. Table 3 shows that all US and EU PTAs are far from being a substitute to WTO negotiations since, altogether, these PTAs give access to less than 13 percent of world GDP for the US, and less than 18 percent for the EU – far away from the benchmark of 85 to 90 percent that could be reasonably assumed for the scenario of successful Doha negotiations.⁹

⁸ Turkey’s strategic choice is largely related to the difficult EU-Turkey relations. The Treaty on the customs union with the EU (Article 16) requires that Turkey aligns its commercial policy with the EU’s in terms of PTAs. However, implementing these provisions has proven to be difficult. First, the countries having a PTA with the EU have been reluctant to conclude a PTA with Turkey because they wanted to grant preferences to the EU alone. Second, the EU did not help Turkey (the Commission gave no advance notice of the PTAs targeted by the EU after the EU-Turkey custom union) presumably because the EU wanted to keep its monopoly as the regional hub. All these factors have been amplified by the EU rebuttal of Turkey accession which has diverted Turkish attention to the traditional “Ottoman” region of influence. The main exception is the negotiations with Korea, which were quickly suspended after their opening before being restarted in January 2012 following a Korean initiative (not included in Table 3 data).

⁹ The benchmark of 90 percent is adopted because it takes into account the fact that the Doha negotiations have de facto allowed many developing countries to take limited commitments. As Table 3 is based on GDP data for 2009-2010, it

Once again, Korea emerges as the only country among the four large signatories of the chosen PTA sample, which has adopted a PTA policy that delivers a close substitute to what could have been achieved through a Doha deal. Indeed, since January 2012, Korea's substitutability is even higher – especially if one includes the opening of the Korea-China PTA negotiations and the conclusion of the Korea-Turkey PTA negotiations. Turkey's PTA policy, on the other hand, appears to be a poor substitute to a successful Doha Round, reflecting its political – non-economic – rationale for the negotiation and conclusion of PTAs.

Section 6. Foreign and development policy agendas

Finally, PTAs negotiations may be driven by foreign and development policy agendas if one defines such agendas in broad terms, including not only the military and “hard” power aspects but also the “soft” power aspects of economic integration and cooperation, and the fact that PTAs enable countries to export their regulatory approaches, as a vehicle for promoting their influence [Ahnliid 2012].

It should be stressed that this motive fits the timing of PTA proliferation particularly well, suggesting that its role has been essential for the following reason. The rapid end of the Cold War has forced most countries to reshape their foreign policies – sometimes in great haste. This has been even more so the case for small countries – a feature which helps to explain the large share of PTAs with small signatories. Trade policy is one of the easiest ways to show new foreign policy commitments and orientations – as best illustrated by the Central European countries which, when they failed to enter NATO in the early 1990s, made their accession to the EU a substitute to NATO membership.

Although this motive has been neglected by most economic studies of PTAs, it is well documented for the US [Hufbauer and Adler 2010, van Grassek 2010] and for the EU [Messerlin 2001]. But the list of PTAs illustrating the influence of the foreign and development agendas is much longer, as illustrated by the following examples. MERCOSUR, first, is deeply rooted in the desire to improve the political relations between Argentina and Brazil. The large number of PTAs involving countries from Central Europe and the former USSR, secondly, reflect the dramatic reshaping of the political relations between these countries in the aftermath of the fall of the Soviet empire. Last but not least, the “noodle bowl” of PTAs in Asia mirrors the foreign policy agendas implemented as a result of the rapid re-emergence of Asian super-powers, China and India [Bark and Kang 2011].

An aspect related to this motive is the frequent reference to some kind of race among countries for concluding PTAs with the same partner. For instance, Table 1 may give the impression that such a race took place between the US and the EU. However, a more careful analysis does not provide a strong support to such a race. First, the “twin” PTA scenario involves only one third of the EU PTAs and 45 percent of the US PTAs. Second, there are relatively long time lapses between the adoption of “twin” US and EU PTAs: five years for Mexico, eight years for Morocco, ten years for Israel, etc. These time lapses can hardly be explained by substantial differences in the content of the agreements, except maybe in the case of Mexico. Last, the “twin” PTAs, which the EU and the US have negotiated almost simultaneously, occurred in different periods (Chile in the late 1990s, Caribbean in the early 2000s and Korea in the late 2000s). And, at least in the case of Chile and Korea, such proximity in terms of timing rather reflects Chile's or Korea's PTA policies and objectives than a competitive relation between the US and EU liberalization efforts.

(Contd.) _____

tends to over-estimate the PTA potential substitutability. Despite such a favorable bias, US and EU PTAs are clearly far to be a substitute to a successful Doha Round.

Section 7. Domestic political economy games behind PTAs

The main conclusion from the sections above is that PTAs seem to be the outcome of all these six motives. None of them appears to be utterly dominant, and none irrelevant. Does such a complex set of motives generate PTAs in a chaotic way, or is there some pattern in the domestic political economic games that drive the creation of PTAs? In the latter case, could one predict the main obstacles and driving forces inherent to such games in the countries envisaging the PTA in question?

In order to answer these questions, Table 4 maps the six motives examined in the previous sections with the five following main groups of domestic actors:

- top policy-makers (Presidents and Prime Ministers, possibly Ministers of Finance or Economy and Ministers of Foreign Affairs);
- other policy-makers with some interests in trade matters (Trade Ministers, and all sectoral Ministers from agriculture to industry to culture or tourism);
- domestic economic vested interests closely related to the bilateral trade liberalization at stake, i.e. domestic offensive interests supportive of the opening of the partner's markets and domestic defensive interests supportive of keeping intact the existing protection of domestic markets;
- domestic actors having an international agenda related to foreign or development policies (public development agencies, NGOs with an international agenda or with a national agenda that they try to impose via international agreements);
- Parliaments, which are, in most countries, the institution ratifying international treaties.

Table 4 presents this mapping from two perspectives: the perspective of small signatories negotiating with large partners (block A) and the perspective of large signatories negotiating with small partners (block B). The cases of countries with similar size are briefly examined in the concluding remarks because they can be derived from the two asymmetrical cases. Table 4 describes the likely behavior of each of the actors.

Table 4. The motives as shaping domestic political economy games

	Possible motives behind PTAs					
	Speed factor	Unfinished tariff cuts agenda	21st Century agenda	Domestic reform agenda	Substitute to Doha Round	Foreign or development
	1	2	3	4	5	6
A. Smaller signatories negotiating with large partners						
Top policy-makers (Presidents, PMs)				high		nil to high
Other policy-makers (Trade, Industry, Ag.)	high	high	high		high	
Vested trade interests (pro- or anti-PTA)	high & wide	high & wide	high & wide			
Foreign/development interests						high
Parliaments		high	nil to high	high	high	high
B. Larger signatories negotiating with small partners						
Top policy-makers (Presidents, PMs)				low		nil to high
Other policy-makers (Trade, Industry, Ag.)	low to high	low to high	low to high			
Vested trade interests (pro- or anti-PTA)	high but narrow	high but narrow	high but narrow			
Foreign/development interests						nil to high
Parliaments		marginal	marginal			nil to high

Top policy-makers

Top-policy makers are focusing almost exclusively on the broad domestic reform agenda of their country – especially in periods of crisis. They are well aware that achieving such agendas requires

many policies and instruments other than PTAs, such as improved macroeconomic policies, domestic regulatory reforms, increasing competition in domestic markets, etc. In short, they are interested in PTAs only to the extent that these PTAs have a notable contributive capacity to such agendas. Moreover, they see PTAs as one instrument among many others and often perceive trade policy as particularly arcane sources of domestic fights between vested interests, full of details they have a hard time with to master. Finally, they are unlikely to pay attention to the five other motives, which could drive PTAs, except possibly foreign and development policies. Two key consequences can be drawn from this situation:

- top policy-makers of small signatories (which include Korea and Turkey when they sign PTAs with the US or the EU) are ready to put PTAs with larger economies on the top of their agenda because such PTAs are likely to have a substantial impact on their domestic reform agenda, given the sheer size effect of the partner's economy. These top policy-makers are then likely to play an active role in promoting such PTAs in their country.
- by contrast, top policy-makers of large signatories (the US and the EU for all their PTAs, Korea and Turkey for their PTAs with smaller signatories) are reluctant to invest their political capital in PTAs with small countries to the extent that such PTAs cannot deliver a strong support to their broad domestic reform agenda – again, because of the sheer size effect of the partner's economy. Top policy-makers thus tend to be absent from the domestic political games of large signatories. PTAs fate in the large countries depends mostly on the other actors, a feature which (as seen below) explains largely the acrimony of PTA debates and the volatility of the respective decision-making.

Other policy makers

By their nature, these actors are in close contact with – and hence lobbied by – the domestic interests having offensive (opening markets) or defensive (keeping them closed) interests in the UTC and 21st century trade agendas. They may also be convinced by the speed factor. These policy-makers have thus an intrinsic and strong tendency to look at PTA negotiations as a stand-alone activity, largely independent from the potential contributive role of PTAs to the domestic reform agenda of their country. The asymmetry of the political economy games is also very strong:

- such motives should be expected to play a particularly powerful role in the small countries – in favour of PTAs or against them – simply because of the size of the large signatory makes the UTC and 21st century agendas looking big in terms of opportunities and threats.
- by contrast, in large countries, the role of these other policy-makers is likely to be (much) more limited because of the small size of the partners, which involve narrow interests compared to the whole economy of the large signatory.

Offensive and defensive vested economic interests

These actors' interests are essentially driven by the UTC and 21st century trade agendas, which may be offensive (opening markets) or defensive (keeping markets closed). They are expected to play a role in large and small signatories. However, there is a key difference between these two types of signatories:

- vested interests of the small signatories are likely to involve a wide range of the country's economic activities because the larger country offers such a wide range of opportunities (offensive interests) or of threats (defensive interests) to the firms of the smaller partner.
- by contrast, the economic vested interests in a large economy, which can be mobilized by PTAs with small economies, are likely to be concentrated in small niches – the small country's markets offer opportunities only to a few firms of the large country and the small country's exporters do not threaten a large number of firms in the large economy.

A first look at political economy dynamics

The interactions among these three first groups of domestic actors generate two very different political economy dynamics in smaller and larger negotiating partners.

- when negotiating with a larger country, the smaller country will benefit from a wide debate on the PTA (as most of the country's vested interests will want to express their views) with strong incentives for both top policy-makers and other officials (because of their functions, such as the trade officials, or because of their relations with the vested interests, such as the Industry or Agriculture Ministries) to be actively involved.
- in sharp contrast, the large signatory of a PTA with a small partner will witness a (very) limited debate, with few and narrow pro- and anti-PTA vested interests running the debate. Top policy-makers are likely to be reluctant to spend their political capital on such arcane and potentially politically dangerous issues. Other officials will hold a wide range of positions, from supportive to hesitant, depending on specific features of the small partner's economy and contingent on the circumstances in world affairs and the domestic economy.

Foreign and development policies

The motives of this fourth – broader – group of officials and lobbies are very different from those driving the trade-related officials, and they are very heterogeneous within this group since they range from pure foreign policy concerns to development, climate change, and human rights to animal welfare. As a result, it is hard to see how this group could be the anchor of robust coalitions during the negotiation process. This is particularly the case in large countries, which are those that need the strongest push from this group in order to reach a decision.

That said, foreign policy and development officials of large countries are expected to favor PTA provisions that satisfy the smaller (and likely poorer) partner in order to get a robust ally in international relations. They should thus favor generous concessions from their own country – the larger (and likely more developed) partner.

The problem is that such views fly in the face of the narrow offensive vested economic interests in the large signatory (and of their related policy-makers) which will instead insist on provisions opening the small country's UTC and 21st century agendas - all provisions which are likely to make the most powerful lobbies of the smaller signatory unhappy (those who have been able to keep protection during the last fifty years).

Parliaments

Few Parliaments are truly active in PTA ratifications. In small countries, most Parliaments tend to ratify negotiated and government signed PTAs with few difficulties, reflecting the wide debate and the strong involvement of the top policy-makers.

The situation is quite different in the two largest world economies. The US Constitution gives prominence to Congress in trade negotiations and the US Administration needs the Congressional approval to open trade negotiations. The other exception is the EU with its complicated system of two Houses. The European Council of Ministers (the "Upper" House in trade matters) defines the Commission's mandate of negotiations and is *de facto* the first House to ratify the outcome. The European Parliament is now the second House that ratifies a trade treaty. In the US and, possibly increasingly, in the EU, the parliamentary approach to PTAs with smaller economies may range from plain disregard (no policy-makers and no interest groups powerful enough are pushing for the PTA at stake or fighting against it) to intermittent or chaotic interests (when the fights among tiny but aggressive offensive and defensive interests are inconclusive and when no top policy-maker is eager to spend political capital on the PTA in question). The second situation is by far the most likely: one does

not need to be a lobby with a large popular support to attract interest from a US Congressman or from a Member of European Parliament in Houses gathering 535 or 754 members. Whatever the reason, the ratification process then becomes highly acrimonious and volatile, as best illustrated by the US ratification process applying to PTAs negotiated with Korea, Colombia and Peru.

Concluding remarks

As the comatose Doha Round leaves PTAs as the only way to deliver trade liberalization, it is essential to understand the main motives behind the negotiation and conclusion of PTAs. There is no robust and strong evidence that PTAs are faster to negotiate and to implement than WTO deals but the fact that such a perception is widely shared among many officials still makes it an important motive for launching PTA talks. The “unfinished tariff cuts” (UTC) agenda still has a lot of attraction. Even if tariffs are low or moderate on average, there are still a lot of peak tariffs to be dismantled. The 21st century trade agenda (norms and regulations) is slowly emerging as an important PTA dimension, but its role in existing PTAs does not yet reflect the importance it will likely have in the future. PTAs can also be used as a vehicle to gain access to all key world markets and as a substitute to WTO negotiations. Finally, foreign and development policies have many and large overlaps with trade policy in today’s world.

Mapping all these motives with the main groups of decision-makers suggests very asymmetrical political economy games in small and large partners. The outcome of such games seems quite predictable in the smaller negotiating partner, while it seems largely unpredictable in the larger partner. If the two partners are of similar size, the games may become volatile, with results depending on how each partner perceives itself (the smaller partner or the larger partner).

Such domestic political dynamics deserve a last – but crucial – remark for trade policy at large. During recent years, they seem to have had a negative impact on the perception of trade policy by the public. This negative impact can be observed in both large and small partners, though for different reasons.

- because offensive and defensive vested interests in the large country are limited to tiny sectors, the public opinion in such countries becomes convinced that the decisions on the PTA at stake – and on trade policy in general – are captured by tiny vested interests, hence that they ignore the country’s global interests. Debates on PTAs then tend to quickly degenerate into a widespread and cynical anti-free trade mood in the country.
- because most PTAs today are *de facto* bilateral agreements, they are easily perceived by the public of the smaller country as a “victory” of the larger partner (seen as able to impose its conditions with few concessions from its side) and as a “defeat” of the smaller one (seen as forced to accept the larger partner’s conditions with few gains from its side). Of course, the defensive interests of the PTA at stake disseminate actively this negative perception in their respective countries. Hence, debates can also degenerate into a widespread anti-free trade mood in the country, with free trade seen as an “oppressive” force in the hands of the larger country and its larger firms.

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The Challenge of Implementing Preferential Trade Agreements in Developing Countries – Lessons for Rule Design

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Abstract

The latest generation of Preferential Trade Agreements (PTA) features a diversity of ‘deep integration’ provisions, which mandate a wide range of border and behind-the-border regulatory and institutional reforms in areas such as food safety and technical standards, customs administration, government procurement, competition policy, or services liberalization. The implementation of such obligations frequently presents developing countries with major challenges, as they face varieties of domestic structural and behavioural constraints. With a view to a better understanding of such challenges and how they can be effectively addressed, the World Bank has launched a series of case studies on PTA implementation in a dozen selected developing countries from around the world. This paper summarizes the main results of a forthcoming World Bank Report, which provides an overview of the findings of the country case studies with respect to the implementation of PTA provisions in seven complex border and behind-the-border policy areas. Drawing from the empirical evidence of the case studies and the conclusions of modern policy implementation theory, the authors suggest that the challenges associated with PTA implementation in developing countries can, at least partially, be addressed through built-in flexibilities, i.e. the customization of PTA rule design to country specific structural and behavioural characteristics, and the establishment of effective institutional mechanisms that are equipped with strong mandates to monitor, analyse, support, and adjust implementation processes over time.

I. Introduction

The recent surge of preferential trade agreements (PTAs) is fast reshaping the architecture of the world trading system and the trading environment of developing countries. As of end-2010, 278 PTAs have been notified by WTO members, around half of which have come into force during the last 15 years. South-South PTAs represent no less than two thirds of all PTAs and North-South agreements make for one quarter.¹

The nature and content of regional agreements is also evolving rapidly, as is the global trade environment. One important dimension of more recent PTAs is their deepening scope, including more comprehensive treatment of border regulatory measures such as trade facilitation and standards, and complex behind-the-border regulatory issues, such as competition policy, investment policy, government procurement, and intellectual property. Often these policies are not covered in the current WTO rule-book, nor are they on the table in Doha negotiations.²

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¹ WTO (2011): *The WTO and Preferential Trade Agreements – From Coexistence to Coherence*, World Trade Report 2011, Geneva. p.55 At: www.wto.org/english/res_e/publications_e/wtr11_e.htm

² *ibid*: pp. 128-133

The increasing number, breadth and depth of PTAs has been extensively documented and discussed in contemporary literature.³ The same applies to the negotiation processes of these agreements, which frequently attract much attention from policy makers, academics, think tanks, and other non-governmental organizations. At the same time, there is only limited knowledge of the challenges that are associated with the actual implementation of PTAs and how these can be effectively addressed through the design of PTAs.⁴ Yet, for many developing countries and private sector operators, the multitude and increasing depth of PTAs pose a major challenge in terms of implementation and administration. This is particularly so with regard to the implementation of complex border and behind-the-border regulatory reforms that are directly mandated or implicitly required by PTA obligations.

In light of this knowledge gap, in 2010, the International Trade Department of the World Bank commissioned 13 country case studies (namely, Cote d'Ivoire⁵, Egypt⁶, Ghana⁷, Jordan⁸, Morocco⁹, Sri Lanka¹⁰, Tanzania¹¹, Thailand¹², Trinidad & Tobago¹³, Turkey¹⁴, Uruguay¹⁵, Vietnam¹⁶, and Zambia¹⁷) to collect available data on the implementation of countries' obligations under the PTAs to which they are party. Moreover, the researchers were tasked to identify the country specific and policy area specific challenges and obstacles that country government, administrations, and the private sector were confronted with in the course of implementation processes. The results of this exercise, and the lessons drawn from the data analysis, are presented in a forthcoming World Bank overview report, titled 'Implementing Preferential Trade Agreements for Development'. The report draws particular attention to the implementation of the complex border and behind-the-border policies that are mandated by contemporary PTAs, e.g. food safety standards, trade facilitation measures and customs

³ See, for instance: Baldwin, Richard & Patrick Low (2009): 'Multilateralising Regionalism: Challenges for the Global Trading System', Cambridge: Cambridge University Press. Estevadeordal, Antoni & Suominen, Kati & Teh, Robert (2009): 'Regional Rules in the Global Trading System' Cambridge: Cambridge University Press. Heydon, Kenneth & Woolcock, Stephen (2009): 'The rise of Bilateralism: Comparing American, European and Asian Approaches to Preferential Trade Agreements', United Nations University Press, Tokyo, Japan.

⁴ Hoekman, Bernard (2010): *North-South Preferential Trade Agreements*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C.. p105

⁵ Cote d'Ivoire - study prepared by Mr. Salik Kone, Assistant Research Professor in Economics at Cocody University in Abidjan

⁶ Egypt - study prepared by Mr. Ahmed Ghoneim, Associate Professor of Economics at Cairo University, Egypt.

⁷ Ghana - study prepared by Mr. John Hawkins Asiedu, Economist and Evaluation and Private Sector Development Specialist the Trade and Industry Ministry of Ghana.

⁸ Jordan - study prepared by Mr. Riad al Khouri, Dean of Business School, Lebanese French University Erbil, Kurdistan, Iraq and Senior Economist at the William Davidson Institute University of Michigan at Ann Arbor.

⁹ Morocco - study prepared by Ms. Cherkaoui Mouna, Professor for Economics at Mohamed V University in Rabat, Morocco.

¹⁰ Sri Lanka: study prepared by Mr. Dushni Weerakoon, Deputy Director of the Institute of Policy Studies of Sri Lanka.

¹¹ Tanzania – study prepared by Mr. Peter Draper, Director of the South African Institute of International Affairs (SAIIA)

¹² Thailand - study prepared by Mr. Archanun Kohpaiboon, Assistant Professor in Economics at Thammasat Univeristy and Mr. Suphat Suphachalasai.

¹³ Trinidad & Tobago - study prepared by Mr. Anthony Gonzales, Trade Policy Analyst and the former WTO Director and Representative for the Caribbean Regional Negotiating Machinery.

¹⁴ Turkey - study prepared by Mr. Subidey Togan, Professor of Economics at Bilkent University, Turkey.

¹⁵ Uruguay - study prepared by Mr. Alvaro Ons and Mr. Vaillant, both Professor of International Trade at the Department of Economics, Social Sciences Faculty, Universidad de la República, Uruguay.

¹⁶ Vietnam - study prepared by Mr. Nguyen Xuan Thang, Vice President of Vietnam Academy of Social Science.

¹⁷ Zambia - study prepared by Ms. Trudi Hartzenberg, Executive Director of the Trade Law Centre for Southern Africa (TRALAC).

reform, intellectual property rights protection, government procurement liberalization, competition policies, and the liberalization of trade and investment in services as well as complementary domestic regulation. It is these policy areas, among others, and their complexity which distinguish the shallow ‘tariff reduction’ agreements of the past from contemporary ‘deep integration’ PTAs.

In this paper, we broadly summarize the main findings and conclusions drawn from the analysis of the World Bank country case studies and complementary literature, which we present in the forthcoming overview report in greater length and detail. We argue that the analysis of implementation processes in developing countries provides supporting evidence to the claim that the achievement of regional policy objectives through domestic rule implementation is a function of customized and flexible employment of varying mixtures of legal instruments that are linked and, over time, adjusted to the dynamics of implementation processes. In particular, the understanding of PTA rule design and implementation as necessarily inter-linked dynamic processes will favour the use of ‘living-agreement instruments’, which provide for institutionalized bottom-up feedback mechanisms that frequently update available information on reform progress and obstacles thereto, settle bilateral disputes informally where they occur, and respond to implementation progress and challenges through the (re)definition of policy objectives, complementary rule-making, and tailor-made resource dedication over time in a flexible manner.

We proceed as follows: The second section addresses conceptual and practical questions as to what we mean by ‘implementation’, and implementation of ‘deep integration’ PTAs in particular. In the three subsequent sections, we provide an overview of the challenges that developing countries face in implementing deep integration obligations. Notably, we identify, first, challenges that are generally intrinsic to implementation processes; secondly, challenges that are related to country specific structural and behavioural factors; and third, challenges that are specific to the complex nature of behind-the-border PTA policies and their regulation. We recognize the fact that these three categories of implementation challenges are, to some extent, inter-related and overlapping. Their differentiation, nevertheless, helps to shed light on their particular character from different perspectives. In the sixth and concluding section, finally we summarize and discuss the lessons that can be learned from the study of implementation processes for the design of PTAs, with a view to achieving effective implementation of PTAs that is compatible with the legitimate development objectives of any given country.

II. The Implementation of ‘deep integration’ PTAs: Conceptual and Practical Issues

In her pioneering work on PTA implementation, Gonzalez (2009) defines PTA implementation as government “interventions that are necessary in order to be able to satisfy treaty obligations; that is, actions that must generally be taken before the agreement enters into force – unless the agreement itself includes transition phases for putting certain obligations into effect”, which is frequent practice.¹⁸ The notion of implementation is conceptually related to, but distinct from, the administration and enforcement of PTAs. Administration refers to the regular management of PTAs by the dedicated national, inter-state, or supranational authorities after implementation has already taken place. A lack of adequate implementation, however, may well surface in the course of the administration of an agreement. The failure to implement particular obligations, furthermore, results in non-compliance with the treaty provisions and can encourage the other parties to take enforcement action through the employment of a dispute settlement mechanism that has been established under the treaty.¹⁹

¹⁸ González, Anabel (2009): *The Implementation of Preferential Trade Agreements: A Conceptual Note*, Inter American Development Bank, April 2009. p3

¹⁹ *ibid*: p3

In theory, the quality and extent of government interventions necessary to implement PTA commitments depends on the magnitude of the ‘implementation gap’ – the difference between a country’s institutional, regulatory, and private sector development status quo on the one side and the obligations codified in the treaty on the other.²⁰ As such, the nature of necessary implementing action is contingent on country specific structural and behavioural factors as well as the complexity of the respective policy field that is governed by the PTA in question.

At the most general level we can observe that ‘deep integration’, i.e. the implementation of complex border and behind-the-border regulatory policies, is far more demanding than the implementation of, for instance, market access commitments mandated by shallow trade agreements. This is particularly the case in low and middle-income developing countries where policy makers, regulators, and administrators are often confronted with a combination of an outdated regulatory and institutional status quo, an underdeveloped private sector, and severe resource constraints.

To illustrate the difference between the implementation of shallow market access agreements, on the one hand, and deep integration PTAs, on the other, we find that the former, depending on the specifics of the respective national legal system, merely requires government interventions that amend existing tariff legislation to give domestic legal effect to respective tariff reduction obligations. Such changes to the legal framework then need to be applied by the existing tax authority upon the entry of goods into the domestic territory.

To be sure, the effective implementation of behind-the-border policies or the adaption of border regimes to international standards frequently goes far beyond such superficial legislative adjustments. Implementation processes that respond to ‘deep integration’ obligations can range from ‘on paper’ implementation (as in legislative implementation) at the beginning of a long-term process, over wide ranging and highly demanding institutional reforms, to private sector capacity building measures that are necessary to ensure compliance with the new regulatory frameworks. Below, we list a number of examples of government interventions, which may be required in the course of implementation processes that apply to ‘deep integration’ obligations, as drawn from the World Bank country case studies:

- ***the translation of PTA commitments into specific legislation that is subject to the domestic political process*** - e.g. the adoption of certain technical or food safety standards responding to the obligation of regulatory harmonization with a partner country or the formulation and adoption of particular competition, IPR, or government procurement regimes;
- ***the creation or reform of institutions mandated with implementation and administration of a policy mandated by the PTA*** - e.g. the establishment or reform of a national competition commission, food safety agency, or government procurement authority;
- ***the creation or reform of intra- and inter-institutional management and communication mechanisms that are necessary for the implementation, administration, and enforcement of cross-cutting policies*** - such as the establishment of a ‘single window’ system for traders or ‘One Stop Border Posts’, which require interventions from multiple government agencies;
- ***institutional capacity building measures, such as technological upgrades as well as staff training and hiring*** - e.g. the introduction and application of modern information technology for customs management, or the hiring and training of experts dealing with the administration and enforcement of competition policy, government procurement, intellectual property rights regimes;
- ***the establishment and effective application of enforcement mechanisms*** - e.g. the creation of specialized IPR courts or conformity assessment agencies for technical and food safety standards;
- ***complementary implementation measures that are aimed at building private sector capacity to comply with, and better benefit from new regulatory frameworks*** - for instance, by providing for

²⁰ *ibid*: p10

training programs for small and medium enterprises on compliance with technical standards and food safety requirements; launching awareness raising campaigns with a view to promoting private sector compliance with IPR and competition regimes; export and investment promotion programs etc.;

- ***and, throughout the duration of such multi-faceted implementation processes, the sustained dedication of budgetary resources for implementation, administration, and enforcement of PTA obligations that may have long-term budgetary implications.***

This non-exhaustive list of potential governmental interventions at the domestic level gives a first impression of the challenges that developing countries may face in implementing deep integration PTAs. In sum, the process of regulatory convergence and integration between two or more PTA members, as frequently mandated by modern PTAs, can be characterized as a highly complex societal ‘enculturation of change’ that entails interventions and responses from large numbers of actors at all levels of domestic governance, administration, and the private sector.²¹

For instance, the complexity of coordination among developing country domestic institutions and agencies makes for a superb challenge for governments with respect to most ‘deep integration’ policy areas. Customs reform and trade facilitation make for an example *par excellence* as these policy areas frequently fall all but exclusively in the realm of trade policy, but are split into a large variety of regulatory areas, such as trade, customs management, taxes, public health and safety, environment, road, railway, air and maritime transport, infrastructure development, finance, or agriculture. In Zambia, to name one example, the World Bank researchers found that no less than 11 government agencies are involved in the implementation of customs reform. In light of such regulatory fragmentation and involvement of various respective agencies and institutions, concerted and targeted efforts to reduce respective barriers unilaterally or in response to bilateral, regional and multilateral agreements is an extremely demanding process. It requires a high degree of coordination of domestic institutions and stakeholders within a country, as well as coordination with institutions of partner countries, relevant international organisations, and donors. Coordination problems are exacerbated by the fact that developing country institutions may have limited experience with tasks that require inter-institutional coordination and communication and lack the necessary management skills and technical expertise.

The following sections discuss in more detail the process specific, country specific, and policy specific challenges that developing countries are frequently confronted with in the course of PTA implementation processes. Moreover, we suggest a number of measures that can, in our view, effectively address such challenges at the level of PTA design.

III. Challenges Intrinsic to Policy Implementation Processes

If effective implementation of PTAs is taken seriously by policy makers and negotiators, the design of PTA obligations and the formulation of a roadmap or an action plan for the implementation of such obligations require an awareness of the challenges that are intrinsic to domestic policy implementation processes. The following brief conceptual considerations, which draw from the conclusions of modern policy implementation theorists, introduce the notion of such process related challenges and make recommendations on how they can be addressed at the stage of PTA design.

In a nutshell, much of the early scholarly literature on policy implementation has focused on a ‘top-down’ approach of understanding implementation processes: policies, in the shape of legally rigid substantive rules, are negotiated and formulated at the highest political level or ‘centre’. Once the political negotiation and policy formulation process has ended, policies are complemented with

²¹ Barrett, Susan (2004): *Implementation Studies: Time for a Revival? Personal Reflections on 20 years of Implementation Studies*, Public Administration 2 (82), Oxford. p260

specific instructions and handed ‘down’ to the administrative level of governance for implementation. This ‘top-down’ dichotomy of political policy formulation processes, on the one hand, and administrative implementation processes, on the other, reflect the conventional separation of political decision-making and public administration and an understanding of implementation as a hierarchical process controlled by the political leadership through hard legal instruments. Effective implementation, therefore, is deemed as a matter of effective administrative control through decision-makers at the highest level.²²

Successive theory development, however, challenged this conception of a coercive, hierarchical and control based policy implementation processes altogether. The main challenge targeted the assumption of the dichotomous relationship of the political policy formulation process and the administrative implementation process. In contrast to the separation of policy design and implementation, the political process would find its continuation in a bargaining and negotiation process with and among those on whom implementing action and policy outcomes depend, notably government agents and private sector actors.²³

The key assumption of this conception of implementation processes is that government agencies respond to various policy initiatives at any given moment in time and are subject to external and internal pressures from different sources, which take the shape of, for instance, political economy dynamics, resource constraints, intra- and inter-organizational power distribution, and private sector responsiveness (or lack thereof) to policy initiatives. Even in the most rule-bound environment, government agencies have discretionary bargaining powers, which are, in their application, informed by own agency interests and values, as well as external and internal pressures and constraints.²⁴

Thus, in order to understand implementation processes with a view to rectifying their failures to deliver ‘compliance’, “implementation studies needed to start with what was actually happening at delivery/recipient level (at the ‘bottom’) and explore the ‘why’ from the ‘bottom up’” in order to improve the ‘implementability’ of policies formulated at the ‘top’. Such a methodology would then produce important information about capacity building requirements and “address questions such as: Is this doable? How might it work? What does it take?”²⁵

The question remains how PTA design can address challenges that are intrinsic to implementation processes. In essence, policy implementation theory tells us that PTA policy content in the form of hard legal rules, which are negotiated at the ‘top’, may be altered in the course of the implementation process (or not implemented at all) due to the limits of administrative control. Thus, challenges and obstacles to implementation arising in the course of the implementation process can only be addressed through monitoring, analysis, and responding action in real time. It is this notion, which renders *ex ante* and static prescriptions of PTA policies alone insufficient to achieve effective implementation.

In our view, process intrinsic challenges can, at the stage of PTA design, be addressed through the codification of complementary ‘living agreement instruments’, i.e. institutional mechanisms equipped with a strong mandate to monitor, analyze, support, and adjust implementation processes in response to identified challenges in real time. Such clauses can, for instance, require the establishment of joint institutions, high-level political fora, joint administrative committees, technical working groups, or all of the above – depending on the intensity of prospective challenges. These mechanisms, depending on their mandate, serve varying purposes. Most importantly, they need to update available information and analysis on implementation progress and obstacles. Moreover, they should be enabled to respond to implementation progress and identified challenges through a further specification or redefinition of

²² *ibid.*: p252

²³ *ibid.*: p253

²⁴ *ibid.*: p253-54. Also see: Barrett, Susan. and Fudge, Colin (eds) (1981). *Policy and Action*. London: Methuen, 1981.

²⁵ *ibid.*: p255

policy objectives, complementary rule-making, and tailor-made resource dedication over time in a flexible manner; and settle disputes over non-compliance informally where they occur. Such ‘built-in’ flexibility, in the form of strong and effective joint institutional mechanisms, is critical for the achievement of the complex and demanding reforms that are frequently mandated by modern PTAs.²⁶

IV. Country Specific Challenges to PTA Implementation

As noted above, the extent and quality of government interventions that are required in order to satisfy treaty obligations depends on the gap that prevails between the institutional, regulatory, and private sector status quo in any given country, on the one hand, and the policy objectives that are defined in PTAs, on the other. In this section, we argue, that the ‘implementability’ of PTA obligations can be illusory if the ‘implementation gap’ is too wide, i.e. if PTA obligations do not correspond to, or overburden, institutional and private sector capacities. We therefore discuss the various country specific contingencies that can impact on PTA signatories’ capacities to implement PTA obligations and need to inform the design of substantive PTA commitments in order to ensure their implementability. In doing so, we draw from the mass of data contained in the 13 World Bank country case studies on PTA implementation for development. To be sure, our discussion cannot be exhaustive and only summarizes the main and most frequent observations made in the case studies.

The first category of country specific challenges comprises institutional capacity constraints that are ubiquitous in many low and middle-income developing countries, and have been found to make for the single most important obstacle to PTA implementation. Such institutional weaknesses may encompass, but are not limited to the following factors:

- *weak government links to and communication channels with the private sector / policy recipients for civil society consultations on policy design;*
- *lack of the legal and economic expertise among government officials and regulators that is necessary to translate PTA obligations into domestic regulatory regimes and establish effective enforcement mechanisms;*
- *inadequate or non-existent administrative structures for the implementation and administration of commitments;*
- *limited numbers, poorly trained, poorly paid, or corrupt administrative staff;*
- *outdated management and communication mechanisms;*
- *limited access to information and communication technology;*
- *insufficient financial and intellectual resources for capacity building measures and the creation of new institutions.*

Such institutional constraints that impede PTA implementation can, to some extent, be addressed by means of targeted technical assistance and cooperation programs funded by external donors and be provided by country cooperation agencies and international organizations, such as the World Bank.

With a view to generating a maximum of government ownership (and thereby legitimacy for the measures vis-à-vis domestic constituencies), trade related technical assistance programs should be designed jointly by the government in question and the external agencies and donors. Moreover, in order to ensure coherence among the often numerous assistance initiatives that take place in a given country, governments need to design long term strategies and action plans, which coordinate

²⁶ Also see: Steger, Debra P. (2012): *Institutions for Regulatory Cooperation in ‘New Generation’ Economic and Trade Agreements*, (38) 4 Legal Issues of Economic Integration (109), Kluwer Law International. Hoekman (2010): op.cit. pp102-104

assistance efforts, avoid their duplication, prioritize the employment of resources, and provide for appropriate sequencing of related or interdependent activities.

The country case studies confirm that such programs are, in many cases, among the key factors that drive PTA implementation in resource poor environments. Moreover, interviews with government officials conducted in the context of these case studies indicate that the prospects of receiving technical and financial assistance from a partner country often incentivizes the negotiation of a PTA with an OECD country as such assistance can considerably facilitate the promotion of domestic reform agendas and the achievement of development objectives.

However, trade related financial and technical assistance, which is frequently provided in context of North-South PTAs to a very significant extent, is often insufficient to respond to the implementation challenges associated with country specific institutional constraints. The most important reason for this phenomenon, as confirmed by the World Bank case studies, is that the hard legal and time-bound obligations of a PTA in a given policy area do not correspond to the institutional reality of the country in question in the first place. In other words, the gap between regulatory status quo and the policy objectives codified in a PTA may be so wide that national institutions are overwhelmed by the tasks that they are supposed to perform. Effective implementation, in these instances, can be illusory, no matter how beneficial the mandated reforms would be in the long run.

The World Bank country case studies, furthermore, show that ‘over-commitment’ of developing countries through deep integration PTAs is far from a rare phenomenon. In line with this observation, Hoekman (2010) notes that “the regulatory standards that are written into trade agreements generally start from the status quo prevailing in OECD countries, so that the lion’s share of associated implementation costs – but presumably so also the benefits – lies with developing country signatories.”²⁷ The institutional preconditions for the implementation of such commitments, however, are often far from satisfied. The World Bank country case studies provide a large amount of evidence supporting this claim.

For instance, the achievements resulting from Morocco’s efforts to harmonize its SPS laws and regulations as well as quality control infrastructure with the EU status quo are rather moderate. Challenges appear to stem from limited institutional capacity, expertise, and inter-institutional coordination. The European Commission’s Directorate General for External Trade has counted 53 instances of SPS and TBT technical assistance provided to Morocco in the period of 2001-05.²⁸ But even though such assistance has undoubtedly been helpful, Morocco is reportedly facing severe problems to gradually harmonize its laws with the EU *acquis communautaire* or to develop feasible approaches to the negotiation of mutual recognition agreements with the EU. In 2007, the Moroccan government recognized the short-term need to reinforce local institutions charged with standardization and conformity assessment.²⁹ Morocco finally created the National Health and Food Safety Agency (ONSSA) in 2009, which is now operational.

This finding leads to the important conclusion that the design of PTA commitments, if implementation is taken seriously, needs to correspond to the institutional realities in the implementing country. This requires a sober stock-take of countries’ institutional capacities *ex ante* and customized design and tailor-made sequencing of the implementation of obligations. Customization of PTA design and of implementation sequences stands in contrast to the application of a one-size-fits-all approach in the shape of highly demanding sets of hard legal obligations aiming at regulatory harmonization at the

²⁷ Hoekman (2010): op.cit. p99

²⁸ European Commission, Directorate General for Trade (2009): *Inventarisation of Technical Assistance Provided to Third Countries in the Area of SPS by the European Union and Its Member States*, October 15, 2009, Brussels.

²⁹ Government of the Kingdom of Morocco (2007): *Fiche signalétique de projet de jumelage: appui à la direction de la normalisation et de la promotion de la qualité dans l’harmonisation et la mise en oeuvre de la législation technique*, final version, May 2, 2007, Rabat.

OECD status quo, which can render the prospect of PTA compliance elusive. Yet, the opposite of one-size-fits-all cannot be no-size-fits all or “anything goes.” Successful implementation of PTAs or more broadly successful experiences of economic integration have been able to achieve the right balance between the pursuit of key principles (e.g. consumer protection, food safety, or intellectual property) and the public and private sectors’ capacity of absorption of the reforms and changes required.

For instance, in order to satisfy institutional preconditions for regulatory reform first, institutional reform, complemented by necessary technical cooperation, can be front-loaded in PTAs through hard legal obligations. Soft legal provisions, in addition, can signal the parties’ ambition for deeper integration in the respective policy area in the future. Furthermore, the parties may mandate a joint inter-governmental body with the monitoring of institutional reform progress, the drafting of specific action plans for the implementation of institutional reform, tailor-made resource dedication for technical assistance programs, and the negotiation of additional substantive legal obligations, which can take effect once the institutional preconditions for deeper integration are met.

Such considerations also apply to other country structural and behavioural factors, notably the specific economic and business environment as well as the political climate that prevail in a given country. For example, the implementation of OECD standard competition laws in countries where national economies are structured in a highly oligopolistic manner or characterized by a high share of public ownership will confront policy makers and government agencies in developing countries with a daunting task. In this specific policy area, World Bank researchers frequently cite a lack of domestic competition culture and vested interests in the preservation of the status quo as the main factors impeding the effective implementation of competition commitments featured in PTAs and the effective enforcement of adopted domestic legislation.

As the case study on Jordan reveals, for example, prevalent state dominated and oligopolistic economic structures in Jordan have resulted in strong resistance to the adoption of the country’s first competition law and the creation of an independent competition authority. In consequence, after years of consultations, the first draft legislation was eventually rejected by Parliament in 2001, before a watered-down version was adopted in 2004. While the Ministry of Enterprise and Trade did establish a competition directorate within its administrative structures, the country still awaits the creation of an independent administrative and enforcement agency. In several regions, moreover, such as CARICOM and the WAEMU, the authors of the World Bank country case studies observe little political interest on behalf of public decision-makers to advance competition reform – despite hard legal regional commitments.

Similarly, the reform of government procurement regimes to allow for foreign competition or the introduction of intellectual property rights protection in economies where trade in counterfeited goods makes for a sizeable share of economic activity will likely provoke significant opposition from the beneficiaries of the existing regimes. As the case studies show, such deep-seated structural factors are often insufficiently addressed through a set of static hard legal obligations as policy makers risk their political survival if they prioritize compliance. Rather, in our view, the ‘enculturation of change’ of such deep-rooted societal arrangements can be, step by step, induced by PTAs through the design of a customized combination of soft and hard legal as well as institutional instruments, which should, ideally, prioritize the achievement of broad and tangible private sector benefits so as to erode political opposition deriving from vested interests in the status quo. As recent political economy research highlights, deep-integration PTAs can thereby act as a ‘stepping stone’ to further liberalization on a unilateral or multilateral basis. Greater trade openness promotes growth in export sectors and alters the balance of political influence between exporting industries and import-competing industries, creating more favourable incentives for governments to reduce trade barriers unilaterally or multilaterally.³⁰

³⁰ Baldwin, Richard & Freund, Caroline (2011): *Preferential Trade Agreements and Multilateral Liberalization*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): *‘Preferential Trade Agreement Policies for Development – A Handbook’*, World Bank, Washington D.C.

Finally, the technical capacity of businesses to comply with novel regulatory regimes is key when policy makers measure the ‘implementation gap’ with regard to behind-the-border PTA commitments. For instance, the private sector costs of adapting production processes to technical and food safety standards that are being harmonized with those of an OECD country PTA partner can significantly outweigh the benefits deriving from such adaptation measures, at least in the short run. In the field of food safety standards, for example, the creation of private sector capacity in developing countries is critical. The private sector that has to adapt production and processing methods and facilities to OECD standard sanitary and phytosanitary measures (e.g. by vaccinating livestock, eliminating pesticide residues, guaranteeing sanitary food processing conditions etc.), identify the SPS measures it needs to comply with in third jurisdictions, and bear the administrative costs for conformity assessments and certification procedures - all of which adds to per-unit costs of production.

As discussed above, such factors need to be taken duly into account at the stage of PTA design as well as in the course of drafting action plans for effective implementation.

V. Policy Specific Challenges to PTA Implementation

A third dimension of effective PTA implementation is related to the nature of policies that are mandated by PTAs. As noted above, the process of regulatory convergence and integration between two or more PTA members can be characterized as a highly complex societal ‘enculturation of change’ that requires interventions and responses from actors at all levels of domestic governance, administration, and the private sector. A feature often associated with the complexity of deep integration policies at the time when PTA commitments are negotiated is ‘uncertainty’. Negotiators may agree that some degree of convergence is beneficial and desirable for the parties involved. However, the optimal depth of integration – that is, the optimal policy content – is often uncertain at the time of legal drafting.

First, information about the relevant factors that determine the optimal degree of convergence may not be readily available. As discussed above, the likely adjustment costs of policy implementation need to weigh into the assessment of the necessary depth as well as geographic and material scope of regulatory convergence and should lead to customized rule design. They tend to be low in cases of close ‘proximity’ between the partner countries in terms of geography, language, levels of development, legal systems, institutional compatibility, policy objectives, and regulatory preferences. Adjustment costs tend to be high for countries where convergence would require deviation from a national regulatory standard that optimally reflects domestic preferences and implementation capacities.³¹

Secondly, negotiators may lack reliable empirical data about the actual trade obstacles that a mandated policy is supposed to remove. In the resource scarce environments of developing countries, the removal of actual trade bottlenecks, rather than across-the-board harmonization, should be prioritized in PTAs in order to avoid the inefficient diversion of resources. In absence of in-depth analysis of respective barriers and trade opportunities, such reform prioritization becomes impractical.

Third, uncertainty may prevail over the broader economic and social impact of the implementation of various alternative regulatory regimes and the extent of necessary complementary measures that are required to mitigate adjustment costs. For instance, the enforcement of distinct competition policy, government procurement, and IPR regimes or domestic regulation applying to the provision of services can result in unintended consequences in the shape of severe adverse effects for some sectors of society. Against this background, Hoekman (2010) notes that “monitoring and analysis of impacts

³¹ Mattoo, Aaditya & Sauvé, Pierre (2011): *The Preferential Liberalization of Services Trade*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): ‘Preferential Trade Agreement Policies for Development – A Handbook’, World Bank, Washington D.C..

and of the performance of supported sectors and activities are therefore important, as is the establishment of credible exit mechanisms; governments need to be able to withdraw support from experiments that fail. Trade agreements offer a potential vehicle for supporting such mechanisms.”³²

Finally, uncertainty can result from the expectation that regulation may have to be adapted to a changing social, economic, and technological environment in the future. Such regulatory changes are particularly frequent with regard to sectors that are characterized by fast-paced technological progress.

Similar considerations have led Chauffour and Maur (2010) to the conclusion that it is “not only the nature of partner countries and their capacity that dictates the need for flexibility, but the regulatory issues themselves. Many of the new policies captured in the latest generation of PTAs do not lend themselves to the reduced standalone legal language in a trade agreement.”³³ It may be, in fact, impossible, impractical, or unreasonable to specify policy content beyond cooperation clauses, which genuinely commit the parties to a process leading to deeper integration in specified policy areas. In this sense, contemporary PTAs often necessarily remain ‘incomplete contracts’, the gaps of which need to be filled by strong and effective joint institutional mechanisms that are established by the parties in order to drive the integration process forward in a cooperative manner.

VI. Conclusions

The latest generation of Preferential Trade Agreements features a diversity of ‘deep integration’ provisions, which mandate a wide range of border and behind-the-border regulatory and institutional reforms in areas such as food safety and technical standards, customs administration, government procurement, competition policy, or services liberalization. The implementation of such obligations frequently presents developing countries with major challenges, as they face varieties of domestic structural and behavioural constraints. With a view to a better understanding of such challenges and how they can be effectively addressed, the World Bank commissioned a series of country case studies on PTA implementation in a dozen selected developing countries from all the regions of the world. This paper has summarized the main results of a forthcoming report, which provides an overview of the findings with respect to implementation of PTA provisions in seven border and behind-the-border-policy areas.

Drawing from the empirical evidence of the studies and the conclusions of modern policy implementation theory, we suggested that the challenges associated with PTA implementation in developing countries can, at least partially, be addressed through ‘built in’ flexibilities, i.e. the customization of PTA rule design to country specific structural and behavioural characteristics, and the establishment of effective institutional mechanisms that are equipped with strong mandates to monitor, analyze, support, and adjust implementation processes over time.

In other words, first, the normative content of provisions, the use of hard vs. soft law, and the prescription of the sequence of implementation processes need to correspond to the individual structural and behavioural contingencies that prevail and develop in individual countries; address existing uncertainties associated with the economic and societal consequences of rule implementation; and take due account of the specific nature of any given field of behind-the-border regulation. Secondly, the understanding of PTA rule design and implementation as necessarily inter-linked, dynamic, and long-term processes will favour the use of ‘living-agreement instruments’, which provide for institutionalized bottom-up feedback mechanisms that frequently update available information on reform progress and obstacles thereto, settle bilateral disputes informally where they

³² Hoekman (2010): op. cit. p103

³³ Chauffour, Jean-Pierre & Maur, Jean-Christophe (2010): *Beyond Market Access: The New Normal of Preferential Trade Agreements*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): ‘Preferential Trade Agreement Policies for Development – A Handbook’, World Bank, Washington D.C.. p30

occur, and respond to implementation progress and challenges through complementary rule-making and tailor-made resource dedication over time in a flexible manner.

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Part III
Reciprocity, EU Trade Politics, Transatlantic Integration,
and the Exportation of EU Standards

Bilateralism and Specific Reciprocity in EU Trade Policy: The Inevitable Link

Adrian van den Hoven*

Abstract

This paper outlines a business perspective on the evolution of EU trade policy. It argues that EU trade policy is currently driven by a bilateral negotiating focus, which has significant repercussions for the whole of policy-making. Most notably, bilateralism accentuates the reciprocal nature of trade negotiations and policy-making for the business community. This paper will show that bilateralism and reciprocity is not only dominant in free trade negotiations but also across other policy domains related to development preferences, procurement and anti-dumping policy and raw materials policy.

1. Introduction

This paper outlines a business perspective on the evolution of EU trade policy. It argues that EU trade policy is currently defined by a bilateral negotiating focus which has significant repercussions for the whole of policy-making. Most notably, bilateralism accentuates the specific reciprocal nature of trade negotiations and policy-making for the business community. This paper will show that bilateralism and reciprocity are not only dominant in free trade negotiations but also across other policy domains related to development preferences, procurement, anti-dumping policy and raw materials policy.

The most profound shift in EU Trade Policy over the last ten years was the Global Europe Communication of 2006¹, which rebalanced EU trade policy away from the so-called Lamy Doctrine² where the EU decided not to initiate new bilateral free trade negotiations until the conclusion of the WTO Doha Round. The purpose of the Lamy Doctrine was to concentrate the EU's administrative and political resources in support of a stronger multilateral trading system. This commitment to multilateralism was underlined in a particular political context where there were concerns that the US would withdraw, or at least reduce, its commitment to multilateral institutions as a result of the 9/11 terrorist attacks and subsequent decisions to engage militarily in different arenas. The launch of the WTO Doha Round, immediately after of the 9/11 attacks, was in itself a renewed multilateral commitment by all WTO members. The EU's strong support for multilateralism was also to further other objectives in areas such as the environment (Kyoto Agreement³) where US engagement or non-engagement would be critical. However, as the WTO Doha Round negotiations dragged on, in spite of repeated EU efforts to revive the talks, EU trade negotiators began to see the risks of putting all the EU's eggs in the multilateral basket. The US Government decision to re-engage in bilateral trade negotiations in 2005 tipped the balance in favour of a new trade strategy.

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¹ European Commission: Global Europe: Competing in the World - A Contribution to the EU's Growth and Jobs Strategy. COM(2006) 567 final, 4 October 2006. http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0567en01.pdf

² The Lamy Doctrine refers to the Parliament approval hearing of Pascal Lamy on 2 September 1999 where he outlined his vision for a

b) Millennium Round of WTO negotiations. In this vision, he proposed that the EU focus its resources exclusively on multilateral trade negotiations. European Parliament: Verbatim Report, Confirmation Hearings of Nominee Commissioners, Pascal Lamy, 1999. <http://www.europarl.europa.eu/press/sdp/dirinf/fr/1999/index.htm>. The Lamy Doctrine had a profound effect on EU bilateral trade negotiations as is evidenced in Andreas Schneider: The EU-Mercosur Free Trade Agreement - The Implications for Trade in Agriculture, CEPS Policy Brief, No. 107/June 2006.

³ The link between trade policy and environment policy was also apparent when the EU concluded WTO accession talks with Russia in 2004 in exchange for its ratification of the Kyoto Protocol. Russia's ratification enabled the agreement to come into force at the time.

Among many other issues, the Global Europe Communication outlined a new bilateral trade strategy focusing on emerging markets in Asia. This strategy would later be extended to other emerging markets, principally in Latin America. Although the EU remained fully engaged in the final attempts to conclude the Doha Round in December 2008, the Global Europe focus on bilateral negotiations would profoundly change EU trade policy-making for years to come.

In general, reciprocity refers to an exchange of equal advantages such as the removal trade or investment restrictions between countries. In the WTO and in bilateral free trade agreements, this has practically led to the reduction of tariffs and other barriers to trade for similar concessions. More specifically, the EU has pursued reciprocity differently in a multilateral and a bilateral context. In the multilateral context, reciprocity is diffuse where the EU considers the market access results of trade agreements within its total balance of trade and where the strengthening of multilateral trade rules is considered of economic benefit to European firms. In bilateral trade negotiations, the EU pursues a much more specific approach to reciprocity based largely on sector reciprocity. This paper will illustrate this major shift toward specific reciprocity in EU trade policy by examining, first, the evolution of the Doha Round negotiations, secondly, the EU pursuit of bilateral free trade negotiations, and, third, the reform of unilateral trade policies.

2. Less than full reciprocity in the WTO Doha Round

Arguably, the WTO Doha Round's failure can be linked to the fact that it enshrined diffuse reciprocity into its mandate through the reference to "less than full reciprocity" for developing countries.⁴ The introduction of this clause was highly controversial among business groups in the EU and the US, which considered the purpose of the Doha Round to establish a more balanced market access approach for industry and services between OECD and emerging countries. While average industrial tariffs in the US and Europe are around 4%, major emerging markets still have bound tariff rates in the double digits such as Brazil (30%) or India (58%). The real and perceived rise of emerging countries in international trade has made it difficult for representatives of the business community to accept the logic of 'less than full reciprocity'. As the WTO stated in 2003: *"There is a clear increasing trend in the share of the developing countries in world trade and in all major developed and developing markets."*⁵ China, India, and, Brazil have all expanded their international trade significantly over the last ten years which attests to the strengthened competitiveness of their economies. In part, this explains why much of the Doha Round centered on very tough negotiations between the large emerging markets, on the one side, and the EU and the US supported by other OECD countries, on the other.

The battle between emerging and OECD countries focused largely on industrial tariff negotiations and services liberalization. In the context of tariff negotiations, the EU pushed very strongly, and ultimately succeeded in convincing, WTO members to adopt a compression formula (the so-called Swiss Formula) for tariff reduction, the effect of which would have been to reduce higher tariffs more than lower tariffs and ultimately achieve more harmonized tariff structures among major trading nations. Emerging countries had championed a different tariff harmonizing formula (the Girard Formula) which would have virtually eliminated OECD tariffs while emerging countries would have only introduced marginal tariff cuts and reduced peak tariffs to 15%. From their perspective, this

⁴ Paragraph 16 of the Doha Mandate, referring specifically to industrial tariff negotiations states that "The negotiations shall take fully into account the special needs and interests of developing and least-developed country participants, including through less than full reciprocity in reduction commitments (...)" World Trade Organisation: DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION WT/MIN(01)/DEC/1; 20 November 2001, Ministerial declaration adopted on 14 November 2001. http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

⁵ Marc Bacchetta and Bijit Bora: Industrial Tariff Liberalization and the Doha Development Agenda COUNSELLORS DEVELOPMENT AND ECONOMIC RESEARCH DIVISION World Trade Organization Geneva, Switzerland, 2003. http://www.wto.org/english/res_e/booksp_e/discussion_papers_e.pdf.

formula would have been an accurate reflection of 'less than full reciprocity'. In addition to the tariff formula, the US - often backed by Japan as well as European industry (but not always with the backing of the Commission) - pressed strongly for sector tariff agreements based on specific reciprocity (zero-for-zero) in chemicals, electronics and environmental goods or machinery. The lack of willingness on the side of emerging countries to negotiate sectoral agreements was one of the direct causes of the breakdown of WTO trade negotiations in 2008.

OECD and emerging country disagreements over industrial tariffs were made more complex by the Doha Round mandate to provide special and differential treatment for developing countries. While businesses were ready to accept this special and differential treatment for small developing economies, there was very strong business opposition to affording this treatment to large emerging countries such as Brazil, India or China. However, as the WTO allows countries to self-define their development status as opposed to using trade competitiveness criteria, there was limited margin of manoeuvre to prevent them from abusing of this escape clause. Ultimately, emerging countries obtained such significant special and differential treatment that they considerably watered down the potential impact of the WTO tariff cutting formula. For example, the final discussions in 2008 considerably limited the impact of the formula by introducing different options for the developing country coefficient (20, 22 or 25) and by adding options to carve out between 5-10% of trade lines and volume from the cuts altogether. Efforts by the EU and the US to impose a requirement that these exceptions not be used to carve out entire sectors were largely in vain.⁶ This was another direct cause of the breakdown of WTO negotiations.

Similar disagreements arose between OECD industries and emerging countries regarding services trade liberalization. Essentially, the US and the EU pressed strongly for mode 3 liberalization, which gives pre-establishment or market access rights to services providers, while emerging countries either resisted this demand or pressed strongly for significant compensation in the form of mode 4 liberalization on behalf of OECD countries, which requires the liberalization of the temporary entry of services providers. Throughout the negotiations, it was always a challenge to understand whether emerging country demands for mode 4 liberalization were driven by economic interest, as may have been the case for India, or as a tool to block services negotiations altogether, as it was well known that the US would have severe difficulties in delivering significant mode 4 commitments, given the limitations of the negotiating mandate that US negotiators had received from the US Congress. The fact that emerging countries often prodded smaller developing countries to oppose services negotiations - as was the case at the 2005 Hong Kong Ministerial conference - seems to suggest that there were emerging country strategies to simply block the services negotiations outright. In fact, emerging countries were ultimately successful in blocking services negotiations through a strategy of preventing technical discussions on the different negotiating options that were on the table. Due to their sector specific nature, this made it next to impossible to understand what WTO negotiators were actually exchanging in these negotiations.

WTO negotiations around other issues - notably intellectual property rights - created yet more frustrations between OECD and emerging country interests in the Doha Round. Throughout the process, emerging countries were successful in rolling back some of their Uruguay Round commitments to protect intellectual property rights. This roll back was most evident in the access to medicines arrangement⁷ where WTO members clarified the right to use the emergency clauses of the

⁶ See World Trade Organisation: Negotiating Group on Market Access DRAFT MODALITIES FOR NON-AGRICULTURAL MARKET ACCESS, TN/MA/W/103 8 February 2008 (08-0609). and World Trade Organisation: Negotiating Group on Market Access MARKET ACCESS FOR NON-AGRICULTURAL PRODUCTS Report by the Chairman, Ambassador Don Stephenson to the Trade Negotiations Committee, JOB(08)/96, 12 August 2008.

⁷ Paragraph 17 of the Doha Mandate states: "We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate declaration." World Trade Organisation: DOHA WTO MINISTERIAL 2001:

TRIPs agreement to apply for compulsory licenses. WTO rules enable countries to issue compulsory licenses to produce medicines for medical emergencies - for example when facing an epidemic. The Doha arrangement on access to medicines significantly widened the scope for issuing compulsory licenses and notably to enable countries to issue them in coordination with foreign suppliers. This new flexibility proved to be a major success for large generic industries located in countries such as India, at the expense of patent right holders largely situated in OECD countries. Interestingly, India obtained this advance for its industry without making any reciprocal compensatory commitments - largely because this issue was treated as a public health issue rather than a trade concession in the WTO Doha Round. The impact of this decision on business was to make the pharmaceutical industry highly skeptical of the WTO Doha Round and of the perceived politicization of the multilateral trading system brought into solve the public health problems of developing countries. It is interesting to note that the US negotiated specific intellectual property rights language in its bilateral free trade agreements subsequent to this decision that effectively limited its scope. This demonstrates the very clear commercial concerns that industry faces although we may also question the extent to which a bilateral agreement can or should undermine a WTO agreement.

Another challenge of the Doha Round was the lack of effective cooperation between the EU and the US to achieve common aims. This was driven in part by the fact that their market access gains from the Round would have materialized in each other's markets. Indeed, for almost all areas of the negotiations, the EU and the US were making significant concessions to one another. As such, mutual suspicions on the true intention of the other made cooperation very difficult. For example, the EU and the US found it challenging to agree on a common strategy for industrial tariff negotiations because the EU suspected the US of wanting to pursue sector negotiations for defensive reasons - mainly to carve out the textiles sectors from tariff liberalization at the end of the Round. Similarly, the US considered that EU reluctance to engage in sector negotiations was secretly driven by its desire to shield certain electronics products from the Information Technology Agreement (ITA). Similar mutual suspicions also made strategic cooperation difficult for the EU and the US in agriculture and services liberalization negotiations. For the emerging countries, it was much easier to build a defensive alliance aiming at restricting the scope and depth of WTO liberalization.

While all of these conflicts certainly contributed to the failure of the WTO Doha Round, the changing perception of China was probably the most important factor. China's rise from a large but essentially backward economy towards one of the most competitive trading economies in the world over the last fifteen years has significantly changed the global economy. There is no doubt that China's accession to the WTO in 2001 was one of the driving factors of its successful integration into the global economy as this served both to strengthen domestic efforts to reform the economy and to enable China to develop its economy as a major export platform for Chinese and foreign investors alike. However, this rise and its direct link to China's WTO accession also increased the perception among many in the European and American business community that China was somehow free riding on the multilateral trading system. Regardless of the fact that China had actually significantly opened its market in the WTO - and certainly much more than India or Brazil had, both the EU and the US faced major domestic challenges in the Doha Round due to this growing perception. In the US this free riding syndrome has combined with concerns over China's growing political and military influence in Asia and was certainly a major factor in the ultimate failure of the Doha Round. In fact, in December 2008, it was largely a China-US showdown over agriculture and industrial sector negotiations that led

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MINISTERIAL DECLARATION WT/MIN(01)/DEC/1; 20 November 2001, Ministerial declaration adopted on 14 November 2001. http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

World Trade Organisation: DOHA WTO MINISTERIAL 2001: TRIPS Declaration on the TRIPS agreement and public health, WT/MIN(01)/DEC/2 20 November 2001, Adopted on 14 November 2001. http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm. World Trade Organisation: Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, Decision of the General Council of 30 August 2003, WT/L/540 and Corr.1 1 September 2003, http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm.

to the breakdown of the negotiations. It is interesting to note that, subsequent to the failure of the Doha Round, the US has developed a rather clear “contain China” trade strategy based largely on geostrategic considerations. The Trans-Pacific-Partnership or TPP is the new driver of US Trade Policy and both its geographic scope and its content essentially aim to isolate China in the region from a trade perspective. Should the EU and the US seriously engage in bilateral trade negotiations in 2013, China would find itself isolated from the global trading system. The so-called US pivot towards Asia would then become a global pivot away from China and toward the US.

To resume, the failure of the Doha Round can be understood as a failure to create a clearer understanding of reciprocity between major trading nations. The fact that the Doha mandate specifically allowed for “less than full reciprocity” made this almost impossible to solve. The inability of the WTO system to create negotiating conditions where major players could negotiate compromises compounded the problem. Regardless of who was to blame, the Doha failure had significant repercussions on the international trading system as most of its members now pursue bilateral trade strategies in its place and the EU is no exception.

3. Specific reciprocity in free trade negotiations

As already underlined, today’s EU trade policy is driven largely by bilateral free trade negotiations but deployed on a global scale. In fact, the EU is currently pursuing free trade negotiations in North and South America, in Asia and to a certain extent with African economies. Only a very limited group of trading economies (essentially China, Australia and New Zealand) are not part of the EU bilateral trade agenda. With the possible exception of Economic Partnership Agreements (EPAs) with African regions, all EU free trade negotiations pursue a specific reciprocity strategy based largely on a calculation of sector gains for EU industries. For industry, the approach and strategy is very different from the WTO approach with its strong focus on a WTO tariff formula. In free trade agreements, the EU requests full tariff liberalization, although the timeframe for dismantling can last up to ten years. In addition, the EU’s bilateral strategy builds extensively on the Commission’s new strategy to remove non-tariff barriers (NTBs) through specific sector NTB annexes and more general rules to remove NTBs - for example export taxes and duties on raw materials. In addition, the EU pursues a very ambitious objective to liberalize services and investment (including intellectual property protection) and to open procurement markets in the context of free trade negotiations. This much wider set of issues, compared to the scope of the WTO Doha Round, makes EU free trade agreements much deeper in terms of economic integration and market opening. This chapter will now assess how the EU negotiates free trade agreements to obtain specific reciprocity for industrial and services sectors.

There are several drivers of the reciprocal approach to free trade negotiations, ranging from EU market size, over WTO rules on free trade agreements, to domestic pressure from interest groups and member states. One key issue to keep in mind regarding EU free trade negotiations is the overall size of the EU market. With over 500 million consumers, the EU is one of the world’s largest import markets and is, for many countries around the world, the leading trading partner. This large market size gives the EU a significant advantage in reciprocal trade negotiations as the EU market is significantly larger than most of its trading partners. In addition, following the breakdown of the Doha Round, many countries have requested the launch of free trade negotiations with the EU, thereby making them *demandeur* relative to the EU. Commission trade negotiators have regularly exploited this situation to press for significant market opening. Perhaps more significant for this paper is the fact that the EU has pursued specific reciprocity with developed and developing markets alike - explicitly shunning the ‘less than full reciprocity’ approach of the Doha Round. Indeed, the EU systematically pursues full tariff liberalization, albeit with longer implementation periods for developing markets, and significant market opening for services sectors in all of its free trade agreements.

Another related argument for reciprocity has been that most EU free trade negotiations have been initiated by the EU’s trading partners. In the WTO, the EU was probably the biggest *demandeur*

member. This was driven by political and economic factors alike. As the largest exporting economy, the EU has a lot to gain from trade liberalization. And as an entity with limited traditional state powers over foreign policy (for example no armed forces or right to engage in military activity), the EU also has an interest in promoting rules-based commerce where it can exercise its economic power as in the WTO. This perhaps explains why the EU played such a strong role in the launch of negotiations in 2001 and why it regularly relaunched the negotiations through different concessions - most notably its decision in 2003-2004 to eliminate agricultural export subsidies and to drop three of the four Singapore issues as primers to restart the negotiations after the breakdown at the Cancun Ministerial conference in 2003.

The shift to bilateral trade negotiations changes the economic and political rationale of pursuing trade liberalization. In multilateral trade negotiations, larger economies tend to play the leading role in driving negotiations as they have a systemic interest in reaching an agreement. In a world of bilateral trade agreements, smaller countries have an interest in pushing for free trade negotiations with their largest trading partners in order to gain a competitive edge over their regional competitors. In contrast, larger markets like the EU have an interest in delaying free trade negotiations with smaller partner to try to extract more concessions from them in future negotiations. This is clearly the tactical game that the European Commission has played over the last few years making itself a *demandeur* only for trade negotiations with the US, South Korea, Canada, India, individual ASEAN countries, Peru and Colombia all actively sought free trade negotiations with the EU in a clear strategy to gain a first entry advantage to the EU market over their regional competitors (South Korea over Japan, Canada over the US, Colombia over Mercosur, etc.). While it may be challenging to assess the specific economic gains these countries have made over their regional competitors, there is no doubt that this has created some changes to their competitors' trade policies.

This can be seen most clearly as a challenge for Japan whose main competitor, Korea, was able to gain an edge in the EU (and US) markets by rapidly negotiating free trade agreements. Japanese automotive and electronics producers now find themselves in a significantly less advantageous competitive position relative to their Korean counterparts. However, as a *demandeur* of trade liberalization, Korea also subjected itself to huge internal pressures for reciprocal concessions from its European and American trading partners, which amounted to considerable protests that developed in Korea. To be sure, there are political limits as to how far countries can carry this kind of pressure. For example, India also was a *demandeur* for an EU-India free trade negotiation and it agreed to negotiate on a surprising wide range of issues in the preparations for an FTA. This was driven by the pro-reform agenda of Prime Minister Singh's first and very successful tenure. However, Prime Minister Singh also felt the internal political repercussions once negotiations started touching on sensitive issues such as the car industry or key services markets, which have weighed in heavily on the Indian government's present and potentially future success in elections.

Compliance with WTO rules is another driver of reciprocity in bilateral trade agreements. Free trade agreements are exceptions to the general WTO rule of most favored nation (MFN) which requires its members to afford equal treatment to all WTO members. To benefit from an exception to this rule, free trade agreements need to be comprehensive in coverage. Hence, the WTO requires parties to liberalize "substantially all trade" in order to benefit from this exception (Article XXIV GATT). Although the precise definition of "substantially all trade" is not yet agreed, the EU view is that it refers to 90-95% of tariffs to be fully liberalized. As many countries tend to protect their agricultural markets, this can be interpreted as almost fully covering industrial tariffs. WTO compliance has been an important issue to enable the EU to press for more reciprocity in trade negotiations with African countries, with India and with Mercosur. In the EPA negotiations, the EU has struggled to progress from a system of unilateral preferences to a more logical reciprocal trading relationship with African countries/regions. Indeed, African countries have benefited from unilateral EU preferences. Although non-reciprocal preferences are still offered to most of them through the Generalized System of Preferences (GSP), the EU had hoped to create a more positive view of

domestic trade liberalization in African countries. However, this has proven to be extremely challenging to achieve in practice.

Negotiations with India and Mercosur have, on the other hand, enabled the EU to use the WTO rule more effectively to pursue tariff liberalization. India initially presented a huge list of products and sectors for special treatment under the EU-India free trade negotiations. However, this list has been successfully - although not fully - reduced by EU negotiators who were able to argue quite convincingly that India would need to make its tariff commitments compliant with WTO rules due to the high risk of trade diversion for other countries that such a trade agreement would generate in the region.

Pressure from EU industry groups has also been a substantial driver of reciprocity in bilateral free trade negotiations. Perhaps learning the lessons of the Doha Round, EU industry groups have been very aggressive in their pursuit of general and sectoral reciprocity. In *BUSINESSEUROPE*, for example, national associations (which typically regroup sector associations) and European sector associations have coordinated to push strongly for full reciprocity. Where this has failed, industry groups have turned to EU Member States to advance their interest more successfully in the EU Council. For example, in the Korea negotiations, the textiles and the automotive sector obtained a special safeguard mechanism related to a duty drawback concession granted to the Koreans by the EU by lobbying EU Member States. Most industry associations considered this concession on duty drawback to provide a potential unfair advantage to Korean industries. Duty drawback allows Korean manufactures to rely on cheap Chinese or North Korean inputs to gain a competitive advantage over EU companies. For example, Korean electronics manufacturers outsourcing parts in China could use the duty drawback clause to benefit from tariff free access to the EU market. Meanwhile, EU electronics producers outsourcing parts in China would be paying import duties in Europe for those same parts. Significant battles over the definition of rules of origin for the EU-Canada free trade negotiations are also taking place through Member State action in the Council.

The European Parliament has also been a surprising ally of reciprocity in free trade negotiations, in contrast to the chamber's rather critical views of seeking reciprocity from developing countries in the WTO negotiations. This may be explained by the fact that the Parliament has obtained significant new powers over trade policy and negotiations in the Lisbon Treaty and is therefore much more reactive to lobby groups and member states than in the past. With a few exceptions (issues related to the protection of intellectual property rights and Economic Partnership Agreements with African regions), the Parliament has been very strong in demanding reciprocity. For example, in linkage to the adoption of the EU - Korea Free Trade Agreement, the Parliament used its co-decision powers over trade regulations to substantially modify the provisions of the safeguard mechanism for the agreement. Some aspects of the changes, such as the right for individual member states to seek redress for damages on their market alone, introduced by the Parliament seem to be in contradiction with the legal text of the Free Trade Agreement which does not provide for the possibility of applying the safeguard clause for import surges on single member states.⁸ In addition, the Parliament was able to extract significant commitments from the Commission to improve its monitoring of the free trade agreement to ensure full reciprocity in its application. In the context of the adoption of the negotiating directive (or mandate) for the EU - Japan Free Trade Agreement negotiations, the Parliament has once again made itself the champion of reciprocity by preparing a resolution to influence the negotiating directives even though the Lisbon Treaty does not provide the Parliament with any powers to participate in the adoption of those directives. Somewhat unsurprisingly, the Parliament has sought

⁸ Article 3 of the Safeguard Regulation states: An investigation may also be initiated in the event that there is a surge of imports concentrated in one or several Member States, provided that there is sufficient *prima facie* evidence that the conditions for initiation are met, as determined on the basis of factors referred to in Article 5(5). Official Journal of the European Union: REGULATION (EU) No 511/2011 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2011 implementing the bilateral safeguard clause of the Free Trade Agreement between the European Union and its Member States and the Republic of Korea, 31 May 2011, L 145/19.

input from European sector organization to seek all sorts of concessions from the Japanese in the prospective negotiations.⁹

Another interesting driver of reciprocity is the practical manner through which trade negotiators work on the basis of template agreements. Rather than reinventing the wheel, EU negotiators basically use the same framework and often the very same legal text to negotiate trade agreements with different partners. Typically, larger economies like the EU and the US would impose their trade agreement model on smaller partners. In many ways, the EU-South Korea FTA is the most relevant template because it covers tariff liberalization, non-tariff barriers annexes, services, public procurement, and investment (pre-establishment). However, the most significant aspect of the Korea FTA concerns the trade-offs between tariffs and non-tariff barriers which reflects a new approach to reciprocity. In negotiating the agreement, Commission negotiators were aware of the defensive position of a few key sectors - especially automotive and electronics - in which Korean manufacturers are highly competitive. To counterbalance the tariff advantage given to Korean producers, the Commission aggressively pursued negotiations on sector NTB annexes for these sectors (also for pharmaceuticals). Interestingly, these sector annexes only apply to Korea which must accept certain EU standards on its market. The EU made no new commitments to Korea as it was assumed that EU regulations were fair because Korean producers already have substantial access to the EU market. The aim was clearly to restore sector reciprocity on the Korean market where real or perceived NTBs had prevented market penetration by EU firms in these sectors.

The Korean template was carried over to the EU-Canada FTA negotiations although here the Commission faced the problem in reverse. Given that many EU sectors have a strong position on the Canadian market (i.e. the auto sector), the Commission struggled to convince the Canadians to sign up to NTB annexes - especially as Canada has faced some rather obscure EU NTBs in the past notably on the export of animal skins and furs. Moreover, the Canadian side has also pushed for flexibilities in the EU rules of origin to allow goods substantially produced in the US and Canada and for which the EU has a significant trade surplus to be exported tariff free under the rules of the agreement. The Commission has struggled with these requests as EU industries fear that the precedent will weaken the EU negotiating position on those sectors in a possible future EU-US trade negotiation. Thus, the reciprocity considerations for future FTAs have spilled over into the Canada negotiations.

Similar challenges are found in the EU-Singapore negotiations which are expected to serve as a template for the FTA negotiations with other ASEAN partners. In addition to rules of origin issues related to ASEAN and to Singapore's role as a transit hub for many Asian nations, the EU has pressed for extensive services market liberalization with the country. Although services trade between the EU and Singapore is very high, the clear aim of some liberalization requests is to set the stage for liberalization in other ASEAN countries. The challenge with this pursuit of future reciprocity is that the EU's trading partners must also see some advantage to the EU's request, and may, in some cases, seek reciprocal concessions for these EU requests or may, otherwise, consider them non-reciprocal.

In contrast with the WTO Doha Round, the EU has pursued full reciprocity in free trade negotiations with most developing markets. In Central and South America, the EU negotiations with Colombia, Peru and Central America have been based on reciprocity of trade concessions and conditions for goods and services. However, the EU has generally accepted longer implementation periods for these countries to open their markets. Negotiations with emerging markets in ASEAN - notably Indonesia and Vietnam - are expected to follow similar rules of engagement based on reciprocity. This negotiation based on reciprocity differs fundamentally from the approach to trade

⁹ European Parliament: DRAFT MOTION FOR A RESOLUTION pursuant to Rules 90 (2) and 110(2) of the Rules of Procedure on EU Trade negotiations with Japan, (2012/2651(RSP)), Metin Kazak on behalf of the Committee on International Trade, RE\907408EN.doc, 26 June 2012, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/inta/re/907/907408/907408en.pdf.

negotiations in the WTO where emerging and developing countries would have benefitted from substantial carve-outs from trade liberalization commitments due to their developing country status.

The pursuit of reciprocity with large emerging markets has proved difficult for the EU, however. In its negotiations with India, the EU was unable to obtain full tariff liberalization in India even with long transition periods. The EU has tried to compensate for this by seeking access in procurement and services markets but has similarly faced huge challenges. In procurement, India only agreed to partially liberalize some Union (or Federal) level procurement markets although this could have a large potential if it would cover Union supported procurement at state level. Major concessions on services markets proved to be very politically challenging for India, on the other hand. The opening of the retail market to large EU retailers is perceived to be a major threat to small shopkeepers in India. Attempts to open the insurance sector and the legal profession to EU competitors also face strong resistance. Therefore attempts to compensate for the absence of full reciprocity on industrial tariffs through concessions on services proved more challenging than expected for EU and Indian trade negotiators.

Reciprocal trade negotiations with the Mercosur region were fraught with even greater difficulties for the EU. The Mercosur countries have seen their industrial competitiveness decline as commodity prices have driven up the value of their currencies. In addition, as the Mercosur countries continue to maintain industrial tariffs between themselves, it proved extremely challenging for the EU to obtain full tariff liberalization as an objective of the negotiations. Efforts to deepen services market opening also proved challenging as the Mercosur countries have traditionally been reluctant to engage in WTO GATS negotiations which has made them difficult partners for the EU in the context of bilateral negotiations due to their general lack of understanding of the issues. Finally, the Mercosur countries have pushed very strongly for significant market access in very sensitive EU agricultural sectors - especially sugar and beef - where it is unlikely that the EU can deliver on the market access requested by its trading partners.

One notable failure in this pursuit of reciprocity has been the Economic Partnership Agreement (EPA) negotiations with four African regions. The aim of these negotiations was to move away from the unilateral preferential tariff liberalisation afforded by the EU to these countries toward a more WTO compliant region-to-region free trade arrangement. However, from the outset, the EU's African trading partners resisted this change and fought against all attempts to come to reciprocal arrangements. For example, most EPAs will only aim to liberalize tariffs to EU imports over a 20-year period, which is an exceptionally long implementation period, and some EPAs only cover around 80% of tariff lines (although close to 100% are covered for EU tariff lines). It is highly questionable whether these agreements are compliant with WTO rules.

The possible pursuit of free trade negotiations with large developed economies - especially Japan and the US - presents specific challenges to reciprocal trade negotiations. As regards Japan, the EU will face a serious challenge to demonstrate that it can achieve reciprocity in the negotiations. First, Japan has very few industrial tariffs so it has nothing to offer in terms of effective market access to EU industries. Consequently, in the scoping exercise with Japan, which is basically a pre-negotiation to define the terms of engagement, the EU put a significant focus on the removal of non-tariff barriers to EU exports to Japan. While theoretically correct, it will be very difficult for the EU to demonstrate reciprocity even if it is able to change some Japanese regulations or technical barriers to trade. While tariff liberalization has an immediate effect, the removal of non-tariff barriers is always complex to assess for both industries and governments. This explains in part why the European automotive industry is so adamant in opposing the negotiations as it can never be certain that their Japanese counterparts will really be playing the reciprocity game. This has made the EU-Japan pre-negotiations extremely difficult for the European Commission which has had to press for significant concessions across the board in Japan covering both goods and services. However, once again, Japan may be politically challenged in delivering on such a wide set of objectives. In the services sector, the EU is pursuing extensive market opening in politically sensitive sectors such as insurance, banking and

express courier where the Japanese postal service benefits from monopolistic privileges. Removing these barriers to trade and investment thus entails a fundamental reform of the postal service in Japan. This is a tall order for a free trade negotiation.

Potential negotiations with the US present a different set of challenges. In this case, the EU and the US are envisaging the negotiations from a strategic perspective of trying to reshape the rules of global commerce. Hence, they are not pursuing specific reciprocity as an aim in itself. While the negotiations will certainly be challenging on industrial and especially agricultural tariffs, the main objective of the negotiations is to take significant steps toward regulatory convergence. By its very nature, regulatory convergence cannot be reciprocal as the aim should be to move toward the optimal type of regulation for convergence, presumably based on the most cost-effective and transparent way to achieve public policy aims (health, safety, environment, etc.). In fact, transatlantic convergence to date has essentially been about the EU adopting American transparency and cost-benefit rules in the EU regulatory process. The EU Impact Assessment Board is a body that seeks to emulate the Office of Management and Budget (OMB/OIRA) in applying cost-benefit assessments of new regulations. Most of the work of the EU-US High Level Regulatory Cooperation Forum has also been to help the IAB learn about the US impact assessment procedures. The aim of an EU-US trade agreement would be to take this regulatory cooperation one step further by establishing a mechanism to mutually recognize each other's regulation where the appropriate procedures have been carried out or at minimum to take account of the other side's interests in the context of the impact assessment of new regulations. The expected outcome of this will be further alignment of the EU regulatory process with the US system, which is generally considered to be more transparent.

Although it is positive that EU regulators adopt American best practice, this creates a challenge for EU trade negotiators who may perceive this to be a "concession" to the US side. This is especially the case for the mutual recognition of technical standards that serve as reference points for some EU and US regulations. Recognizing this challenge, the EU and the US have been exploring sector specific regulatory issues in areas such as electric vehicles, chemicals, pharmaceuticals and machinery to determine the extent to which some degree of mutual recognition could be achieved through this negotiation. Although this alignment would only serve to further align regulatory practice, it is considered strategically important by the negotiators to demonstrate reciprocity. Although there will certainly be some reciprocal horse-trading between the EU and the US in these negotiations, most likely on agriculture and public procurement market access, it is interesting to see how trade negotiators seek to create the perception of reciprocity even in areas where traditional trade-offs cannot be practically achieved, such as regulatory convergence.

Finally, although not specifically bilateral negotiations, the EU has also pursued reciprocity in WTO accession negotiations. This was especially the case with Russia, being one of the EU's main trading partners. Although the EU and Russia concluded their bilateral agreement on Russia's accession in 2004, the EU used the multiparty negotiations to pursue a series of specific side agreements to remove certain trade and investment problems in Russia. The agreements covered investment rules for the automotive sector, export restrictions in the wood sector, the application of agricultural sanitary rules and charges for airlines flying over Siberia.

4. Reciprocity in trade legislation

While the reciprocal logic of EU trade policy is most evident in bilateral trade negotiations, it has also affected EU trade legislation in a variety of ways - most notably by restricting the real or perceived unilateral trade concessions granted to EU trading partners.

The most obvious shift to more reciprocity in EU trade legislation has been the proposed reform of the Generalized System of Preference (GSP), which introduces substantial cuts in the geographical coverage of the system. The GSP falls under an exception to the WTO's Most Favoured Nation clause,

the so-called 'Enabling Clause', which was adopted in 1979 as part of the GATT Tokyo Round in order to enable industrialized economies to afford unilateral trade preferences to developing countries, provided they would be offered to all developing countries on a non-discriminatory basis. Although these preferences had been progressively reduced for highly competitive emerging country exporters and refocused on the 50 least developed countries, the 2012 reform of the GSP went a significant step further by excluding all high income emerging countries and by strengthening the graduation mechanism for highly competitive export sectors in some developing countries. The end result of this process will be a reduction of the geographical scope of the GSP from 176 to 89 countries in 2014. Most Latin American, European and North African and Middle Eastern states will be excluded from the system over time. Similarly, China and India will be excluded for most of their competitive export sectors from the outset.

While the purpose of the reform was to refocus trade preferences on poorer countries, the Commission was also perfectly clear that the countries excluded from the GSP should seek to obtain access to the EU market through reciprocal free trade agreements. Indeed, one of the primary aims of the reform was also to exclude countries with a free trade agreement with the EU from the system. Article 4b of the Commission proposal states that "An eligible country, as listed in Annex I, shall benefit from the tariff preferences provided under the general arrangement referred to in Article 1(2)(a) unless (...) it benefits from a preferential market access arrangement which provides the same tariff preferences as the scheme, or better, for substantially all trade."¹⁰

The GSP reform went through the Council and Parliament with very few problems in spite of the fact that the Commission's impact assessment showed the significance of this reform. For example, the impact assessment shows that China, India, Thailand, Brazil and Russia account for nearly 67% of all EU GSP imports¹¹ and as they would be largely excluded from the new scheme, EU import tariffs could rise as a result of the reform by three to four billion euros per year.¹² Although the effects of reform will be felt much more in exporting countries than in the EU, it would have been unimaginable to expect the EU to pursue a similar approach during the WTO Doha Round where the European Parliament was very supportive of emerging countries benefiting from less than full reciprocity.

Reciprocity in procurement is another example of how the bilateral trade agenda influences EU trade legislation. A recent EU Commission proposal¹³ came about following concerns that the EU had made too many unilateral concessions under the Government Procurement Agreement (GPA) of the Uruguay Round. In fact, the EU's very wide concessions under the GPA are qualified by a reciprocity clause, which theoretically enables the EU to restrict its market for countries that refuse to open their market for similar sectors. In practice, the EU never fully implemented these reciprocity clauses into its own internal market procurement legislation. This very fact limits the ability of EU Member States to restrict procurement markets to one another.

The two Commissioners responsible for this initiative made it perfectly clear that they were pursuing specific reciprocity through this initiative. For Michel Barnier, European Commissioner responsible for the Internal Market and Services, "[t]he EU should no longer be naïve and should aim

¹⁰ European Commission: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL applying a scheme of generalised tariff preferences, Brussels, COM(2011) 241 final, 2011/0117 (COD), 10 May 2011.

¹¹ European Commission: COMMISSION STAFF WORKING PAPER IMPACT ASSESSMENT VOL. I - Accompanying the document Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on applying a scheme of generalised tariff preferences, 10 May 2011: SEC(2011) 536 final VOL. I, p.6. http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2011/sec_2011_0536_en.pdf

¹² Idem, p.30.

¹³ European Commission: Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries. COM(2012) 124 final 2012/0060 (COD), 21 March 2012.

for fairness and reciprocity in world trade. Our initiative builds on Europe's belief that the opening up of public procurement generates benefits at global and European levels. We are open for business and we are ready to open up more, but only if companies can compete on an equal footing with their competitors. The Commission will remain vigilant in the defense of European interests and European companies and jobs." Clearly, one can detect his concern that the EU market is too "naively" open to unfair competition. Certainly the recent introduction of protectionism in procurement markets in the US, China, Canada, Brazil, among many others, shows that the EU faces numerous market access challenges abroad. For Karel De Gucht, European Commissioner for Trade, on the other hand, the aim is clearly to strengthen the EU's ability to obtain more reciprocal market opening in free trade negotiations. De Gucht stated that "I am a firm believer in making sure trade flows freely and government procurement must be an essential part of open trade markets worldwide. It's good for business, good for consumers and brings value for money for taxpayers. This proposal will increase the leverage of the European Union in international negotiations and with our partners to open up their procurement markets for European companies. I am confident that they will then get a fair opportunity at winning government contracts overseas and so generate jobs."¹⁴ Contrary to the GSP reform, the procurement initiative is coming under much more scrutiny in the Council, in particular from Germany and the United Kingdom, which oppose the proposal for very different reasons. For Germany, its industry is well positioned in emerging markets to get around local content requirements and other procurement restrictions so that it deems this initiative a threat to its industries' competitive position. The UK is home to many foreign investors especially Japanese companies operating in procurement markets, which could be the target of the future legal instruments to be created. Interestingly both countries criticize the Commission's focus on reciprocity in this proposal considering it to be synonymous with protectionism. Considering how strongly both of these countries push for specific reciprocity in free trade negotiations, this criticism is surprising.

Reform of trade defense has also been caught up in the reciprocity movement. While many of the reforms touted in this exercise are purely technical - such as the enhancement of transparency, the clarification of deadlines, or the improvement of information provision for all interested parties - the proposal to increase the number of anti-subsidy cases is much more political. The drive behind this idea is twofold: first, to render trade defense perceived to be less protectionist by tackling the often claimed cause of dumping, i.e. direct or indirect state subsidies. Second, the Commission has a broader strategy to tackle the lack of reciprocity in the use of state aid through export credit banks. Increasingly, China and other Asian countries (Korea and Japan) have been accused of subsidizing their exports through export credit institutions. Attempts by the EU to convince China to sign up to OECD rules governing export credits have not succeeded, thereby opening the door to increasing competition globally. Therefore, through an increased use of anti-subsidy investigations, the EU aims to build up a case to pressure China to negotiate on export credit subsidy limitations and perhaps to join the OECD code.

The better enforcement of trade rules is also linked to the reciprocity drive. Typically, the European Commission focuses its work on trade negotiations. Increasingly, however, it has devoted new resources to better enforcement. In the context of the WTO, the EU has become a more aggressive user of the WTO dispute settlement mechanism to enforce both traditional trade rules (for instance, discriminatory tax treatment in the liquor sector in the Philippines) and to tackle new issues such as Chinese export restrictions and duties on raw materials. On the bilateral level, the EU has created a specific monitoring mechanism to ensure that Korea will honor its commitments on non-tariff barriers in the future. This was in direct response to industry criticism that Korea would gain access to the EU market and never implement the agreement in Korea.

¹⁴ European Commission: DG Trade Website, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=788>

5. Conclusion

The paper has argued that the bilateral focus of EU trade policy leads to a policy driven by specific reciprocity objectives. Not only does this represent a significant move away from the EU approach taken in the realm of WTO Doha Round negotiations, which enshrined diffuse reciprocity through the 'less than full reciprocity' clause in its mandate, toward full coverage bilateral free trade agreements. It also had an impact on EU trade regulations that are now being redesigned in support of more specific reciprocity objectives. While one explanation of this shift to specific reciprocity is certainly the enhanced competition from emerging countries whose share of global trade is growing more rapidly than the EU's share in relative terms. Another explanation lies in EU frustrations with WTO Doha Round negotiations where it struggled to obtain significant market access commitments from emerging countries in industrial and services market access. However, this paper shows that there are also inherent aspects of bilateral trade policy that accentuate specific reciprocity. The large EU market encourages smaller trading partners to seek FTAs with the EU placing them in a position of *demandeur*. WTO exceptions for free trade agreements also impose strict conditions for tariff liberalization. The Commission's reliance on FTA templates also pushes for more reciprocal liberalization. Recent changes to EU legislation governing the generalized system of preferences, the EU procurement market or trade defense have also been driven, in part, by its FTA negotiating objectives for reciprocity. We may therefore conclude that the EU's bilateral trade strategy strengthens its pursuit of reciprocity.

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The Negotiation and Adoption of Preferential Trade Agreements in the Lisbon Era: A View from the European Parliament

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Abstract

This paper aims to describe the institutional and substantive changes brought by the Lisbon Treaty to the common commercial policy of the European Union (EU), in particular in what regards the negotiation and adoption of Preferential Trade Agreements (PTAs). It offers a view from within the European Parliament and argues that the institutional changes brought by the Lisbon Treaty to the mechanics of PTA negotiation and adoption have resulted in an extension of both the formal and the informal powers of the European Parliament. This is particularly visible in the necessary ratification of all PTAs by the European Parliament (as a formal power), and in the influence of that institution on the conditions for launching negotiations, the objectives to be achieved throughout the negotiations, and the date of entry into force of the agreements (informal powers). Inter-institutional and intra-institutional relations have undergone major transformations to bring decision-making procedures that apply to EU trade policy in line with the new requirements of the Lisbon Treaty. Although the learning curve was initially steep for all three institutions, there is now a proper institutional triangle operating. The changes of the Lisbon Treaty have also had an impact on the political dynamics of trade within the European Parliament, resulting in a higher degree of politicization of what used to be a fairly 'technocratic' policy.

Introduction

This paper aims to highlight the institutional and substantive changes brought by the Lisbon Treaty to the Common Commercial Policy of the European Union (EU), and their implications for the processes of negotiating and adopting Preferential Trade Agreements (PTAs). It offers a view from within the European Parliament and focuses on: (i) the institutional changes brought by the Lisbon Treaty to the mechanics of PTA negotiation and adoption via the extension of the formal and informal powers of the European Parliament; (ii) the impact of the new constitutional arrangements on inter-institutional and intra-institutional relations and procedures; (iii) the political dynamics of trade within the European Parliament and the increased politicization of EU trade policy.

I) The mechanics of PTA negotiation and adoption in the post-Lisbon era

Upon its entry into force on December 1, 2009, the Lisbon Treaty introduced major changes to the decision-making procedures that apply to European trade policy. Among those changes, the most significant is, by far, the enhancement of the role of the European Parliament.

Before the implementation of the new Treaty, European trade policy was defined mostly behind closed doors under the initiative of the Commission and decision of the Council. With a few exceptions, Parliament enjoyed only a consultative role. In the Lisbon era, Parliament is fully involved in the decision-making process and has a decisive say on the direction and implementation of European trade policy.

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The new formal powers enjoyed by Parliament are particularly visible in the context of PTA negotiation and adoption with: (i) Parliament now enjoying co-legislative powers with the Council of the EU for measures defining the legislative framework of the common commercial policy, such as: the basic regulation on anti-dumping, the Generalised System of Preferences, but also, and more importantly in the PTA context, legislation accompanying PTAs, such as 'safeguard' regulations (Article 207 Treaty on the Functioning of the European Union); (ii) Parliament's ratification of international trade agreements now being a requirement for the final implementation of those agreements (Articles 207 and 218 TFEU).

These changes result in Parliament now being an indispensable actor in the process of EU trade policy formulation. The European Commission, the Council of the EU (represented by its rotating Presidency), and the European Parliament must now work together, in a truly 'communitarian' fashion, to deliver trade policies that aim to serve the interests of the EU as a whole.

The abovementioned changes brought by the Lisbon Treaty create a formal role for the European Parliament- albeit a decisive one - solely at the very end of PTA negotiations, i.e. during the ratification phase. However, in practice, those changes also increase the European Parliament's 'soft power' over the conditions for launching negotiations, the objectives that are to be achieved throughout the negotiations, and the date of the entry into force of the agreements.

Under the Treaty, the Council, on the basis of a Commission proposal, formally adopts the negotiating mandate, which sets out the general objectives to be achieved, and to which Commission is bound during PTA negotiations. According to Article 207 TFEU, 'the Commission shall make recommendations to the Council, which shall authorise it to open the necessary negotiations'. There is no role for the European Parliament at this stage. However, the Inter-Institutional Framework Agreement¹ between the European Parliament and the European Commission leaves room for manoeuvre. This agreement governs the working relations between the two institutions and was adopted in November 2010 to bring inter-institutional procedures in line with the increased competences of Parliament under the Lisbon Treaty. It stipulates that the European Parliament has the possibility to 'express its views (...) at all stages of the negotiation and conclusion of international agreements, including the definition of negotiating directives' (art 23). The Commission is under the obligation to take Parliament's views 'as far as possible into account' (art 24). The possibility for the European Parliament to express its views on the negotiating mandate is therefore an extension of the informal powers of the European Parliament over PTA negotiations. The Commission is not legally bound to follow Parliament's recommendations. However, it is in the Commission's interest to have the European Parliament involved in the negotiations from a very early stage: doing so reduces the possibility of Parliament rejecting an agreement on the basis that it does not incorporate issues of particular importance to its Members.

During the course of PTA negotiations, Commission regularly informs Parliament of the progress achieved, the difficulties remaining, and the obstacles that have yet to be tackled. The Treaty does not, once more, give a formal role to the European Parliament at this stage. The Commission's sole legal obligation is to 'report regularly (...) to the European Parliament on the progress of negotiations' (Article 207 TFEU). However, assuming that the Commission seeks to have the agreements ratified by the European Parliament, it is in the Commission's interest to take on board Parliament's views and priorities during the negotiations to reduce the risk of a negative vote by the plenary. Parliament's views are well known to the Commission, as they are set out in public resolutions adopted in plenary. Resolutions generally express a general political orientation but may also include substantive elements that negotiations should aim to achieve. For example, Parliament has, via resolutions, made clear that

¹ European Parliament and European Commission: Inter-Institutional Agreement: Framework Agreement on relations between the European Parliament and the European Commission, Official Journal of the European Union, November 20, 2010. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:304:0047:0062:EN:PDF>

a PTA with India will only be acceptable if it includes strong 'sustainable development' clauses². The parliamentary 'toolkit' to influence negotiations also includes regular exchanges of views with the negotiators, workshops, and exchanges of views with experts, civil society, businesses, and other interested parties.

Finally, the European Parliament's new powers with regard to the definition of the Union's common commercial policy also result in an extension of the European Parliament's say over the date of entry into force of PTAs. In the past, the Commission would sometimes propose provisional application of mixed trade agreements (agreements that contain both provisions that fall under EU competence and provisions that fall under Member State responsibility). Provisional application is possible after the Council has signed the agreement. This possibility allows certain parts of the agreement to be applied while the 27 Member States ratify those parts that fall under Member State responsibility (a process that can take a couple of years). However, in the case of the EU-South Korea Free Trade Agreement (FTA) - the first agreement subject to the ratification procedure as required under the Lisbon Treaty -, the European Parliament was given informal guarantees by the European Commission that the agreement would not be provisionally applied before the chamber's vote - even though there are no provisions in the Lisbon Treaty or in the Inter-Institutional Framework Agreement of 2010 that prevent the Commission from proposing provisional application of an agreement prior to Parliament's consent. Nevertheless, the Commission prudently decided to wait for Parliament's consent, thereby signalling its full respect for Parliament's new prerogatives. If it had been otherwise, Parliament would have voted on an agreement that was already being implemented - a situation likely to upset a certain number of Members. Hence, the EU-South Korea FTA was only applied following Parliament's consent, which, in turn, only came after the co-legislators had reached an agreement on the 'safeguard' legislation - an essential component to build a strong pro-FTA coalition in the European Parliament. It was only after having pushed through a strong safeguard clause to protect European industries from potentially harmful import surges from South Korea that a large majority of Members of the European Parliament gave consent to the agreement on a 'yes-or-no' basis, paving the way for the agreement's application.

The ratification process of the EU-South Korea FTA established a precedent. It is now expected that the Commission will refrain from proposing provisional application for mixed trade agreements. In turn, Parliament does its utmost to have agreements voted in plenary as rapidly as possible. The two other PTAs that Parliament is currently evaluating - the Trade Agreement between the EU and Colombia and Peru and the EU-Central America Association Agreement - will indeed follow the same sequence: Parliament will vote on the respective 'safeguard' legislation first and then give its consent (or not). The agreements will only be provisionally applied in case of a positive vote.

In sum, the Lisbon Treaty has increased both the formal and the informal powers of the European Parliament in the formulation of the EU's common commercial policy. The European Parliament is now an actor in all stages of PTA negotiation and adoption. In other words, the Lisbon Treaty has transformed what used to be an almost exclusive relationship between Commission and Council into a full-fledged institutional triangle.

II) The impact of the new constitutional arrangements on inter- and intra-institutional relations

The increased and decisive (as opposed to purely consultative) role of the European Parliament means that trade policy is now the subject of intense negotiations and interaction between Council, Commission, and Parliament.

² European Parliament resolution of 11 May 2011 on the state of play in the EU-India Free Trade Agreement negotiations. The text is available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-224>

Although the learning curve has been steep for the three institutions, genuine efforts and good will from all parts have allowed for a swift and smooth implementation of most of the trade-relevant aspects of the Lisbon Treaty.

The Commission was the quickest to integrate its new obligations vis-à-vis Parliament. In anticipation of the entry into force of the Lisbon Treaty and the consequent increase of Parliament's powers, communication channels and contacts between civil servants from both institutions had already been established when the Treaty was implemented. As a result, the transition into the new Treaty framework required a codification of existing practices rather than the setting up entirely new procedures from scratch. Some of those practices and other significant aspects of the Lisbon Treaty were specified and clarified via the 2010 Inter-Institutional Framework Agreement.

For the Council of the EU, the transition into the new constitutional arrangements was somewhat more troublesome. Most trade experts in Permanent Representations and in capitals of Member States had had little contact with the European Parliament up until December 2009. It was therefore necessary for all parties involved to undertake significant efforts to become familiar with each institution's traditions, interests, and procedures. Regular contacts and informal exchanges between the two institutions have by now become permanent features of daily work, both at staff and at senior level. For example, the Chairman of the International Trade Committee of the European Parliament (INTA) now attends a bi-annual working luncheon with the members of the Trade Policy Committee of the Council of the EU (former Article 133 Committee) for a review of files and potential conflicts and/or successes. The enhanced degree of mutual understanding that now exists also results from the significant number of files on which Parliament and Council have had to cooperate, negotiate, and compromise to satisfy each other's mandates as established in the Lisbon Treaty.

Within the European Parliament itself – where the deliberative process and voting procedures in parliamentary committees play a decisive role –, INTA has gone from being a relatively junior committee in the previous legislature to being the busiest legislative committee in the European Parliament (according to internal Parliament statistics of June 2011). INTA's newly acquired importance, combined with the Commission's active trade agenda, has given rise to a number of conflicts of competence with other committees, in particular with the Foreign Affairs Committee (AFET), stronger both in terms of numbers and of political standing in Parliament. AFET traditionally deals with issues related to the common foreign, security and defence policies, enlargement, human rights, protection of minorities, etc. But in the recent past, AFET has challenged INTA's competence over several legislative files that have both foreign affairs and trade components. It has, in particular, succeeded to be the lead committee for the consent procedure on the EU-Central America Agreement (which is, *stricto sensu*, an "Association Agreement"³, although the vast majority of its provisions are trade-related). This means that foreign affairs considerations may prevail over trade considerations in the evaluation that the committee makes of the agreement.

The conflict of competences over trade policy within the European Parliament is not merely a procedural consequence of the implementation of the Lisbon Treaty. It is also a reflection of an increasing degree of politicization of trade policy that is manifest in the political dynamics of trade within the European Parliament.

³ An Association Agreement is a broader political cooperation agreement, where trade is one of several topics that are covered.

III) The dynamics of trade within the European Parliament and the politicization of trade policy

The 'parliamentarization' of the common commercial policy has resulted in an enhanced politicization of trade policy in general, and of the negotiation and adoption of PTAs in particular. This is mainly due to the stronger role of the European Parliament – a political institution by nature – in the legislative process. It is also a result of the diverse political positions and interests that are represented by the seven political groups represented in Parliament⁴.

In terms of numbers, the current Parliament features a pro-trade coalition. The European People's Party (EPP - centre right), the Alliance of Liberals and Democrats for Europe (ALDE - liberals), and the European Conservatives and Reformists (ECR - conservatives) – all typically free trade oriented – hold a majority in the plenary. The Socialist & Democrats Group (S&D - centre left) is divided on trade issues, while the Greens and the Communists are typically opposed to trade liberalisation.

The EPP, ALDE and ECR pro-trade coalition is, however, fragile: it holds only 403 seats, i.e. 35 seats more than required for a simple majority. It is even more fragile given that national delegations of political groups sometimes defect from party lines. This generally happens when the impact (real or perceived) of a trade agreement is particularly negative on the industry of a certain Member State. For example, the French S&D delegation voted to reject the EU-South Korea FTA, rebelling against the group (the S&D group's line was to approve the agreement). In the specific case of the South Korea agreement, the rebellion of that and other national delegations was not so significant as to imperil the adoption of the FTA. However, in cases where the pro-agreement coalition is narrower, such defections can suffice to tip the scale. This was, for example, the case when the extension of the EU-Morocco fisheries agreement was put to a vote in plenary: the European Parliament rejected the agreement even though the voting indication⁵ of the two largest political groups (EPP and S&D) was positive. Indeed, it was enough that parts of some national delegations⁶ of those two groups voted against the agreement for the narrow pro-agreement coalition (it did not include ALDE) to lose its majority vote.

Therefore, in order to secure the adoption of a PTA in the European Parliament, a large political majority should be formed, typically among the EPP, S&D, ALDE, and ECR. Achieving this wide majority implies that compromises have to be found in order to address concerns and satisfy specific interests of the political groups or the national delegations within those groups that have difficulties with a given agreement.

The concerns that emerge with regard to a particular PTA, and the way they are addressed, vary. In case of the EU-South Korea FTA, concerns were mostly of an economic/commercial nature, with the European auto industry being particularly vocal in denouncing negative effects that the agreement could have on European manufacturers⁷. The instrument that was employed to address those concerns was the safeguard regulation, which, in its final version⁸, increases the safety net for European producers. The challenge in adopting the EU-South Korea FTA therefore lied mainly in passing a strong safeguard regulation, which proved to be indispensable to secure a large majority of positive

⁴ More information about the political composition of the European Parliament is available at: <http://www.europarl.europa.eu/aboutparliament/en/007f2537e0/Political-groups.html>

⁵ Political groups decide, for each vote, whether there will be a group 'position' (that members are expected to follow), or whether the vote is 'free' (delegations are free to vote in favour, against, or abstain).

⁶ See breakdown of the vote by MEP, national delegations, and political groups here: <http://www.votewatch.eu/en/eu-morocco-fisheries-partnership-agreement-draft-legislative-resolution-vote-legislative-resolution-.html>

⁷ Read more about the concerns of the European automotive industry at: http://www.acea.be/news/news_detail/eu_industries_insist_on_improving_trade_deal_with_south_korea_full_article/

⁸ The text of the bilateral safeguard as adopted by the European Parliament is available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-61>

votes in plenary. The compromise that was achieved on 19 December 2010, between the INTA negotiating team⁹ and the Belgian EU Council Presidency, only three months after the start of 'trilogue negotiations',¹⁰ finalised a text that paved the way for a first reading¹¹ agreement on the EU-South Korea Bilateral Safeguard Regulation. Parliament adopted the safeguard legislation with a comfortable majority in February 2011. Consent to the FTA was given immediately afterwards, with 465 votes in favour, 128 against, and 19 abstentions.¹²

In the case of the Trade Agreement between the EU and Colombia and Peru, which is up for a vote in December 2012, concerns expressed by MEPs are more political in nature and fall under a typical 'trade-and' issue: human, labour, and environmental rights. The European Trade Union Confederation (ETUC) has been alerting MEPs to situations of abuses of trade unionists in Colombia and calling on MEPs to reject the agreement. ETUC's rationale is that the adoption of the accord would be a prize that the Colombian government does not deserve to obtain before it has taken additional steps to bring down the murder rate of unionists. This campaign was particularly effective in the S&D Group, traditionally close to trade unions. In fact, a majority of MEPs of the S&D would have been prepared to vote down the agreement. Such a scenario would most likely have imperilled the adoption of the agreement.

However, in a tale of political compromise and negotiation that is typical for the European Parliament, the S&D and the EPP adopted a common resolution in June 2012 that suggests that the governments of Colombia and Peru adopt binding and transparent roadmaps aimed at improving the situation of human, labour, and environmental rights in their respective countries. This resolution was the result of negotiations and compromises between the pro-trade political groups in order to bring the S&D on board. Recently, the Colombian and Peruvian governments have presented their respective roadmaps (subject to timetables), setting out goals, measures and results in the fields of labour, environmental and human rights, related to international trade. This step is highly likely to secure an affirmative vote in the consent procedure from a majority of MEPs in the S&D group. That, together with the votes of the EPP, the ECR and ALDE, should lead to a swift and smooth approval of the agreement by a large majority of MEPs.

The cases of both the EU-South Korea FTA and the Trade Agreement between the EU and Colombia and Peru illustrate how the involvement of the European Parliament increases the degree of politicization of European trade and investment policy, but also how stakeholders and the public at large now see the European Parliament as an avenue for increased participation of business, trade unions, and civil society at large in this field. Those two cases also illustrate the way that Parliament has managed to remain flexible and creative enough to take specific interests on board without prejudicing the overarching goals of EU trade policy, i.e. 'the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers' (Article 206 TFEU).

⁹ The negotiating team from the European Parliament is composed of the rapporteur and the shadow rapporteurs for the file, staff from the European Parliament secretariat and staff from the political groups. The Council is represented by its rotating Presidency.

¹⁰ 'Trilogues' are informal negotiations between the two legislators and moderated by the European Commission. The aim of such negotiations is to explore possible avenues for agreement on a given file between the European Parliament and the European Council.

¹¹ For more information on the legislative process, please see Title II of the Rules of Procedure of the European Parliament, available at: <http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>

¹² The text of the legislative resolution giving consent to the FTA is available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0034&language=EN>

Conclusion

It remains to be seen how the Lisbon Treaty will change the politics of intra- and inter-institutional cooperation in PTA negotiation and adoption in the long term. Three years after the implementation of the 'new' Treaty, it is however clear that EU trade and investment policy is now a truly European policy, to which a fully-fledged institutional triangle applies. The higher degree of politics infused into this traditionally 'technocratic' policy has opened up more space for debate and contributions from civil society, businesses, and stakeholders at large. This openness makes European institutions more accountable, and underscores their responsibilities in getting the EU's trade policy right.

Competitive Liberalization and Transatlantic Market Integration: The Case for a Transatlantic Free Trade Agreement

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Abstract

The US and the EU have both been pursuing preferential trade agreements (PTAs) with numerous trading partners in Asia and Latin America in recent years. The current financial and economic crisis has exposed how imperative the transatlantic commercial relationship is for both economies. The EU and US remain the most integrated and preeminent trading partners for each other - together accounting for more than 50 per cent of world GDP and more than one third of world trade flows. A further deepening of this commercial relationship, where investments form the backbone, will provide a substantial boost to trade and subsequently growth and jobs. Several studies have documented the gains that can be achieved through removing transatlantic barriers both at and behind the borders – gains that are much greater than those estimated to follow from PTAs with others or from a successful conclusion of the now stalled Doha Round. The US and EU business communities are thus jointly pushing for comprehensive and ambitious transatlantic initiatives that will generate growth and jobs by removing barriers in the areas of trade, investment, and regulatory policy. There is a confluence of external and domestic factors that make such initiatives viable now, as well as common values and social standards that increase the likelihood of broad public support. The US and the EU are increasingly cognizant of the common challenges from emerging economies and the need to maintain an open global trading system. Competitive liberalization between the EU and the US is steadily giving way to a greater degree of cooperative liberalization.

Introduction

Every cloud has a silver lining according to an old adage. It is hard to identify any in the current economic crisis, save one that is already evident: The increased awareness – on both sides of the Atlantic - of the imperative of maintaining and deepening the transatlantic relationship in order to spur economic growth and job creation in Europe and the United States. Europe still matters to the US economy and the extensive commercial ties between the two economies can be strengthened in order to promote needed jobs and growth in both.

The EU-US Summit Decision in November 2011 to establish a US-EU High Level Working Group on Jobs and Growth to review options for strengthening transatlantic ties is evidence of this renewed awareness; and this process can be seen as a shift from competitive liberalization to cooperative liberalization as a means of maintaining and strengthening the open multilateral trading system. As the Transatlantic Task Force on Trade and Investment concluded in February 2012:

“...significant external pressure is needed to reinvigorate the multilateral process. A transatlantic trade initiative is arguably one of the few initiatives that can generate enough outside pressure to motivate countries to recommit themselves to substantial trade liberalization.”¹

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¹ European Centre for International Political Economy (ECIPE) and The German Marshall Fund of the United States (GMF), *A New Era for Transatlantic Trade Leadership - A Report from the Transatlantic Task Force on Trade and Investment*, February 2012. p. 15

The EU and US have both similarities and differences in their approaches to Preferential Trade Agreements (PTAs).² The author Peter Baldwin argues in *The Narcissism of Minor Differences* that we in Europe and the US tend to focus too much on what separates us rather than on what we have in common, and often overlook our basic similarities, particularly perhaps in terms of policy choices.³ Yet, when it comes to negotiating PTAs, there have been major differences in approaches between the EU and the US - although the approaches today appear to be converging.

Several authors have documented and analyzed EU and US approaches to PTAs, notably Jeffrey Schott of the Peterson Institute of International Economics.⁴ In the following I will limit myself to providing a cursory overview of major similarities and differences, relating to timing, number of agreements, countries covered, content, institutional issues, and driving forces. I will go on to argue that the time is ripe for the EU and US to join forces in pursuing a bilateral trade agreement both for economic reasons, and in order to strengthen the multilateral trading system.

EU and US approaches to PTAs are converging

1. Timing

The EU – which of course itself began as, and is, a regional trading agreement of unique depth -- has definitely had a longer history of negotiating PTAs starting in the late 1950s and early 1960s. The EU initially pursued preferential agreements with countries with close historical ties or countries seeking membership in the European Community and later EU, and countries in close geographic proximity. Agreements were concluded with the individual European Free Trade Area (EFTA) countries in the early 1970s, which has negotiated agreements among themselves in the 1960s. EFTA then included Spain, Portugal and the UK, Sweden, Finland, Norway and Denmark.

In the US, PTAs are a fairly recent policy choice, with the first agreements negotiated in the 1980s. Not until around 2002 did US government officials (United States Trade Representative Robert Zoellick) expound on the concept of *competitive liberalization* as a policy.⁵

2. Number of agreements

The EU has without a doubt concluded a much greater number of PTAs than the US. Based on the European Commission DG trade website, the EU has concluded preferential trade agreements with 45 countries including Economic Partnership Agreements (EPAs)⁶. In terms of notifications to the World Trade Organization (WTO)⁷, the EU has a total of 34 agreements in force. Agreements are under negotiation with more than 20 additional countries. With the expected launch of PTA negotiations with Japan later this year, and conclusion of the ongoing negotiations with several other major partners

² While the WTO uses the terminology Regional Trade Agreement as opposed to Preferential Trade Agreements, which in the WTO context are viewed as agreements providing for unilateral preferences, many RTAs today can no longer be meaningfully termed regional in nature. I have used the term PTA as is this has become the common term for both Free Trade Agreements (FTAs) and RTAs.

³ Baldwin, Peter: *The Narcissism of Minor Differences - How America and Europe Are Alike*, Oxford University Press, 2009.

⁴ Schott, Jeffrey (ed): *Free Trade Agreements - US Strategies and Priorities*, Peterson Institute of International Economics, April 2004.

⁵ The term had first been coined by Fred Bergsten of the Peterson Institute for International Economics (then the Institute of International Economics) in the mid 1990s.

⁶ http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/agreements/#_europe

⁷ <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=840&lang=1&redirect=1>

including Canada and India, only China and the US will remain outside of preferential agreements with the EU along with four other minor trading partners.

The US, by comparison, has 13 agreements in force with a total of 20 countries according to notifications to the WTO. This imbalanced list leads some to conclude that there is a major divergence in EU and US approaches to PTAs, or that the US is losing ground to the EU in competitive liberalization.

If one instead views the share of trade covered by the PTAs the picture that emerges is somewhat different. The EU and US have basically the same level of trade taking place under PTAs: 44.6 per cent of EU trade was covered by PTAs in 2009, compared to 41.6 per cent of US trade covered by PTAs the same year.⁸ With the conclusion and entry into force of agreements with South Korea the percentage covered for both is closer to 50 per cent.

The explanation for the similarity in coverage, despite the discrepancy in numbers, is easily explained: the US has negotiated NAFTA with its two neighbours and main trading partners, Canada and Mexico, which together account for nearly 30 per cent of US trade. Subsequently agreements have been pursued with a large number of Latin American countries. The U.S. Chamber of Commerce estimates that 87 per cent of US trade today with Latin America takes place within PTAs. In addition, the US goal is to conclude the ongoing Trans Pacific Partnership (TPP) negotiations this year. The negotiations are being held jointly with 9 countries: Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore and Vietnam, and thus include some countries with which the US already has PTAs. Canada, Mexico and Japan have expressed their intent to join the TPP Agreement.

The share of US and EU trade covered by PTAs pales in comparison to those of Chile, where 98 per cent of trade is covered by trade with PTA partners. Surprisingly, a country like Japan, that has traditionally avoided PTAs, had 38.4 per cent of its trade covered by PTAs already in 2009. PTAs are, in other words, not only the purview of the EU and the US. “All WTO members (with the exception of Mongolia) belong to at least one PTA.”⁹ According to the WTO there are now more than 500 PTAs notified to the organization – where around 300 of them are termed to be active. There were around 70 such agreements worldwide in 1990 demonstrating that the number of PTAs has grown exponentially the past two decades.

3. Choice of partner countries

The driving forces have been similar in the US and EU with regard to choice of partners. Close political or geographical ties appear to have been a common determinant in the choice of partners at the outset. The subsequent choices, however, appear to follow no discernible pattern. In the US it has been a requirement of the Trade and Tariff Act of 1984 that US trade partners take the initiative to negotiate a PTA. Jeffrey Schott points out that the US choice of partners reflects a myriad of political, economic and security interests.¹⁰ Comparing EU and US PTAs by *country coverage* nevertheless reveals that there are several of the partners that they both have agreements with, the most recent being the PTAs with South Korea. The following diagram (which excludes the EU EPAs) illustrates the PTA partners that the EU and the US have in common, but also shows the much longer list of EU PTAs.

⁸ VanGrasstek, Craig: *The Political Economy of Services in Regional Trade Agreements - OECD Trade Policy Working Papers*, OECD, 2011. <http://dx.doi.org/10.1787/5kgdst6lc344-en>

⁹ WTO: World Trade Report 2011. The WTO and preferential trade agreements - From co-existence to coherence. p. 6

¹⁰ Schott, Jeffrey (ed): *Free Trade Agreements - US Strategies and Priorities*, Peterson Institute of International Economics, April 2004.

Figure 1. US and EU country coverage in existing RTAs – as notified to the WTO¹¹



Still under negotiation for the EU

4. Content

In terms of content, the EU and US PTAs today increasingly cover similar areas. The earliest agreements were often limited to tariff preferences for trade in goods. Agricultural goods and textiles, however, were often partially or fully excluded. The US and Canada set a new standard with their free trade agreement in the late 1980s, and services and non-tariff measures have subsequently been included in many PTAs, as well as intellectual property rights (IPR) and procurement. According to the WTO around one third of PTAs in force today include commitments on services compared to less than a tenth in 1990.¹² Both the EU and the US have focused in more recent negotiations on expanding

¹¹ http://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm?country_selected=none&sense=g

¹² WTO: *World Trade Report 2011. The WTO and preferential trade agreements. From co-existence to coherence.* http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf (p. 7)

the coverage of the agreements also beyond negotiating subjects at the multilateral level, to include issues such as investment protection, competition, environmental issues and state owned enterprises (SOEs).¹³

The WTO has seen the effects of these “deep PTAs” as positive: resulting in rule-changes in the partner countries, which often are implemented on a non-discriminatory basis.

“By their very nature, some deep integration provisions are *de facto* extended to non-members because they are embedded in broader regulatory frameworks that apply to all trading partners.”¹⁴

The EU and the US, as the dominant trading partner in all negotiated agreements, have been able, to a large extent, to define the parameters of the content of the agreements.

5. Domestic challenges/Institutional issues

While entrenched interests have opposed individual PTAs in both the EU and the US, it is fair to say that the agreements have been a much harder political sell in the US than in the EU. In the United States the public debate has often revolved around issues relating to labor and environmental standards in connection with such agreements. There have been claims that they would result in a so-called “race to the bottom” – a development where business would move production to free trade partners with less stringent labor or environmental standards. This apparent domestic opposition delayed the requisite political support for NAFTA and the FTAs with South Korea, Panama and Columbia in the US Congress.

With the entry into force of the Lisbon Treaty the European Parliament (EP) has attained a new role in trade. The EU - Korea Free Trade Agreement was the first requiring consent by the EP, and the review process led to a delay in approval of the agreement. One can expect the EU may experience a similar challenge to the pursuit of PTAs as US policy-makers have faced, given the involvement of the European Parliament in the decision-making process.

According to polling on public attitudes to trade, the US public is of two minds. There is support for increasing trade with Canada, Japan and the European Union, yet only around 30 per cent of the population approve of PTAs or the WTO according to a PEW 2010 poll.¹⁵

6. Driving forces

The rationale for the competitive liberalization that has been pursued by the US and the EU during the last decade has been multi-faceted. The economic drivers have often been intertwined with political rationales. The trade related drivers can be summed up as the following:

- lowering of barriers to trade in specific markets;
- spurring trade growth;
- less time consuming and less complex negotiations than in the multilateral and WTO centred process;
- the opportunity of addressing new trade issues that are not part of the multilateral agenda;
- the creation of additional pressure for multilateral liberalization.

¹³ A critical study of the comparison of the coverage of EU and US PTAs has been done by Horn, Hendrik & Mavroidis, Petros & Sapir, André (2009): *Beyond the WTO – An Anatomy of US and EU Preferential Trade Agreements*, BRUEGEL Blueprint 7, Brussels.

¹⁴ WTO: *World Trade Report 2011. The WTO and preferential trade agreements. From co-existence to coherence*. http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf (p. 14)

¹⁵ PEW Research Center for the People and the Press, (November 2010) <http://www.people-press.org/2010/11/09/public-support-for-increased-trade-except-with-south-korea-and-china/>

There is ample evidence of the increases in trade that have taken place after the entry into force of many of the PTAs. The latter rationale though – seeing PTAs as a means of strengthening the multilateral system and creating additional pressure for multilateral commitments - has perhaps been the most absent in terms of results, with the notable exception of the conclusion of the North American Free Trade Agreement (NAFTA), which is widely credited for having served to renew momentum in the Uruguay Round. The precursor to NAFTA – the FTA with Canada concluded in 1987 - has also been attributed with introducing new issue areas into trade agreements, which then subsequently were taken up in the multilateral arena.

Critics of competitive liberalization point out that PTA signatories have been willing to commit to liberalization in the context of preferential agreements in areas that they have not subsequently been willing to commit to multilaterally. Moreover, the WTO has also identified PTAs that withdraw multilateral commitments in the context of trade under an agreement - so called “GATS-minus” agreements.¹⁶

The result is a picture of world trade that emerges where estimates conclude that more 60 per cent of trade flows take place within the frameworks of PTAs.¹⁷ The WTO, however, has estimated that only around 35 per cent of total world merchandise trade is intra-PTA (a figure which excludes intra-EU trade), and only around 16 per cent is qualified as preferential trade since around half of world trade receives zero-tariffs on a most-favoured-nation (MFN) basis.¹⁸ This characterization is partially misleading though, as the preferential access can be provided through other means than tariffs.

The challenges created by the numerous agreements are well documented - complex and diverse systems of rules of origin that in some cases serve to increase barriers to trade and reduce transparency.¹⁹ With the growing documentation of the increasing share of global supply chains in world trade these challenges are increasing. These issues, however, go beyond the scope of this paper.

¹⁶ GATS- minus commitments in regional trade agreements. Rudolf Adlung (WTO Working Paper)

¹⁷ Bergsten, Fred: *Competitive Liberalization and Global Free Trade: A Vision for the Early 21st Century*, Peterson Institute for International Economics, Working Paper, 1995.
<http://p.181.www.iie.com/publications/wp/print.cfm?researchid=171&doc=pub>

¹⁸ WTO: *World Trade Report 2011. The WTO and preferential trade agreements: From co-existence to coherence*.
http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf

¹⁹ Professor Jagdish Bhagwati, who coined the phrase “Spaghetti Bowl Effect”, is one of the most prominent critics of the effects of PTAs on global trade.

Table 1. EU PTAs – an OECD document excerpt

Table II.2. The RTAs of the European Union
Agreements in effect listed in chronological order; others in alphabetical order

Partner(s)	Year Entered into Effect	Type	Share of European Union's Trade (2009)	
			With Partner	Cumulative
Syria	1977	FTA	0.2%	0.2%
Andorra	1991	CU	<0.1%	0.2%
European Economic Area	1994	Econ. Integ'n Agr.	11.9%	12.1%
Turkey	1995	CU	3.5%	15.6%
Faroe Islands	1997	FTA	<0.1%	15.6%
Palestinian Authority	1997	FTA	<0.1%	15.6%
Tunisia	1998	Assoc. Agreement	0.7%	16.3%
Israel	2000	Assoc. Agreement	0.9%	17.2%
Mexico	2000	Global Agreement	1.1%	18.3%
Morocco	2000	Assoc. Agreement	0.8%	19.1%
South Africa	2000	FTA	1.4%	20.5%
FYR of Macedonia	2001	FTA	0.1%	20.6%
Croatia	2002	FTA	0.7%	21.3%
Jordan	2002	Assoc. Agreement	0.1%	21.4%
San Marino	2002	CU	<0.1%	21.4%
Chile	2003	Assoc. Agreement	0.5%	21.9%
Lebanon	2003	FTA	0.2%	22.1%
Egypt	2004	Assoc. Agreement	0.8%	22.9%
Algeria	2005	Assoc. Agreement	1.4%	24.3%
Albania	2006	FTA	0.1%	24.4%
Bosnia & Herzegovina	2008	FTA	0.2%	24.6%
Montenegro	2008	FTA	<0.1%	24.6%
Cameroon	2009	FTA	0.1%	24.7%
CARIFORUM	2009	EPA	0.4%	25.1%
Côte d'Ivoire	2009	FTA	0.2%	25.3%
Serbia	2010	FTA	0.4%	25.7%
Colombia	[Signed]	FTA	0.3%	26.0%
Korea	[Signed]	FTA	2.3%	28.3%
Peru	[Signed]	FTA	0.2%	28.5%
All Other ACP	[Under way]	EPA	3.0%	31.5%
Canada	[Under way]	Comp. Econ. & Trade	1.8%	33.3%
India	[Under way]	FTA	2.3%	35.6%
MERCOSUR	[Under way]	FTA	2.7%	38.3%
Singapore	[Under way]	FTA	1.5%	39.8%
Gulf Cooperation Council	[Under way]	FTA	3.5%	43.3%
Ukraine	[Under way]	FTA	0.9%	44.2%
Central America & Panama	[Under way]	Assoc. Agreement	0.4%	44.6%

Source: Compiled and calculated from European Union statistics.

Source: VanGrasstek, Craig: The Political Economy of Services in Regional Trade Agreements - OECD Trade Policy Working Papers, OECD, 2011.

Table 2. US PTAs – an OECD document excerpt

Table II.3. The RTAs of the United States

Agreements in effect listed in chronological order; others by category and in alphabetical order

Partner(s)	Year Entered into Effect	Type	Share of U.S. Trade (2009)	
			With Partner	Cumulative
Israel	1985	FTA	1.00	1.00
Canada	1989	FTA	15.94	16.94
Mexico	1994	FTA	11.35	28.29
Jordan	2001	FTA	0.08	28.37
Chile	2004	FTA*	0.59	28.96
Singapore	2004	FTA*	1.43	30.39
Australia	2005	FTA*	1.06	31.45
Morocco	2006	FTA	0.08	31.53
Bahrain	2006	FTA	0.04	31.57
CAFTA-DR	2006-2009	FTA	1.52	33.09
Oman	2009	FTA	0.08	33.17
Peru	2009	FTA*	0.35	33.52
Colombia	[Signed]	FTA	0.80	34.32
Panama	[Signed]	FTA	0.18	34.50
Republic of Korea	[Signed]	FTA	2.65	37.15
Brunei Darussalam	[Under way]	TPP*	0.01	37.16
Malaysia	[Under way]	TPP*	1.29	38.45
New Zealand	[Under way]	TPP*	0.18	38.63
Vietnam	[Under way]	TPP*	0.62	39.25
Ecuador	[Suspended]	FTA	0.36	39.61
S. African Customs Un.	[Suspended]	FTA	0.45	40.06
Thailand	[Suspended]	FTA	1.01	41.07
United Arab Emirates	[Suspended]	FTA	0.51	41.58

*: A partner in the Trans-Pacific Partnership negotiations.

Source: Compiled and calculated from Inter alia Office of the U.S. Trade Representative and U.S. International Trade Commission.

Source: VanGrasstek, Craig: *The Political Economy of Services in Regional Trade Agreements - OECD Trade Policy Working Papers*, OECD, 2011.

A deeper transatlantic relationship

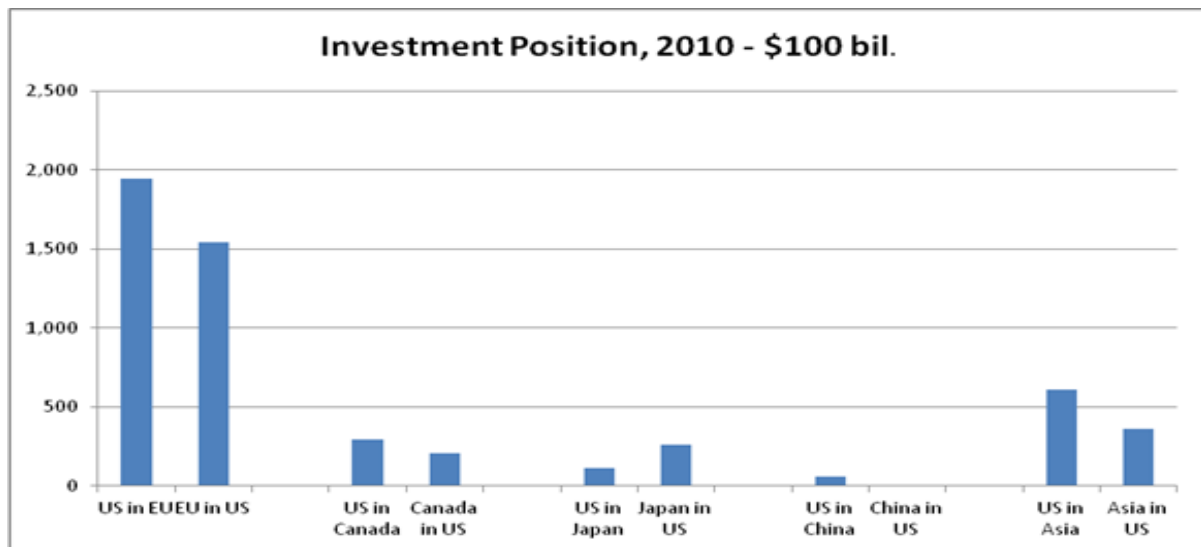
Despite the pursuit by the EU and US of competitive liberalization through PTAs with other countries, transatlantic commercial integration has remained preeminent. The US and the EU remain each other's most important trading partners and together account for nearly 30 per cent of world trade. As Daniel Hamilton and Joseph Quinlan continue to document annually there is no other commercial relationship that compares in size or extent to US-EU commercial relations.²⁰ It is a relationship that generates more than \$5 trillion in sales annually. US- and EU firms are each other's largest investors and more than one third of transatlantic trade takes place within companies. It remains the EU's and US' common most valuable economic relationship.

The financial crisis and current lackluster economic output in both the US and the EU have, of course, also affected this relationship, but there is no meta-shift in investments or trade despite the

²⁰ Hamilton, Daniel and Joseph P. Quinlan: *The Transatlantic Economy 2012 – Annual Survey of Jobs, Trade and Investment between the United States and Europe*, Center for Transatlantic Relations, Washington, DC, 2012.

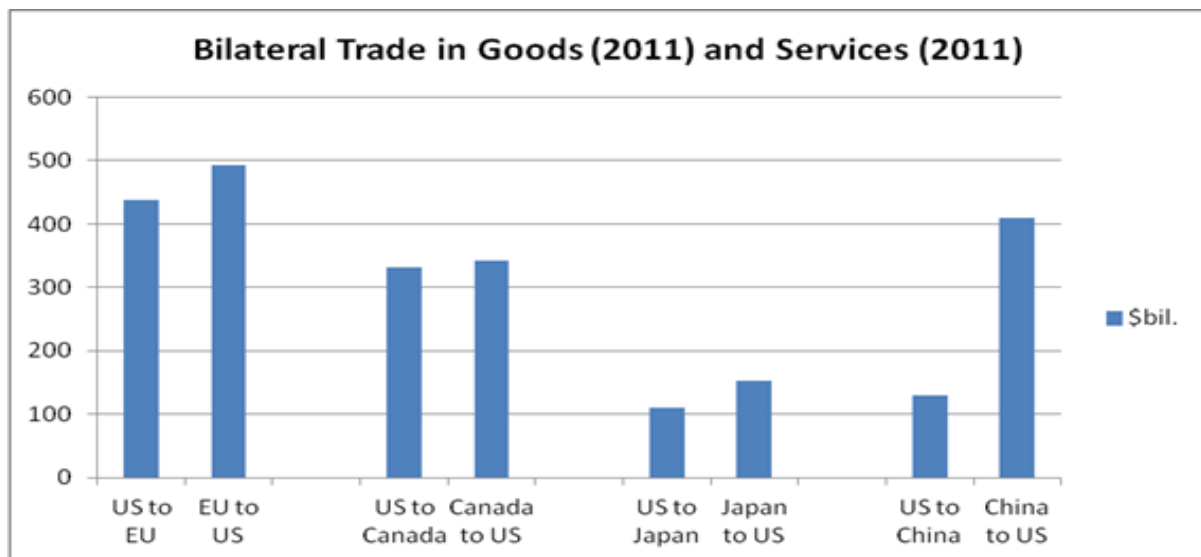
media headlines reporting on a shift in focus to the emerging economies. To the contrary, trade numbers are back to pre-crisis levels and investments are continuing to increase.

Figure 2. US – EU Investment Position in major markets 2010.



Source: Compiled by U.S. Chamber of Commerce, 2012 based on US investment statistics.
http://www.uschamber.com/sites/default/files/international/files/17566_TransEconomic_TradePact_OPT.pdf

Figure 3. EU and US Bilateral Trade in Goods and Services with major trading partners. 2011



Source: Compiled by the U.S. Chamber of Commerce based on US statistics.
http://www.uschamber.com/sites/default/files/international/files/17566_TransEconomic_TradePact_OPT.pdf

US investments in Ireland alone continue to be four and a half times larger than US investment in China. The EU continues to receive around 20 per cent of US exports totalling more than \$270 billion in 2011, and the US receives around the same level of EU exports.

Hamilton and Quinlan document the driving force that investments have in the relationship. A total of 72 per cent of the FDI in the EU originate in the US and around 55 per cent of FDI in the US

originates in Europe. “Mutual investment dwarfs trade and is the real backbone of the transatlantic economy.”²¹

A common misconception has been that the barriers in transatlantic trade are so low that there is little to be gained from removing them. The U.S. Chamber of Commerce commissioned a study together with the Swedish Confederation of Industries in 2010 to analyze the benefits of merely removing the tariffs in transatlantic trade. The European Centre for International Political Economy (ECIPE)²², which produced the study, documented that through tariff elimination alone, within five years exports from each side would be about 17 per cent higher than otherwise. The WTO, while arguing that PTAs often do not provide much benefit in terms of tariff preferences (given the already low bound and applied average tariff rates) nevertheless points out that the utilization rates in PTAs with the US and EU are very high, 92 and 87 per cent respectively. Even for items with tariffs below 1 per cent, there are relatively high utilization rates.²³ This can be attributed in part to preferential customs clearance for example.

An earlier study carried out by ECORYS in 2009/2010 for the Commission at the request of the European Parliament documented the substantial economic and export gains that could be attained by reducing the trade costs of transatlantic regulatory divergences.²⁴

Trade promotes growth and jobs and there is an urgent need for both - in the United States as well as in Europe. The US business community has therefore pushed for the launch of talks aimed at the deepening of the transatlantic commercial relationship with urgency. In part as a result of these efforts, policy-makers at the EU-US Summit in Washington D.C. in November 2011 subsequently decided to launch a High Level Working Group (HLWG) to assess the options for such an initiative. The EU business communities have joined in this advocacy effort. The U.S. Chamber of Commerce and Business Europe have jointly provided input to both the US Administration and DG Trade on the importance of such an initiative in February 2012,²⁵ and again spearheaded a joint letter from several transatlantic business organizations in March 2012 to Presidents Obama, Van Rompuy and Barroso, urging an early decision to launch negotiations.²⁶ The organizations argued that by announcing an intention to launch negotiations, US- and EU leaders would immediately boost confidence in the business community and among investors and consumers.

The idea of a bilateral agreement to enhance transatlantic trade is not a new one, although it has been given different labels (among them: TAFTA). In the past, a transatlantic PTA has been dismissed by both the US and EU for various reasons. A recurring argument against such an agreement has been that it would undermine the multilateral trading system. This argument may have had sway when the EU and the US were seen as the two major trading entities in the world without comparison, and when multilateral negotiations were still active. Neither is true today. Several countries, and particularly Brazil, Russia, India, and China (the so-called BRICs), have increased their leverage in international trade. The Doha Development Round in the WTO has stalled completely after more than ten years of

²¹ Hamilton, Daniel and Joseph P. Quinlan: *The Transatlantic Economy 2012 – Annual Survey of Jobs, Trade and Investment between the United States and Europe*, Center for Transatlantic Relations, Washington, DC, 2012.

²² Erixon, Fredrik and Matthias Bauer: *A Transatlantic Zero Agreement: Estimating the Gains from Transatlantic Trade in Goods*, ECIPE Occasional Paper, 2010.

The study followed an earlier ECIPE study from 2009: *A New Trade Agenda for Transatlantic Economic Cooperation*, Fredrik Erixon and Gernot Pehnelt which estimated the static gains of a bilateral agreement to remove tariffs

²³ WTO: *The WTO and preferential trade agreements - From co-existence to coherence*. World Trade Report, 2011.

²⁴ ECORYS: *Non-Tariff Measures in EU-US Trade and Investment – An Economic Analysis*, 2010.

²⁵ <http://www.uschamber.com/sites/default/files/international/files/USTR-2012-0001-%20US%20Chamber-%20BusinessEurope%20FRN%20US%20EU%20High%20Level%20Working%20Group.pdf>

²⁶ http://www.uschamber.com/sites/default/files/hill-letters/Transatlantic%20Business%20Associations%20statement%20on%20the%20HLWG_FINAL.pdf

negotiations. Furthermore, the global proliferation of PTAs makes it absurd that the two most integrated economies in the world do not provide each other with the best possible market access and common disciplines for trade. Fredrik Erixon concludes: "...there has been a profound change in global trade policy that reinforces the case for a transatlantic trade deal." And he sees a

"...deepened transatlantic cooperation...as the reasonable consequence of sharing an understanding of and support for the core principles of an open global economy, and of an interest in maintaining those principles at a time of dysfunctional multilateralism"²⁷

In a recent public hearing in the US Congress House Committee on Ways and Means, the CEO of Deloitte, James H. Quigley, put it very succinctly:

"Building a strong transatlantic partnership and moving towards a barrier-free transatlantic market, I am convinced, will contribute to economic growth and job creation in both the United States and Europe. They also can be strong inducements to progress on a broader global trade agenda."²⁸

EU and US experiences of common challenges in world trade have also led to the realization that these challenges can be best met through cooperation instead of through competition. There are an increasing number of specific areas, which showcase the potential benefits of enhanced cooperation:

- One concrete example is the development of standards for electric vehicles, where businesses on both sides of the Atlantic have pushed authorities to pursue common transatlantic standards in order to avoid a situation where the absence of such standards fragments the market and the standards are set by others due to a lack of agreement between the EU and US. This is one area where the Transatlantic Economic Council (TEC) provides for a forum of regulatory cooperation;
- Another example is *The Statement on Shared Principles for International Investment* agreed by the EU and US on April 10th 2012.²⁹ The principles provide for a blueprint for an open and stable investment climate, and other countries are urged to sign on and implement them in their legislation. Again, this is an achievement reached within the TEC framework.
- The concluded negotiation of the Anti-Counterfeiting Trade Agreement (ACTA) - although still awaiting approval by the European Parliament - is another example. The agreement is not a bilateral agreement between the EU and the US, but convergence of policy between the two was a prerequisite for finalizing the text.³⁰
- The EU - US Agreement on Principles for Information and Communication Technology (ICT) announced in March 2012 is also an indication that both sides see the imperative of joint action to meet joint challenges in third country markets.
- The agreement by the EU and US this May to approve as equivalent each other's programs for customs security is the most recent example.

There are also grounds to assume that the policy climate – particularly in the United States – is more favourably inclined to trade agreements than has been the case in recent years. While CAFTA - the Central American Free Trade Agreement, which was approved by Congress in 2006 - only passed by 2 votes, the PTAs with Korea, Panama and Colombia passed by a margin of 83-15 votes in the Senate and 278 – 151 votes in the House of Representatives. This is viewed as reflecting an increased awareness that trade is important to growth and jobs, although the lobbying efforts by the business communities should probably also receive some credit.

²⁷ Erixon, Fredrik: *Transatlantic Free Trade: An Agenda for Jobs, Growth, and Global Trade Leadership*. Centre for European Studies (CES), 2012. pp. 7, 15

²⁸ <http://waysandmeans.house.gov/UploadedFiles/QuigleytestFC229.pdf>

²⁹ http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf

³⁰ Five member states and the European Parliament are now threatening not to ratify the agreement over concern about its provisions on digital copyright.

An additional facilitator of a deepening of the US - EU commercial relationship is the expected conclusion of the ongoing EU - Canada free trade negotiations the Comprehensive Economic and Trade Agreement (CETA). Arguably, these negotiations build the foundations for a subsequent US - EU agreement and in this sense can be seen as an example of competitive liberalization. For instance, the EU has accepted the negative list approach employed by the US for services in the negotiations, i.e. a listing of those sectors which are exempt from the obligations of providing market access and national treatment, and not only those that are covered, as is the practice in the GATS. The negotiations are also grappling with the different approaches to rules of origin, where Canada has, as a point of departure, a preference for the NAFTA rules.

What would such a pact contain?

The U.S. Chamber of Commerce and Business Europe - in the joint submission mentioned above, have been specific in outlining what they envision in a transatlantic package:

- goods: eliminate tariffs and significantly enhance electronic customs procedures;
- services: facilitate cross-border provision of services and associated data flows;
- investment: allow for establishment of investments on a national treatment basis (with limited exceptions) across all sectors, provide full protections for such investments, and allow investor-state dispute settlement;
- business mobility: extend visa waiver, treaty trader, and treaty investor programs; allow intra-firm transferees; extend “trusted traveller” security programs;
- procurement: ensure each side’s non-discriminatory participation in any ‘Buy National’ programs and significantly expand scheduled commitments for national treatment in procurement;
- regulatory cooperation: establish a mechanism to permit US and EU regulatory counterparts, in consultation with their political oversight bodies, to recognize that they have mutually compatible regimes and may thus accept, in their market, goods and services approved for sale in the other market.

The two business organizations have also called upon our governments to continue working closely together to *promote the rule of law and market liberalization in third countries*, especially in such areas as intellectual property rights, investment, information and communications technologies and regulation.

The initiative has received political support from the highest level in the EU – both from President Barroso and from Trade Commissioner Karel De Gucht - latest in a speech to the European Parliament.³¹ Commissioner De Gucht stated that such an agreement should be negotiated in the course of 18 months, and argued that:

“[b]road trade liberalisation across the Atlantic would help us put our recovery on a sounder footing. It would drive down the cost of transatlantic business. Tariffs are low between Europe and the United States but the volume of our trade is so big that their elimination would be helpful - particularly when one considers that so many of the traded goods are part of long value chains.

At a broader level the intensified competition that a transatlantic agreement would create would improve the competitiveness of firms across the whole economy. Long-term evidence in Europe indicates that a 1 per cent increase in openness of the economy results in an increase of 0.6 per cent in labour productivity the following year.

In the short term, I believe the conclusion of an ambitious agreement would also address another aspect of our current economic difficulties. At the heart of today's problems is a crisis of confidence in governments' ability to make tough but necessary decisions. A new transatlantic trade initiative would be a bold move that would show that politics works in Europe and the United States. That both sides are willing to take the action necessary to deliver recovery.”

³¹ http://trade.ec.europa.eu/doclib/docs/2012/may/tradoc_149519.pdf

De Gucht goes on to argue that a final reason for pursuing a transatlantic trade deal is to promote “the core principles of transparency and predictability so as to facilitate smooth operation of our companies' global supply chains” in emerging markets.

EU member states have also voiced support for strengthening transatlantic ties, starting with the explicit support from the UK Prime Minister Cameron and Chancellor Merkel of Germany in their speeches at the Davos World Economic Forum in January, 2012. The President of the European Commission, Jose Manuel Barroso, has stated that he sees the initiative as important not only in signalling EU and US joint commitment to an open trading system, but also as an opportunity to extend governance to new economic areas. Even so, first and foremost, it is an initiative that can provide a boost to economic growth and jobs. Moreover, four key members of the European Parliament's International Trade Committee (INTA) in March 2012 wrote to the Commission President, underlining their support for the initiative. In a non-legislative resolution the European Parliament (EP) has subsequently adopted by 526 votes for, 94 against and 7 abstentions on the 23rd of October 2012, MEPs called for talks on a possible trade deal with the US to start early 2012. The resolutions points to the huge potential for growth and jobs on both sides of the Atlantic, while cautioning that the EU's interests must be protected, especially in the farm sector.³² The full text of the report from the INTA Committee was intended to be the EP's input into the work of the High Level Working Group.³³

At the moment, the difficulty for the idea of a bilateral agreement appears to be with the U.S. administration, notwithstanding numerous expressions of support. Numerous business organizations and the AFL-CIO have submitted comments in favour of pursuing a transatlantic initiative to the USTR's Federal Register Notice (A total of 42 submissions had been submitted by the February 1st, 2012 deadline.)³⁴ A bi-partisan group of 20 US Senators,³⁵ and in a separate letter, a bi-partisan group of 51 US Congressmen,³⁶ wrote to the White House in support of such an initiative the 22nd of February and 14th of May 2012, respectively. And in June 2012, the US President's own Export Council issued a statement arguing the importance of launching a transatlantic PTA for the US economy.³⁷

“A Transatlantic Partnership will deliver real economic value. Approximately half of U.S. manufacturing foreign direct investment is in Europe, totalling \$268 billion in 2009. Manufacturing sales by majority-owned U.S. companies' affiliates in Europe total almost \$1.4 trillion and EU investment in the U.S. supported 3.6 million jobs in 2010. Additionally, U.S. and EU services sectors are closely interlinked and would benefit from the elimination of existing barriers. Despite the overwhelming size of the trade and investment relationship, bilateral trade is handicapped by existing tariffs and other barriers to trade and investment. The gains from removing these barriers would be a significant boost to both the American and European economies. Additionally, an U.S.-EU initiative has unprecedented public support – including from the American and European business communities, legislators, European heads of state, and civil society.”³⁸

Whether or not such support will translate into a decision by the US Administration to launch transatlantic negotiations is at the time of writing unclear, although the HLWG Interim Report which was published on the 19th of June 2012 concluded that “a comprehensive trade and investment

³² http://www.europarl.europa.eu/pdfs/news/expert/infopress/20121019IPR54034/20121019IPR54034_en.pdf

³³ The full report can be found at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0321+0+DOC+PDF+V0//EN>

³⁴ <http://www.regulations.gov#!docketBrowser;dt=PS;rpp=25;po=0;D=USTR-2012-0001>

³⁵ <http://portman.senate.gov/public/index.cfm/press-releases?ID=3b3f67e0-a74a-44e5-97f3-efeeef0004410>

³⁶ <http://www.uschamber.com/sites/default/files/international/files/EUUSTradeLetterHouse.pdf>

³⁷ [http://www.gbdinc.org/PDFs/PEC%20Transatlantic%20Partnership%20Letter%206%206%2012%20\(2\).pdf](http://www.gbdinc.org/PDFs/PEC%20Transatlantic%20Partnership%20Letter%206%206%2012%20(2).pdf)

³⁸ *ibid.*

agreement” had the greatest potential for supporting jobs and promoting growth and competitiveness across the Atlantic. It should be noted, however, that the Report contains the caveat “if achievable”.³⁹ The EU opened a broad public consultation on the relationship that ended on the 27th of September 2012; and the HLWG has subsequently launched further joint EU-US consultations with public and private stakeholders on specific proposals on regulatory issues.⁴⁰ Recent press reports seem to indicate that US- and EU officials expect that the HLWG in its final report will recommend that negotiations be launched early 2013.⁴¹

Conclusion

The economic benefits of a transatlantic trade package have been documented in detail. It is clear that the increased trade and investments will spur economic growth and job creation on both sides of the Atlantic. The external global trade environment and domestic challenges related to the current economic crisis, furthermore, make the pursuit of such an agreement more politically viable than ever before. A transatlantic trade pact will not only demonstrate to the world that the EU and US will maintain open markets towards each other, but that both will cooperate to safeguard an open rules based trading system worldwide. There is no longer a threat involved in such an approach to the multilateral trading system, to the contrary such a joint demonstration of leadership will only serve to strengthen it. It is time to move from competitive liberalization to cooperative liberalization.

³⁹ http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149557.pdf

⁴⁰ http://ec.europa.eu/enterprise/policies/international/files/eu-us-agreement_en.pdf

⁴¹ http://articles.chicagotribune.com/2012-10-17/news/sns-rt-us-eu-usa-trade89g0kt-20121017_1_eu-investment-trade-and-investment-agreement-eu-leader

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Exporting Legal Standards through Trade Negotiations - Intellectual Property Rights Chapters in Global Europe PTAs

Jakob Cornides*

1. The “Global Europe” Strategy

International trade policy making currently goes through an era of bilateralism: the multilateral trade negotiations at WTO level are stuck and it is not clear at what point in time they can be revived. The EU has always advocated multilateralism for reasons of principle, and thus hopes that the current deadlock will be overcome sooner or later. But given the prevailing situation, we must do what we can to advance our trade interest through bilateral negotiations, even if we consider them only a “second best”.

Ironically, the two most important multilateral achievements of the last ten years were in those areas my unit in DG Trade is following: intellectual property and public procurement. With regard to IP, the WTO has agreed on a permanent amendment of the TRIPs Agreement in order to allow the issuance of compulsory licenses on pharmaceutical patents for export purposes (rather than solely for a country’s domestic needs) in order to facilitate access to medicines in countries that do not themselves dispose of their own production facilities.¹ As regards public procurement, the parties to the WTO Government Procurement Agreement have agreed on a revised version of the GPA, which also includes wider coverage.² The WTO is thus – to a limited extent - still capable of making progress, although the TRIPs amendment is of course a progress towards less (and not more) IP protection, and although the limited membership of the GPA makes agreement somewhat easier in this than in other areas.

It nevertheless is clear that within the foreseeable future it will not be possible to progress towards stronger IP protection in the WTO context. On the contrary: as the debate around TRIPs has amply shown, there is strong political pressure from some countries to call into question the merits of what has been achieved, to contest it, and – where possible – to limit its impact. The TRIPs standards (which are thought of as minimum standards of IP protection³) are interpreted as restrictively as possible and no great efforts are made to enforce them.

For the EU with its knowledge-based economy, the protection of Intellectual Property remains a vital interest. This is reflected in the 2006 “Global Europe” Strategy, which states inter alia that:

“We will require a sharper focus on market opening and stronger rules in new trade areas of economic importance to us, notably intellectual property (IPR), services, investment, public procurement and competition.”

“Free Trade Agreements (FTAs), if approached with care, can build on WTO and other international rules by going further and faster in promoting openness and integration, by tackling issues which are not ready for multilateral discussion and by preparing the ground for the next

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¹ A temporary waiver was adopted by Decision of the WTO General Council of 30 August 2003: Implementation of paragraph 6 of the Doha Declaration on the TRIPs Agreement and public health, WT/L/540. This Decision will be replaced by a permanent amendment of the TRIPs Agreement that has been adopted on 5 December 2005. For that amendment to enter into force, ratification by two thirds of the WTO membership is necessary. At the time of writing (2012), roughly one half of the WTO membership had accepted the modification.

² WTO Committee on Government procurement, GPA/113 (2 April 2012)

³ Cf. Art 1 (1) of the TRIPs Agreement: “.... Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement...”

level of multilateral liberalisation. Many key issues, including investment, public procurement, competition, other regulatory issues and IPR enforcement, which remain outside the WTO at this time can be addressed through FTAs.”

“The EU should seek to strengthen IPR provisions in future bilateral agreements and the enforcement of existing commitments in order to reduce IPR violations and the production and export of fake goods.”

The IP chapters that are contained in bilateral agreements negotiated after 2006 or that are currently under negotiation seek to implement this strategy.

2. The EU's economic interest in IPRs

For a strategy to be successful, it must not only be successfully implemented, but it must also be built on a correct analysis of the offensive and defensive interests that need to be taken into consideration. Stating that the EU has an interest in strong IPR protection is correct as a general statement, both with regard to domestic and international legislation. However, the ideal level of protection is a delicate balance. It needs to take into account not only the interests of domestic industry and consumers, but also foreign trade interests.

While trade generally conducive to a mutually beneficial distribution of labour and natural resources on a worldwide scale, national economies and individual operators will usually act according to their self-interest:

- to sell with the highest possible profit (which often means: at the highest possible price), and
- to purchase at the lowest possible cost.

Intellectual property rights have an impact on both. The prices for branded or copyrighted products or for patented technical know-how are higher than they otherwise would be. The right-holder can make higher profits, and the purchaser must pay a higher price. The ability of a country's economy to profit from IP will therefore depend on whether it is an exporter or an importer of goods and services benefiting from IP protection. The situation is far from uniform and may vary from one economic sector to another.

2.1 World leader in upmarket goods

Different sectors of the economy rely on different sets of IP rights (for example, the computer software industry on copyright, and the textile industry on trademarks). Likewise, the situation of different sectors may have different effects on the overall competitiveness of the EU: in some sectors, where the EU is an importer rather than exporter, the interest in stronger IP rights will not be as strong as in other sectors where EU industry is more innovative than its non-EU competitors.

Some general assumptions on the European interest in IP protection can, however, safely be made.

The EU has the leading role in the world economy as a producer and exporter of *high-quality, upmarket goods*: the rest of the world is keen on European lifestyle, food, and clothing. Also in more technical areas, the most renowned products with the most sought-after brand names stem from European production. This advance in the domain of high quality is clearly illustrated by **Figure 1** in the Annex, which shows that, if the EU industry's position on world markets is still good, it is due to its strong export performance in upmarket products. It is a striking fact that upmarket products now account for 50% of European exports and a third of world demand. By contrast, with regard to medium and low range products, the position of the EU is associated with negative values.

This competitive advantage with regard to up-market goods is found not only in the area of luxury consumer goods, but across the whole range of EU specialisation including intermediary goods, machines and transport equipment. It actually reflects a new form of “vertical”, qualitative, intra-

sectoral international division of labour (i.e. according to the level of product range), which differs from the classical “horizontal” inter-sectoral specialisation. Whereas the EU globally seems to have lost its competitive advantages on some basic consumer goods, this is not the case with regard to top-of-the-range goods for which the EU is in a very strong global position and which has not been eroded in the recent past.

This contrasts sharply with the situation of other developed economies such as the US or Japan. The US experience a deficit across all ranges, whereas Japan shows no particular weakness or strength in any of them.

Figure 2 in the Annex shows that with regard to the proportion of total exports accounted for by upmarket products, the EU is in second place in the world just behind Japan but ahead of the US. Upmarket products account for 52% of Japanese exports and 48 % of European exports, but for only 41 % of US exports. In contrast, they still account for less than 15 % of Chinese exports. This shows the EU capacity to not only produce but also sell expensive upmarket products, which can be sold at a higher price than those of its competitors due to a set of non-price factors such as innovative feature, quality, reputation, continuity over time or related services.

On this basis, it can generally be assumed that the EU must have a strong interest in strong protection for trademarks. The reliance on trademark protection is of vital importance for nearly all sectors of industry, and plays a vital role in their international competitive strategy.

For example, even if the EU has lost much of its former competitiveness in clothing and footwear (which is reflected in both in export statistics and the huge job shift to low wage countries), European producers are still leading as designers of high quality clothing and footwear. Trademark and design protection rights enable them to reap huge profits worldwide, even if the actual production is in many cases outsourced or licensed to production sites outside the EU.

Similarly, despite a sharp international competition, the EU is able to export agricultural products at high prices if they are associated with a brand name that guarantees high quality. For this reason, the EU has a clear interest in the world-wide recognition and protection of Geographical Indications, such as Champagne, Parma Ham, Scotch Whisky, etc.

Thus, there is a clear interest for the EU to ensure that high standards for the protection of trademarks and Geographical Indications are introduced and respected worldwide.

This sets a clear agenda for international trade negotiations. However, the EU interest is a conservative one in the area of trademark law⁴, given that the international standards set out by international conventions (Madrid Agreement and Protocol, Paris Convention, TRIPs) seem largely sufficient, whereas it is an offensive one in the area of Geographical Indications, where protection standards are still lower than what seems desirable. Indeed, one of the major recent successes of the EU is to have built a coalition of WTO Members to support a stronger protection for GIs at multilateral level⁵, whereas other countries (in particular the U.S., Australia, Canada, New Zealand, Chile, Argentina, Japan and some other developing countries) are seeking to promote a far more restrictive approach.⁶

⁴ Enforcement of trademark rights remains a concern particularly in emergent economies such as China, India, and others. The issue has been addressed in the Enforcement Strategy Paper adopted by the Commission in 2004.

⁵ This position is reflected in the joint Communication on Draft Modalities for TRIPs Related Issues (Document TN/C/W/52), which was submitted by over two thirds of all WTO Members, led by the EU, Brazil, India, China and Switzerland, in the run-up to the July 2008 Ministerial meeting of the WTO

⁶ This approach is summarized in a so-called "alternative Joint Proposal", which basically suggests a mere GI database limited to wines and spirits. According to the Joint Proposal, participation in the system for notification and registration would be strictly voluntary, no WTO Member would be required to participate, and participation could be terminated at

It seems thus extremely difficult to make significant progress on GIs within the WTO framework beyond the relatively weak and imprecise provisions currently found in the TRIPs Agreement – which is why the EU must also use bilateral negotiations for that purpose.

With regard to substantive copyright and patent law, the situation may require somewhat more differentiation. While in some economic sectors stronger IP protection clearly works out favourably for the EU economy, this may be different in other sectors, depending on whether, in a given sector, the EU is a net seller or a net purchaser of IP protected products. As the EU trade balance is not positive in all high tech sectors⁷, it might be worthwhile to make an assessment of the specific EU interest with regard to each of the sectors most concerned by IP law.

Such a *tour d'horizon* would probably reveal that high standards for film copyright are probably of greater interest for the US than for the EU, whereas the protection of registered and unregistered design might be a priority for the EU rather than the US. The sound recording industry (which, due to file sharing on the internet has lost much of its ability to generate profits) is controlled by five conglomerates that are too globalized to be described as American or European, and in the absence of a study that is based on a convincing methodology one is probably not mistaken by simply assuming that the benefit of increased copyright protection (be it in terms of longer duration or better enforcement) would be distributed among shareholders (and to a lesser extent among right-holders) worldwide, whereas the expenses would have to be borne by the consumers in those countries who introduce such stepped-up protection.

The pharma industry, too, is highly globalized, and although the “American” or “European” identity of different companies is still easily discernible, most of them operate on global markets. But there are huge differences with regard to the effective patent protection available in different countries, to the effect that the profits reaped by the research-based pharma industry is mostly paid for by European, American, and Japanese, consumers (or their health insurance). Any increase of patent protection, wherever it takes place, would therefore be beneficial to shareholders, but it would be a far shot to say that it would be more beneficial for the EU than for America, or vice versa. In actual fact, there is no doubt that patent protection – especially in wealthy countries like the EU, the US, Japan – is what provides the industry with the necessary means to invest in research and innovation, but the industry’s investment decisions will often rather depend on the availability of talented researchers, liberal ethical standards (e.g. for stem cell research) and similar factors rather than on the availability of longer patent terms in the country where the investment is made. Thus it can make sense to set up important research facilities in countries like India or Brazil, even if the patent protection there is not the strongest. The country where, due to strong patent protection and similar factors, a pharma company is best able to generate high profits is thus not necessarily the country in which it decides to place its research or production facilities. Similar considerations apply to the producer of crops or biochemicals.

While the IP Chapters negotiated following the 2006 Global Europe Strategy contain detailed substantive rules on patents and copyrights, those rules usually do not go far beyond what is already foreseen in the TRIPs Agreement.

Another issue that plays an important role in IP negotiations (although it has more to do with fair competition than with intellectual property) is the protection of test data. Article 39.3 of the TRIPs Agreement obliges WTO Members to protect undisclosed test or other data that is submitted to public authorities in order to obtain marketing authorisation for new pharmaceutical or of agricultural chemical products against disclosure and unfair commercial use. However, TRIPs contains no exact provision how this protection is to be achieved. In bilateral IP chapters, the EU usually seeks to obtain

(Contd.) _____

any time. Participating Members would only commit to ensure that the database is consulted, without any legal effect ensuing from this consultation.

⁷ Cf. Annex, **Figure 3**

more precise commitments, which are based on relevant provisions of Community law. Confidential data should be kept confidential for an unlimited period of time. By contrast, the period for “non-reliance” is usually the subject of much haggling, and the EU has several times settled for protection periods that are shorter than those applying in Europe.⁸

2.2 Enforcement of IPR

The TRIPs Agreement includes a chapter on enforcement, but experience shows that those provisions leave a wide margin of interpretation. Like other industrialised countries, the EU has consistently taken the position that the TRIPs provisions on enforcement make IPR enforcement a task that States should deal with *ex officio* (for example through border measures, administrative action or, in serious cases, through criminal prosecution), rather than just leave it to right-holders to enforce their rights through civil action. The reason is that IP infringement today often is associated with organized crime and takes place at huge commercial scales. It is hardly possible for individual right-holders to defend themselves against mafia structures, and it should also be noted that such structures, if they are not consistently fought against, can develop into a serious threat for a country’s economic development.

Unfortunately, however, many countries tend to have a rather minimalistic attitude towards the TRIPs enforcement regulations: they do only what is strictly necessary, and even this only with a certain lack of zeal.

Against this backdrop, the EU’s interest is not to introduce more or stricter enforcement provisions, but to promote a better understanding and application of the existing ones. In other words, the objective is not “TRIPs-plus”, but “TRIPs-better”. This objective is served through the inclusion of more detailed enforcement provisions (based on the standards derived from the legislation of the EU and its Member States) into bilateral IP Chapters, and through a stand-alone multilateral agreement on IP enforcement, the ACTA.

2.3 Conclusion

As a conclusion, it can be said that the EU, due to the knowledge-based orientation of its national economies, has a strong interest in all sectors of IP. But as regards substantial IP provisions, that interest is greatest with regard to GIs, where internationally accepted standards are still very weak.

Besides this, the main focus of attention is on enforcement, where the EU seeks to promote a better understanding of TRIPs standards.

3. Intellectual Property in International Trade Agreements

3.1 Globalisation of IPRs:

In recent years, there has been a remarkable trend towards what may be called the gradual globalisation of Intellectual Property Rights.

⁸ For example, while the protection period for pharmaceutical test data in the EU can extend to a maximum of 11 years (cf. Article 10 of Directive 2001/83/EC, as amended by Directive 2004/27/EC), the Agreements concluded with Korea (Art. 10.36 (3), Peru and Colombia (Article 231 (2)), and Ukraine, foresee protection periods of five years. The text negotiated with Central America contains no explicit reference to clinical test data, but it is clear from the context of the negotiations (and explicitly mentioned in a Declaration by the EU that is attached to the Agreement) that, under application of the MFN principle, the EU may rely on the standards agreed between Central America and the US in Art. 15.10 of the CAFTA Agreement, i.e. a protection period of five years.

Originally, IP was granted by a local or national authority and applied only within the jurisdiction of that authority. Right-holders from outside such jurisdiction could only enjoy protection if their country of origin had agreed to grant the same protection on the basis of reciprocity. The increase of commercial exchanges led, from the 19th century onwards, to the conclusion first of bilateral, then of multilateral conventions on IPRs.

The most important of these Conventions are the Revised Berne Convention (on copyright, concluded in 1886) and the Paris Convention (on industrial property, concluded in 1883).

With the conclusion of the TRIPs Agreement in 1994 a new era has set in: intellectual property is no longer international, but global. The reason is that TRIPs makes the granting of a minimum level of IP protection a requirement for all countries wishing to join the WTO. As a result many states that before had hesitated to sign up to the Berne and Paris Conventions, decided to do so after 1994. This means that both Conventions, which previously had been adhered to by a restricted number of (mainly industrialised) countries, are now of nearly global application.

3.2 The governing principles: National Treatment, minimum protection level, and Most-Favoured-Nation Treatment

Both the Berne and the Paris Convention enshrine the principle of National Treatment:

“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.” (Article 5 (1) Revised Berne Convention)

“Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with.” (Article 2 (1) Paris Convention)

The result of this principle is that an author/inventor from country A may enjoy in country B a higher level of protection than in his own country, if the general level of protection is higher in B than in A.

Both the Revised Berne Convention and the Paris Convention are in part, by reference, included into the WTO TRIPs Agreement⁹. Moreover, TRIPs explicitly re-states the principle of National Treatment in its Article 3. In addition, Article 4 of TRIPs Agreement establishes a further principle in favour of foreign right-holders: the Most-Favoured Nation-Treatment, which, coined on the model set by the GATT, obliges WTO members to “*accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property (...)*”.

The practical consequence is that all IPRs enshrined in domestic legislation in any WTO member and in any signatory state to the Berne and Paris Conventions benefit not only to domestic, but also to foreign right-holders. If, for example, a country extends the duration of its copyright term, all authors from all other WTO members will automatically benefit from this by virtue of the TRIPs Agreement, even if in their home country the copyright term remains as it was.

Much in the same vein, IP chapters contained in bilateral Trade Agreements will usually apply *erga omnes*: If, for instance, countries A and B agree to introduce specifically high standards of IP protection in both countries, right-holders from country C may also invoke these standards.

⁹ See Articles 2, 9.1, 15.2, 16.2, 16.3 and 22.2 TRIPs

As a result of the principles set out above, IP is today a truly internationalised domain of legislation, where every legislator must be aware that whatever measure he is adopting will have an impact not only domestically, but far beyond:

- Introducing new – stricter – IP rules benefits to domestic as well as foreign right-holders and may in some cases attract new investment, but it also can lead to higher prices for consumers; if the country at question is a net importer of IP-relevant goods and services, this can put a burden on the trade balance;
- To change the international IP law, multilateral agreements are the usual way forward. But also bilateral agreements have effect *erga omnes* and thus contribute to the construction of an international framework.

3.2 The Shift to Bilaterals

Given the difficulties to push forward the IP agenda on a multilateral level, a shift has taken place to include very detailed provisions on IP in bilateral trade agreements. The trend has been set by the US, and the EU has followed the example.

With respect to the EU, this shift towards bilateral IP chapters becomes easily discernible when comparing agreements concluded before and after the 2006 Global Europe Communication.

Prior to 2006, the bilateral agreements negotiated by the EU already contained IP provisions. But these were of a very general nature, following three standard models that were adapted to the state of economic development of, and the closeness of economic and political relations with, the country concerned:

- Agreements concluded with **European Third Countries** (Balkan, former Soviet Republics) usually contain a general clause obliging the other party to “... *provide, by [...], for a level of protection similar to that existing in the Community, including effective means of enforcing such rights.*”¹⁰ This general clause is accompanied by a commitment to accede to **all** international conventions to which EU member states are parties, or which are applied by the EU.
- Agreements concluded with **Non-European Third Countries** (most of them developing countries¹¹) contain a clause obliging the country at question to “...*grant and ensure adequate and effective protection of intellectual property rights in accordance with the **highest international standards**, including effective means of enforcing such rights provided for in international treaties.*”¹² This is accompanied by a commitment to join **certain** WIPO conventions within a deadline, and a “soft” commitment to join other conventions.
- “European” standards are thus, according to the terminology used by EU trade law, higher than the “highest international standards”.
- In the Cotonou Agreement between the EU and **ACP countries**, the Parties “recognise the need to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights, and other rights covered by TRIPS including protection of geographical indications, **in line with the international standards** with a view to reducing distortions and impediments to bilateral trade”. There is a soft commitment to adhere to TRIPS, the CBD and the conventions mentioned in TRIPS (Paris, Berne, Rome). In addition, Parties

¹⁰ cf. the EU Partnership and Co-operation Agreement with Russia, Article 54 and Annex 10

¹¹ This concerns, for example, agreements with Mediterranean countries (MEDA), with Mexico, South Africa, Chile, etc. On-going negotiations with two regional blocks: Mercosur and Gulf Co-operation Council also follow this line.

¹² cf. the EU-Chile Association Agreement, Article 168

“may consider the conclusion of agreements aimed at protecting trademarks and geographical indications for products of particular interest of either Party.”¹³

This differentiated approach is justified by the fact that agreements with European third countries have been concluded with the aim of initiating a process of integration of the countries concerned into the EU interior market. Necessarily, this presupposes that the EU standards on IP protection are taken over completely. The approach towards non-European countries has, by contrast, been guided by their lower level of development and the fact that there is no similar ambition to integrate them into the interior market. The approach towards ACP countries takes full account of their status as developing economies.

The US, for their part, have been keen on including more precise language into their bilateral agreements. The IP chapter included in the FTA with Morocco is 37 pages long, and chapters concluded with CAFTA (31 pages), Chile (32 pages), Singapore (22 pages) and Australia (29 pages) are of similar size.¹⁴ With their detailed provisions, these agreements considerably modify and strengthen the IP legislation in the countries concerned. Whoever wants, for example, to inform himself on the Moroccan IP legislation, should read the US-Moroccan FTA alongside the relevant domestic legislation.

This shift to the bilateral level, especially the IP chapters negotiated by the US, has been criticised as “bullying developing countries to introduce unnecessarily high standards”¹⁵, and undermining the multilateral system by generally limiting the use by developing countries of flexibilities and exceptions allowed for in the TRIPs Agreement.¹⁶

3.4 Agreements negotiated after 2006

As from 2006, there has been a visible shift in the EU approach towards IP. Rather than summary statements on “European”, “international, or “highest international” standards, the bilateral trade agreements now contain detailed IP chapter that, regarding their length and attention for detail, resemble those that had already previously been contained in many agreements negotiated by the US. But there are some differences in the details: while the FTAs concluded by the US use language taken from US legislation, the new generation of “Global Europe” IP Chapters builds in part on international conventions and in part on EU Directives.

At times, this can lead to difficulties. In the FTA negotiations between the EU and Central America, for example, the Central American countries, having signed the CAFTA with the US only shortly before, could not realistically be asked to sign up to a new set of similarly detailed rules inspired by EU law, whereas the EU could not be expected to sign up to the CAFTA set of rules that, in many details, differ slightly from the EU standards. What resulted from these negotiations was a smallest common denominator between EU-inspired and US-inspired provisions, the main added

¹³ cf. Article 46 of the Cotonou Agreement

¹⁴ Full texts of these agreements are available at:
http://www.ustr.gov/Trade_Sectors/Intellectual_Property/IP_Chapters_in_FTAs/Section_Index.html

¹⁵ Oxfam Briefing Paper 33: *US bullying on drug patents: One year after Doha*
http://www.oxfam.org.uk/what_we_do/issues/health/bp33_bullying.htm;

¹⁶ cf. David Vivas-Eugui, Regional and bilateral agreements and a TRIPS-plus world: the Free Trade Area of the Americas (FTAA); Pedro Roffe, Bilateral agreements and a TRIPS-plus world: the Chile-USA Free Trade Agreement, Quakers United Nations Office, Geneva, 2004; “TRIPS-plus through the back door,” published by GRAIN in cooperation with SANFEC (South Asia Network for Food, Ecology and Culture: <http://www.grain.org/publications/trips-plus-en.cfm>); an “Open Letter concerning IPRs and Access to Medicines in the US-CAFTA”, addressing the use of TRIPs-plus clauses, was sent by Médecins sans Frontières (MSF) to USTR Robert Zoellick on 15 October 2003.

value of the agreement being that Central America agreed to register a number of European GIs through a fast-track procedure.¹⁷

For the IP Chapters negotiated since 2006 there was no template that was cast in iron. But there certainly is a number of desiderabilia that can be drawn from TRIPs, the most relevant international conventions (such as the Berne and Paris Conventions, the Madrid Protocol, UPOV, etc.), and EU legislation (such as the Copyright Directives¹⁸, the Enforcement Directive¹⁹, relevant parts of the E-Commerce Directive²⁰, and EU legislation on clinical test data²¹). In its negotiations, the EU always seeks to adapt this wish-list to the capabilities and state of economic advancement of the country or countries concerned. On the other hand, it is clear that we are seeking to improve the protection of IP granted by those countries. A mere re-confirmation of mutual obligations that already are enshrined in TRIPs would hardly represent an added value.

This reluctance to use a one-size-fits-all-approach and the need to reflect the newest evolvments of EU legislation and experiences drawn from prior negotiations are the reasons why the chapters that result from the negotiations are not identical in each case. A further reason, obviously, is that in each negotiation some compromises must be made: while EU negotiators will always seek to obtain the best result they can get, they are usually not in a position to dictate their conditions. But that also means that it would be inappropriate to term those IP chapters a "diktat": they reflect what the other side is able to accept.

Without going too much into details, the main features of the new IP chapters can be summarized as follows:

- Enhanced protection for GIs, which is usually achieved through agreeing on a list of GIs that will be registered under a fast-track procedure;
- Extended copyright terms (70 years *post mortem auctoris*, as in EU legislation);
- A clarification of mutual commitments under Art 39 TRIPs regarding the protection of clinical test data (non-disclosure and non-reliance), in the ideal case based on EU standards;
- A clarification of the enforcement provisions set out in the TRIPs Agreement.

3.5 The ACTA

Although ACTA, the Anti-Counterfeiting Trade Agreement, is not a part of a bilateral trade agreement, it should nevertheless be mentioned here, as it is intrinsically connected with the EU's bilateral negotiations.

ACTA is not a full-fledged agreement on IP. In fact, it does not deal at all with substantial IP standards (such as the duration of copyright or patent terms, or the patentability of certain kinds of

¹⁷ Cf. Art 245 of the Agreement, which, in Art. 248, also strikes a delicate balance between geographical indications and rights conferred by trademarks.

¹⁸ Directive 91/250/EEC on the legal protection of computer programs, Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Directive 96/9/EC on the legal protection of databases, Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), Directive 2006/116/EC on the term of protection of copyright and certain related rights (codified version)

¹⁹ Directive 2004/48/EC on the enforcement of intellectual property rights

²⁰ Notably the provisions regulating the liability of internet service providers in Articles 12 – 15 of Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce

²¹ Notably Art 10 of Directive 2001/83

inventions, or the scope of exclusive rights conferred by a trademark). It deals simply with the enforcement of existing IPRs, that is, of rights that authors and inventors already have.

And even in this area, ACTA does not introduce any new rules or set any new standards. It constitutes merely a common denominator of how the EU and the other parties of the Agreement interpret and apply the (already existent) enforcement provisions of the TRIPs Agreement. In that sense, the ACTA is not even “TRIPs-plus”, but it merely adds precision and stringency. For the EU (and, supposedly, for all other signatory parties) nothing in domestic legislation and practice would have to change if the ACTA came into force. Everything that is foreseen in ACTA is already foreseen (at times in greater detail) in EU Directives and national legislation.

Some will ask: why is the EU negotiating an international agreement that does not lead to substantial changes for any of the parties involved? And if it is all so harmless, why is there so much opposition against ACTA? I have no answer to the second question. But to the first question I can answer that ACTA is a trade agreement and that it is perfectly normal for a trade agreement to reflect what has first been introduced as a legal standard domestically. Indeed, the inverse case (i.e. negotiating an international agreement that would oblige EU Member States to substantially change their domestic legislation in the field of IPRs) would be unusual, and it is hardly likely that Member States would accept this “harmonization through international agreements”.

The real purpose of ACTA is that it creates a platform that other countries may be invited to join later on. And this would be particularly useful in the context of negotiations on IP chapters in bilateral trade agreements. Rather than negotiating lengthy and very complex enforcement provisions, those chapters could include the ACTA by reference, i.e. through a provisions saying that “both Parties shall accede to ACTA by (insert date)”. This would considerably facilitate the work of trade negotiators, and at the same time help ensuring uniformity between different agreements.

In actual fact, therefore, the ratification of ACTA would not change anything for European consumers and internet users. If, in a specific circumstance, the download of a file from the internet was legal before the entry into force of ACTA, then it will not be illegal afterwards. If it was illegal before, it will not become legal afterwards. Nor will ACTA, as far as Europe is concerned, lead to any change with regard to the means of enforcement that are available for right holders.

The ratification process for ACTA is stalled for now²², but the Commission has not yet given up the hope that the agreement could be ratified at a later stage. For this to happen, it will be necessary that, once the general excitement has calmed down, there will be an opportunity to open a new debate on the agreement that is based on a rational analysis of facts.

It is for this reason that the Commission has decided to refer ACTA to the ECJ, asking for a legal opinion on its compatibility with the EU Charter of Fundamental Rights. It seems very unlikely that the ECJ could answer this request in any other way than by saying that ACTA is perfectly compatible with the Charter, and that it actually contains nothing that is not already law in the EU.

²² The European Parliament voted to reject the Agreement on 3 July 2012, some six weeks after this speech was delivered. In his first reaction to the vote, Trade Commissioner Karel De Gucht announced that the Commission would continue to seek the opinion of the ECJ with regard to alleged violations of fundamental freedoms, which it would take on board when deciding on further steps. This appears to indicate that the Commission does not consider the debate to be closed:

Given that the main point of criticism against ACTA was a provision that allegedly obliges internet service providers (ISPs) to communicate to right-holders the names and addresses of persons who illegally download music and video files from the internet, it should be noted that in fact ACTA does not contain such an obligation, but only provides that signatory states *may* adopt such rules. Shortly after the rejection of ACTA by the European Parliament, the Bundesgerichtshof (i.e., the supreme judiciary instance in Germany for all civil and criminal matters) made public a decision (I ZB 80/11 of 19 April 2012) which obliges ISPs in Germany to communicate such data to right-holders not only where illegal downloads are made at a commercial scale, but also with regard to illegal downloads made for private use. This reaches far beyond what is foreseen either in ACTA or in EU legislation.

What will happen if ACTA is not ratified? The world would go on turning around, and the European Union would continue negotiating bilateral trade agreements with IP chapters as before, based on the strategic choices that were outlined in the 2006 Global Europe Communication. But the international credibility of the EU would surely suffer some damage: how can we ask China or Russia to improve their IP enforcement, if at the same time our own politicians reject ACTA and thus demonstrate that IPR are no longer a priority even within the EU?

4. Conclusion

In adopting the 2006 Global Europe Strategy the EU has made an important strategic choice, which reflects the paramount importance of intellectual property rights for a knowledge based economy. While the EU generally seeks to establish a high level of protection worldwide, including through bilateral negotiations, this approach can be said to leave sufficient room for manoeuvre to take into account both the development status as well as the closeness of its trade relations with the EU, of any trading partner with whom a bilateral agreement is sought.

The ACTA agreement is an important part of that strategy. It contains sound rules on IP enforcement, adding precision and stringency to what is already foreseen in the TRIPs agreement, while at the same time not surpassing the legal standards that are already contained in existing EU legislation.

It is to be hoped that this approach will contribute to a reliable and innovation-friendly business environment worldwide, both within and outside the EU.

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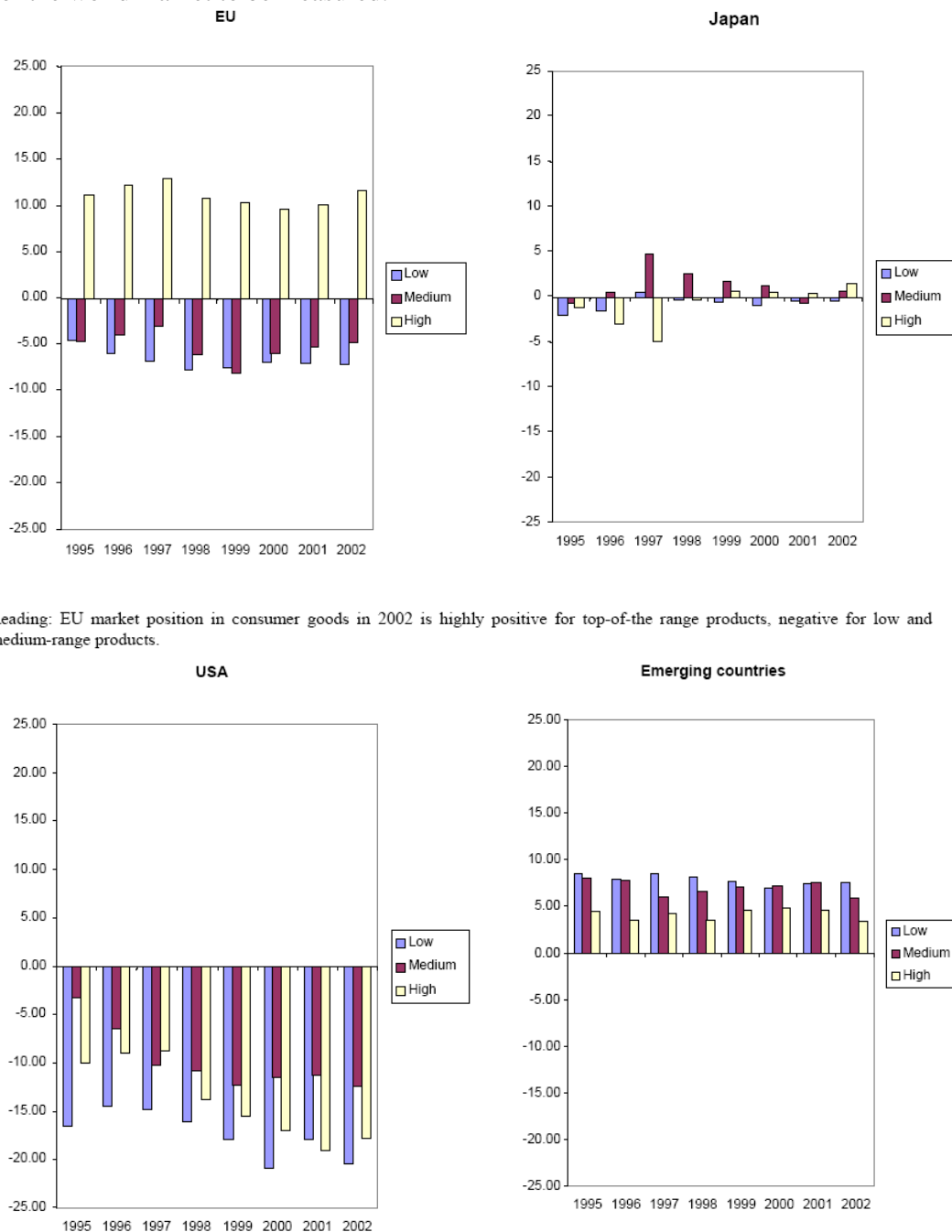
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Figure 1 –

Market positions for consumer goods by range (as a percentage of the world market, 1995-2002)

The analysis of market positions compares the imports and the exports of an economy at a specific production stage. This approach is suited to a situation in which the widespread fragmentation of international value added chains is constantly increasing imports (components, semi-finished products, etc) in order to defend export market share: a country which maintains its share of export markets through a strategy of large-scale delocalisation of its supply of inputs could see its market position in the sector concerned worsen. This approach also enables an exporter's power in a given sector or branch of the world market to be measured.



Reading: EU market position in consumer goods in 2002 is highly positive for top-of-the range products, negative for low and medium-range products.

Reading: US position in consumer goods in 2002 is negative regarding all categories of product (upmarket, medium-and low range products). It is better for medium-range products than for low-range or upmarket products.

Source: CEPII (2004), European industry's place in the International Division of Labour: situation and prospects.

Figure 2 - Proportion of exports accounted for by upmarket products (%)

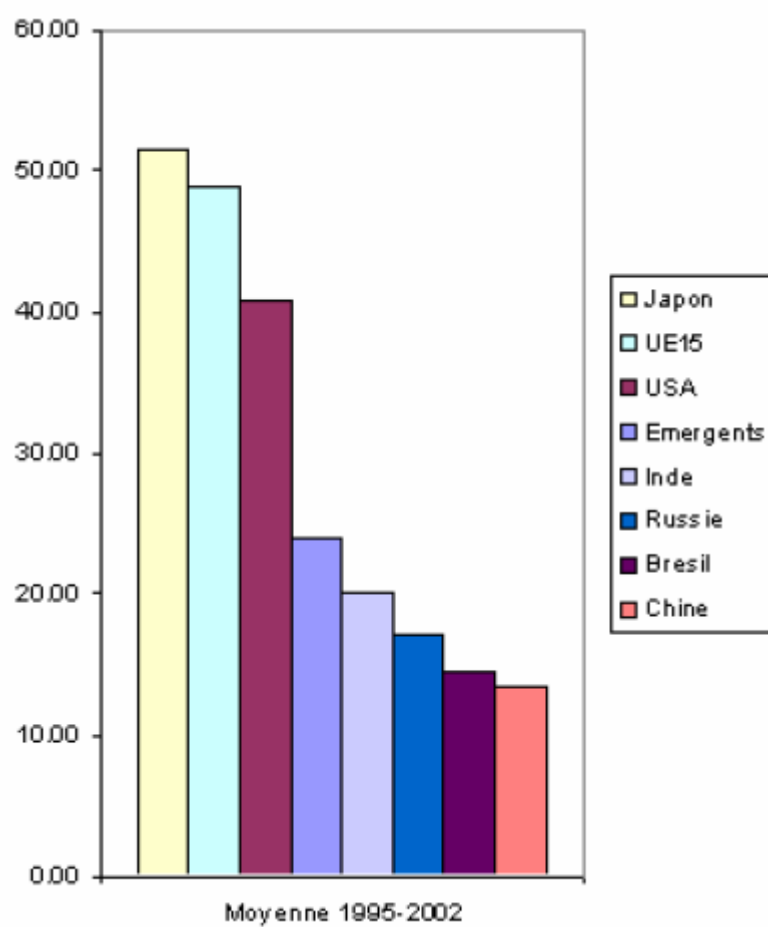
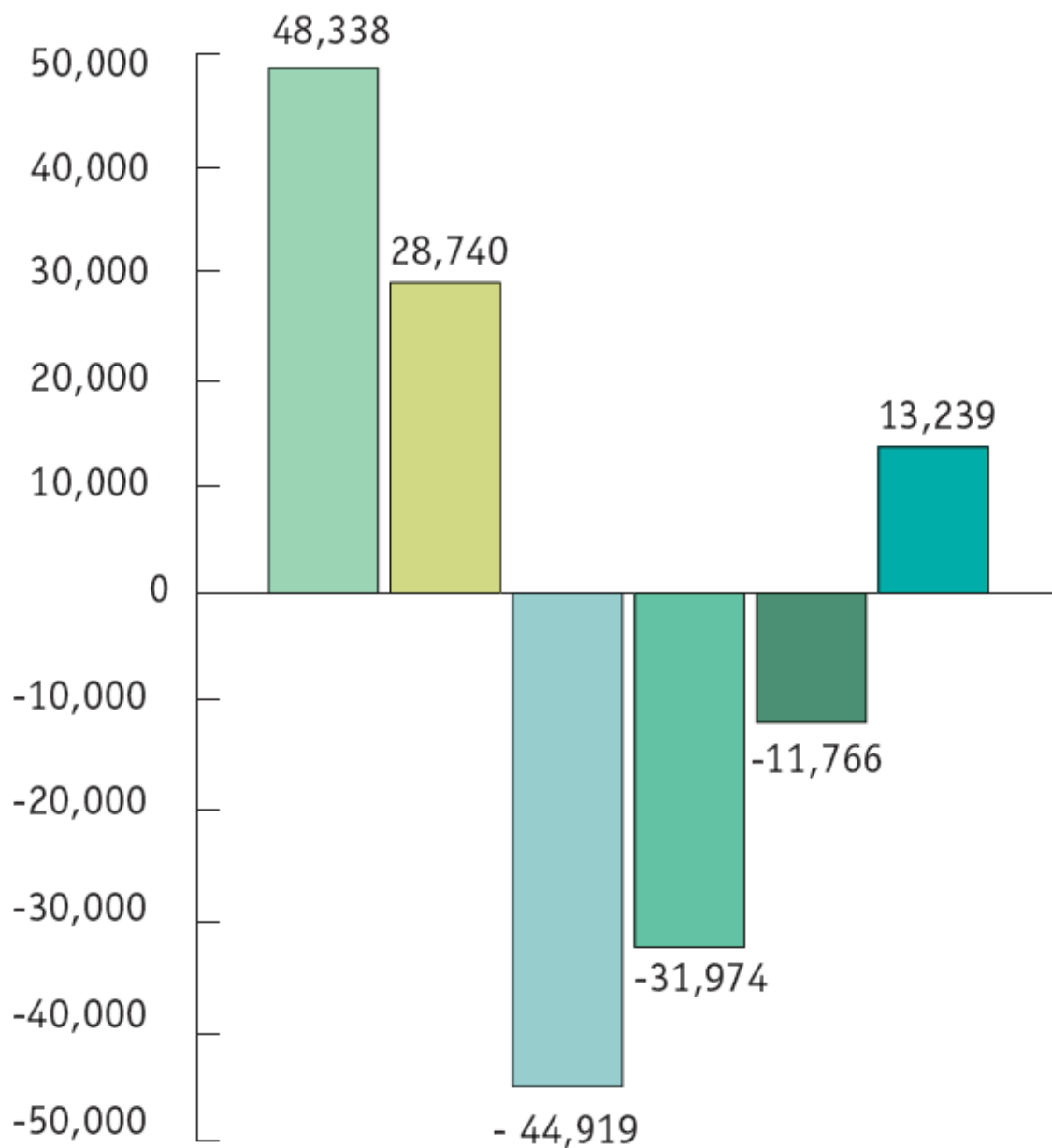


Figure 3 - EU 27 Trade balance – high technology sectors (€million) - 2011



- SITC 54 Pharmaceutical products
- SITC 71 Power generating machinery and equipment
- SITC 75 Office machines and computers
- SITC 76 Telecommunication, sound, TV, video
- SITC 77 Electrical machinery
- SITC 87 Professional, scientific, controlling material

Source: Eurostat, COMEXT database, May 2012

Taken from: EFPIA, The Pharmaceutical Industry in Figures, 2012 Update, p.21

**Part IV –
Regional Integration, Development, and Human Rights**

European Trade Policy, Economic Partnership Agreements and Regional Integration in Africa

Isabelle Ramdoo and Sanoussi Bilal*

Abstract

The European trade policy is a potentially powerful instrument of foreign and development policy, which has also been used to promote regional integration among developing countries, notably in Africa. In this context, the EU has been painstakingly negotiating economic partnership agreements (EPAs) with its Sub-Saharan African partners over the last decade. What has been so far the impact on the regional integration dynamics in Africa? And what lessons can be drawn for the future of the European Union (EU) trade and development agenda? While full of good intentions, the EU approach has generated mixed results at best. The EU has provided significant support to regional integration in Africa, but its approach and priorities tends to differ from those of its African partners, and the EPA process has often been at odds with the African integration dynamics. Drawing on this experience, seven key lessons for the EU approach are identified: (i) avoid mixed signals and conflicting incentives, (ii) do not underestimate the challenges for EU partners to negotiate in a regional configuration, (iii) 'better' can be the enemy of 'good enough', (iv) be more transparent on the balance between interests and development principles, (v) regional integration cannot be externally driven and is often characterised by the lowest common denominator among partners, (vi) regional integration is a highly political matter, not just a technical issue, and (vii) one instrument (i.e. trade policy) should not aim at addressing too many objectives. As a consequence, a more modest approach to harness EU trade policy to regional integration in developing countries might prove ultimately more effective.

1. Introduction

Africa and Europe share at least one thing in common: trade policy is at the core of their respective foreign policies, although objectives, focus and methods differ significantly. Indeed, trade policy is a core element of the European Union's foreign policy as a means to secure prosperity, jobs and growth in Europe, as well as promote development (see EC, 2006). Over the last 10 years, the EU has concluded a number of free trade agreements (FTAs) with its trading partners, whenever possible in the context of regional groupings. Today, operational FTAs account for approximately 30% of its trade. Since 2002, the European Union (EU) has entered into the negotiation of Economic Partnership Agreements (EPAs) with its African, Caribbean and Pacific (ACP) trading counterparts, in an attempt to turn what was considered as a unilateral trade regime, at odds with the rules of the World Trade Organization (WTO), into WTO-compatible, reciprocal - though asymmetric - trade agreements. The EPAs are meant to foster the smooth and gradual integration of ACP economies into the global economy, notably through the process of regional integration.

Over ten years after the start of the negotiations, the results are rather disappointing. Only 36 ACP countries have signed or initialled an (interim) EPA. All are still continuing negotiations towards final regional EPAs, with the exception of the 15 Caribbean states that have concluded a CARIFORUM-EU EPA at the end of 2007 already. For several African countries, however, there clearly is a diminishing appetite for conclusion as time goes by. Conceived as development tools, EPAs have in most cases failed to generate the required consensus to reach timely agreements. In Africa, there is a sense of frustration: EPAs are often perceived as essentially the price to pay to keep the desired preferential market access to the EU, and should thus be highly flexible and asymmetric in favour of the ACP. On

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the EU side, EPAs were first perceived as comprehensive free trade agreements aimed at fostering most needed economic reforms and contribute to the creation of well-integrated and regulated regional markets, essential to promote sustainable and balanced growth. With such stark differences in perception, and the disappointment that ensued, ambitions in what the agreements should contain were significantly reviewed downwards, which may still not prevent some countries to ultimately abstain from concluding an EPA with the EU.

Did the EPAs have a significant impact on regional integration? Europe strongly believes in the merits of regional integration as an important tool for development and political stability. Its own history speaks for itself. It has also consistently supported and advocated for regional integration in its foreign policy. In Africa, since the 9th EDF, it has provided direct financial support to regional economic communities (RECs), despite absorptive capacity challenges. But is the combined trade and development agenda entailed in an EPA an appropriate tool to support regional integration? From what can be observed from the state of play of EPAs, it seems that they might be creating additional challenges, in particular in regions where some countries belonging to a customs union concluded an agreement while other countries remain outside the agreement. But EPA negotiations and agreements seem to already have had some positive effects. They have contributed to provide a new impetus to the regional integration dynamics in some parts of Africa. Arguably, EPAs have at times stimulated the implementation of Africa's own regional agenda and have contributed to outline ways to address some inherent challenges, such as overlapping memberships. The success of this renewed dynamism became subject to timing and sequencing of engagement with third countries, including the EU.

The paper outlines the somewhat contrasting African and European approaches to regional integration that have shaped the relationship between the two partners. It seeks to address the question of the relevance of the European trade and development policies towards regional integration in Africa. While it acknowledges the wide support of the EU, it also discusses some of the complexities, which ultimately resulted in disappointing outcomes and tensions. Finally it looks at some of the lessons of the EPA negotiations for EU policies, focusing on the mixed signals of the latter's own policies, ambitions and expectations.

The discussion is organised as follows. Section 2 gives a general background on EU's and Africa's trade policy. Section 3 outlines the somewhat contrasting African and European approaches to regional integration, that have shaped the relationship between the two partners. Section 4 seeks to address the question of the relevance of the European trade and development policies towards regional integration in Africa. While it acknowledges the wide support of the EU, it also points to some of the complexities, which ultimately resulted in disappointing outcomes and tensions. Finally, in conclusion, the paper identifies some key lessons for regional integration of the EU trade policy and in particular the EPA negotiations process, focusing on the mixed signals of the EU's own policies, ambitions, and expectations.

2. Background

The EU trade policy follows a multi-track approach, focused on (i) the multilateral trading system and negotiations at the WTO, (ii) bilateral trade policies, with the conclusion of FTAs, and (iii) unilateral trade preferences, as embodied in the EU generalised system of preferences, and until the end of 2007, specific trade preferences for the ACP countries only. In recent years, the EU has pursued a very active policy to help its products have better access to its trading partners' markets, through WTO and FTA negotiations. With the lack of progress at the WTO round of negotiations, but also driven by a desire to go beyond the scope of the WTO, the EU has redoubled its efforts to enter into a number of bilateral FTAs, several of which are still under negotiations.

Results have so far remained rather mixed: while the last generation of FTAs are quite deep and comprehensive in their coverage (e.g. the EU-South Korea FTA), the EU's FTA negotiations have not

always been successful (e.g. with Mercosur), and have been quite challenging at times. The EU's operational FTAs today represent, on average, less than 30% of its trade¹ and it has, so far, concluded no FTAs with its main trading partners. Indeed, in 2009, countries falling outside the realm of EU's FTAs, such as Australia, China, Japan, US, Russia and New Zealand, together accounted for 55.8% of European industrial imports, 46.7% of its industrial exports, 19.6% of its agricultural imports, and 44.7% of its agricultural exports.

Despite the rather open trade policy stance of the EU and its attempts to open up foreign markets for its exports, forecasts nevertheless suggest that the EU is unlikely to be able to maintain its leading position in the global landscape. Europe's share of global trade is expected to be slashed by a third by 2030 to reach 21%, compared to 33% in 2010 (see Buiter and Rahbari, 2011). If this trend is confirmed, Europe will therefore no longer be the world's largest trading partner, overtaken by Asian countries. In addition, the rise of new economic powerhouses in Asia and Latin America, coupled with the current economic and financial crisis, has already significantly weakened the EU's position. Finally, shrinking resources available for development assistance is also likely to negatively affect Europe's aid flows and therefore might result in the EU no longer being the largest aid provider in the world.

By contrast, over the past decade, Africa's economic prospects have been positive on several fronts. It has proved to be quite resilient to the economic and financial crisis and concluded the year 2011 by being the second fastest growing region, behind Asia. Despite numerous challenges, if the trend is maintained, Africa is set to be a high growth pole, opening up opportunities from investment and trade.

Trade policy is not less important on the African agenda. It is a core instrument of regional economic communities (RECs) and a key objective of broader continental integration. However, the level of intra-Africa trade remains disappointingly low, accounting in 2011, on average, for only 12% of Africa's total trade, compared to more than 60% within Europe and 35% within North American Free Trade Area (NAFTA) (see World Bank, 2012). This translates fundamental challenges within African RECs, which include, amongst others, relatively high trade barriers within and across regions and concentrated export structures of many countries, traditionally oriented towards non-African markets. It also reflects a lower complementarity of African economies. Paradoxically, trade among African countries themselves is often conducted under less favourable conditions than with the EU. In effect, most African countries benefited from generous trade preferences, covering almost 97% of their trade, under the former Lomé / Cotonou regimes. In contrast, few African countries have concluded effective FTAs among themselves. The increasing emphasis on boosting intra-Africa trade and on deepening regional integration, as endorsed by the 2012 AU Summits, should be seen as a way to correct this bias.

3. Contrasting African and European approaches to regional integration

Regional integration in Africa is not a new concept – it has been on top of the African agenda, when the idea of a “united Africa” was proposed in 1900 at the first Pan-African Congress. Similarly, the creation of the first African REC even pre-dates that of the EU: the Southern African Customs Union (SACU) was created in 1910. The wave of independence in the 1960s fuelled the desire to connect countries together economically and politically. The objective was one of pan-African solidarity and collective self-reliance, born out of a shared destiny. Championed by few key leaders, countries showed strong political will to construct endogenous regional initiatives, around geographical locations. Some of these were guided by short-term objectives of political cooperation, while others

¹ In 2009, the share of EU's industrial imports from operational FTAs accounted for 22.3% of total EU's industrial imports; industrial exports accounted for 27.7% of total EU's industrial exports; agricultural imports represented 24.3% of total agricultural imports and agricultural exports accounted for 29.1% agricultural exports.

were driven by wider visionary ambitions of deeper economic and political integration (see Dinka and Kennes, 2007).

Besides regional initiatives, the desire to have a broader continental approach to integration led to the creation of the Organisation of African Unity (OAU) in 1963, replaced in 2002 by the African Union (AU). With the exception of Morocco, all African countries are members of the AU. Today, sitting side by side at the AU, there are fourteen² RECs, eight³ of which are officially recognised by the AU. Their role, size, nature, scope, objectives and coverage vary greatly and progress achieved so far on different levels of integration has been significantly different (see UNECA, 2006).

The profusion of RECs across the continent has also created a number of challenges: overlapping memberships, conflicting agendas, and relatively low level of implementation of regional commitments at national level have, among other things, constrained progress in the regional integration agenda. Initiatives, such as the Tripartite FTA - between COMESA, EAC and SADC - or the recently launched Continental FTA, are renewed attempts to further the African regional integration agenda and improve its coherence and effective implementation (Dinka and Kennes, 2007; UNECA, 2006).

Although guided by strong geo-political considerations at the end of the Second World War, the European experience contrasts sharply with that of Africa (Draper, 2012). First, it started small, with only six countries. Shaped by history, the European construction is a clear attempt to stabilise the region after two successive world wars and to reinforce democracy in Europe. Economic integration was perceived as a key pillar to achieve this objective.

Over time, while gradually extending its membership to 27 countries today, the European construction has deepened, moving towards a common market, a common currency and increasingly, though with its own difficulties, towards more political integration with a coordinated foreign and security policy (see Mattli, 1999). Today, the EU is often viewed as a model of successful regional integration: it has been able to create a strong internal market, creating positive spill-overs for countries that were initially at a lower level of development, and has a solid institutional setting, that ensures regular coordination and harmonisation of policies with individual member states (see Bilal, 2005; Cameron, 2010; and Laursen, 2007). Interestingly, recurrent internal crises have so far always contributed to strengthen and deepen the European integration agenda and its institutions. This stands in sharp contrast with the experience in many African regions, where internal crises and tensions have often led to a weakening (and even collapse) of their integration process and institutions. The decision-making process, enshrined in the Lisbon Treaty, gives additional strength to the EU model. Finally, the strong mandate given to European institutions often allow them to define strong policies and notably drive EU's trade interests. But the European model has recently shown some of its limits. The current Euro crisis has triggered reflections within Europe itself, around deeper economic and political integration and what it means for the sharing of commitments and responsibilities when serious divergence emerges between member states.

While, at least in principle, the African and European approaches share the common objective of achieving deeper regional integration, in most cases in Africa, regional integration remains largely driven by the political sphere and the interest of some countries to deliberately remain in different groupings. Often countries have joined RECs to be part of the geographical configuration, but with

² These are Southern African Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA), Indian Ocean Commission (IOC), Intergovernmental Authority on Development (IGAD), Southern African Customs Union (SACU), East African Community (EAC), Communauté Economique et Monétaire de l'Afrique Centrale (EMAC), Economic Community of Central African States (ECCAS), Economic Community of Great Lakes Countries (CEPGL), Arab Maghreb Union (AMU), Economic Community of Western African States (ECOWAS), Union Economique et Monétaire Ouest Africain (UEMOA), Mano River Union (MRU) and Community of Sahel-Saharan States (CEN-SAD).

³ These are AMU, CEN-SAD, COMESA, EAC, ECCAS, ECOWAS, IGAD, and SADC.

lower ambitions regarding the implementation of the underlying integration agenda. This is largely shaped by the heterogeneity of countries and interests, which *de facto* entails different levels of ambition and priorities. Low levels of real political endorsement (as opposed to grand declarations) have resulted, in practice, in relatively low levels of transposition and implementation of regional commitments at national levels, which has further hampered the overall integration progress. Consider the case of COMESA, whose aim is to build a common market. Formerly established in 1994, in replacement of the Preferential Trade Area created in 1981, with seven countries, today COMESA has 20 members. Despite the fact that the major objective is to create a *common* market to date, only 13 countries⁴ are members of the FTA. The Customs Union was formerly launched in 2009. While it provides flexibility for countries to opt in or out, it creates the risk of variable geometry, thus creating an incomplete regional market, with many countries never joining the customs union. This approach contrasts sharply with the European experience, based on the principle of the community *acquis*, whereby new members that joined the EU did so on the condition that their accession would build on the existing construction and that they would implement existing commitments, notably in the context of the common market, with the necessary financial support to do so. It is reminiscent, however, of the multi-speed or variable geometry Europe based on differentiated approaches and level of commitments, as in the case with the Euro for instance.

While it often remains a model for Africa, the distinctively different approaches in practice to regional integration between the EU and Africa makes it difficult to apply European recipes for success to African challenges.⁵ There are certainly lessons to be learnt from the European processes but they need to be adapted to the African context. The next section raises the point of whether European policies have been successful in Africa.

4. Are European development and trade policies relevant for regional integration in Africa?

The EU strongly believes in the merits of regional integration, its experience speaks for itself. Regional integration is viewed as is an important tool for development, political stability and as vehicle for a smooth integration into the global economy and has continuously advocated for it in its external policies. This stems from its own 50 years of experience, having itself followed an impressive integration agenda, in terms of depth, scope and membership. Acting as a prime example of regional integration, it has provided extensive support to trade and development cooperation⁶ to developing countries, and in particular to African regional initiatives and RECs (see Bilal, 2012b; and Dalleau and Van Hove, forthcoming). Development support has mainly been channelled through the European Development Funds (EDF) although individual EU member states continue to provide separate bilateral support. Initiatives such as the ACP-EU Water Facility, the ACP-EU Energy Facility, the Africa Peace Facility and the EU-Africa Infrastructure Fund are all aimed at supporting key sectoral regional initiatives in view of strengthening regional markets. For the period 2008-2013, the overall support to regional integration under the 10th EDF amounts to €1.783 billion, twice as much as under the provisions of the 9th EDF. Much of the financial support is attributed to deepening regional integration agenda. In the Eastern and Southern African and Indian Ocean region, of the €645 million envelope, 85% are dedicated to the implementation of the customs union, EPAs, trade-related

⁴ In 2000, Djibouti, Egypt, Kenya, Madagascar, Malawi, Mauritius, Sudan, Zambia and Zimbabwe formed a FTA. Rwanda and Burundi joined in 2004. Libya and Comoros joined in 2006.

⁵ See for instance Bilal (2005), Cameron (2010), Chauffour and Maur (2011), De Lombaerde and Schulz (2009), and Draper (2012).

⁶ EU's vision on regional integration is found in its 1995 Communication "European Community support to regional economic integration efforts among developing countries" (EC, 1995). In 2008, the Communication on "Regional Integration for development in ACP countries" further outlined the way in which Europe intended to support integration progresses, including through trade policies, notably the EPAs, and through aid for trade (EC, 2008).

infrastructure and food security, 10% to deepen political integration through conflict prevention and governance and the remaining 5% to capacity building and support to non-state actors. Similar priority areas have been identified for other African RECs beneficiary of a regional envelop under the 10th EDF.

Despite increasing financial commitments, development support has not fully met its objectives. The European Court of Auditors has highlighted the low utilisation rate of committed EDF at the regional level, partly due to administrative red tapes in EU's procedures, which significantly slow down access to funds but mostly due to the limited absorptive capacity of RECs (European Court of Auditors, 2009). Furthermore, it stumbled over the hurdles of challenges linked to the specificities of African integration processes. The complex web of overlapping memberships, conflicting agendas, duplicating mandates and insufficient institution building have led to inconsistencies, incoherence and coordination problems within and among RECs, low levels of implementation of regional commitments at the national level and difficulties in pursuing an effective integration agenda due to the lack of existing mechanisms to deal with countries that fail to honour their commitments (see Mackie *et al.*, 2010).

While the EU remains firmly committed to supporting regional initiatives, as acknowledged once more in its 2012 Communication on *Trade, Growth and Development* (EC, 2012), there are however mixed signals as to the way it intends to pursue support to African RECs. Following the mid-term review of regional indicative programmes in 2012, the European Commission has written officially to all RECs to announce its intention to slash the financing of some regional projects, on the justification that those projects lacked maturity and had accumulated delays in preparation and implementation. While RECs recognise their limits to absorb funds and to develop solid and concrete bankable projects, the Commission proposal, which targeted projects in the pipelines, is likely to jeopardize some efforts already made and may put on hold implementation of many projects. Cutting the cloth might therefore not be the most effective way to stimulate RECs to improve and strengthen these weak projects.

More fundamentally, the EU seems to be reassessing its own approach to supporting regional integration. Why continue to earmark large amounts of aid funds for RECs if these do not have the capacity to absorb (i.e. spend) it? The European Commission response to cut funds seems to suggest that it believes it is perhaps less a question of capacity, which could then perhaps better be remedied with additional capacity building projects, than a question of political will or sheer inefficiency at the level of some of the RECs. If confirmed, the change of mood at the EU level may have further significant consequences for the forthcoming 11th EDF. Regional funds may be seriously reduced as compared to the current 10th EDF and/or may take different forms. These may include innovative financing for development, with a greater reliance on blending instruments for instance; greater support to international or regional institutions such as development banks, which have regional programmes; greater conditionalities to regional support and hence greater differentiation among RECs; greater support at national level for project with a regional dimension; etc.

A possible consequence of the EU's apparent shift of attitude may be to push RECs towards other partners that have more flexible financing instruments, little conditions attached and much bigger financial capacity to support large regional initiatives. The EU has often criticised those who had a loose purse, but these may become comparatively more attractive to some RECs. As a result, the political leverage and influence of the EU in Africa may be further eroded. Ultimately, this may turn out to be a good thing for Africa. It should stimulate some self-reflection within RECs and their member states about how best to mobilise domestic and international resources to pursue their respective integration agenda. Only those with greater commitment and credibility may succeed. It may also help African countries and regions to recognize that the needs of the continent goes well beyond what any development partner alone can realistically achieve, and thus reduce the over-reliance of some RECs on EU support. The presence of new partners in Africa should also steer some

reflection within the EU circles around their own involvement with Africa and how best they can adapt their support to fit in the change in the geo-strategic landscape.

The implications of EU trade policy for Africa have been more controversial. The trade relationship between the EU and Africa dates back to the early 1960s when trade preferences were granted to former colonies, under the Africa, Caribbean and Pacific group of states configuration⁷. These trade preferences, granted unilaterally by the EU since 1975 under the successive Lomé Conventions and the first years of the Cotonou Agreement, are clearly not compatible with the rules of the WTO. The EU obtained waivers, the second of which expired on 31 December 2007, by which date, the EU had committed to cease its unilateral preferences to the ACP (see ECDPM and ODI, 2006). In this context and in order to prevent trade disruption while promoting development, it entered into the negotiation of bilateral, reciprocal - though asymmetric - EPAs with its ACP partners. Basically configured on 6 and ultimately 7 regional groupings, these FTAs also require ACP partners to liberalise “substantially all trade”⁸ towards the EU in return. Enshrined in the Cotonou Agreement itself, one of the objectives of the EPAs is the promotion of regional integration agenda in view of facilitating the integration of ACP countries into the world economy.

Notwithstanding the good intentions of EPAs, the process has proved to be less straightforward and more complex than expected (see Bilal and Stevens, 2009). Once regional configurations were defined, the inherent challenges of African RECs quickly surfaced. The way that regions have been configured for EPA negotiations itself has become a challenge in Africa. Overlapping memberships ultimately resulted in countries having to opt in or out of regions, to which they traditionally belonged to, in order to negotiate the EPAs. With the exception of ECOWAS and EAC, no other regional EPA group had full membership mirroring that of the RECs. SADC for instance has 15 members⁹ – but for EPA negotiations, only 7 countries¹⁰ decided to negotiate under the SADC configuration, the remaining negotiating under other EPA configurations. Similarly, COMESA has not negotiated with its entire 20 members – while Egypt and Libya are not part of the negotiating process, only 11 countries made up the Eastern and Southern Africa group, a creation only to fit EPA negotiations.

Such patchworks have resulted in a number of challenges and subsequently, to undesirable tensions at the regional level. In terms of commitments made vis-à-vis the EU, the members of the RECs, depending in which EPA regions they were negotiating, ended up having different trade agreements with the EU, with different market access commitments. This has an impact on their own regional negotiations, because commitments taken in the EPA context are often more ambitious than what countries had agreed among themselves at the regional level.

The problem of overlapping membership and diverging interests among regional members is not due to EPAs; however, the EPA process has exposed, in some instances heightened, internal tensions to the African integration processes.

As a result, while the EPAs are meant to strengthen regional integration, in some cases, it instead threatens to seriously weaken the process, because regional negotiations and EPA negotiations are

⁷ Yaounde Convention (1963 - 75), Lomé I to IVbis Conventions (1975 - 2000), Cotonou Agreement (2000 – 2020).

⁸ Article XXIV of the General Agreement on Tariffs and Trade (GATT) sets out the conditions under which free trade areas and customs unions are to be accepted as consistent with members’ obligations under the WTO Agreements. Article XXIV.8(a) (i) states that a regional trade agreement must satisfy the condition that “duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories”.

⁹ These include Angola, Botswana, DR Congo, Lesotho, Mauritius, Madagascar, Malawi, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

¹⁰ Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland.

conducted in parallel tracks. In the EPA negotiations, national interests often diverge among members of a regional grouping, often at the expense of regional interests.

Beyond the complexities of the EPA negotiating process, which have often not been properly sequenced and aligned to regional objectives, the EU and Africa tend to have different expectations about what EPAs are meant to achieve. When EPA negotiations started, the EU repeatedly declared that it was not driven by commercial interests but instead that it believed that in the merits of EPAs as essentially development tools. As the negotiations advanced, it became clear however that EPAs fundamentally remained free trade agreements. Much of the substantive negotiations have focused on market access rules and liberalisation schedules, which are obviously primarily driven by national interests. As a result, diverging or conflicting interests have contributed to heighten tensions among regional members as well as with the EU. This is the opposite of the shared intended objective of EPAs to foster regional integration. It was too simplistically and often wrongly assumed that if African countries negotiate within regional groupings, this would necessarily stimulate their own regional integration processes. This also explains why, in practice, EPAs have often turned out to antagonise the entire economic and political relationship between Europe and Africa.

African RECs also entered the EPAs with the expectation that these will deliver on development. In essence, many were interested in mainly maintaining at least the same level of market access they had under previous regimes, therefore preventing trade disruption, but had little appetite to go beyond trade in goods. Here, it must be emphasised that the EU started with a significant disadvantage: under the previous trade regime (i.e. Cotonou), 97% of African products were covered by preferences (i.e. all goods except some agricultural products). In the EPA context, they offered full duty free quota free market access, which meant in reality, little additional preferences. In return, African countries had to open at least 80% of their markets to European products – a significant level of liberalisation for many, since they provide no preferences to the EU and given the relatively high level of tariff barriers in many Africa countries. While many were ready to consider making such efforts, in return, there were high expectations regarding additional financial accompanying measures to help them meet the transitional costs linked to liberalisation. Hopes were watered down when the EU made it clear that it would not make binding commitments to provide any additional funds, beyond its traditional support under EDF and aid for trade. Ultimately, the level of engagement of many countries reflected this disappointment and the loss in enthusiasm.

Although many have argued that EPA negotiations have undermined regional integration processes, in a sense, it has somehow been a blessing in disguise. The difficult EPA process has, to some extent, triggered some regain in dynamism among RECs, to speed up their regional integration process, acting as a ring bell to many that they first had to address regional issues, before engaging with third partners. It may be a matter of sheer coincidence, but at least in Eastern and Southern Africa, there has been several key milestones achieved in deepening regional economic integration. To name just a few, the SADC FTA was launched in 2008, the COMESA Customs Union was launched in 2009 and the EAC common market entered into force in 2010. In 2012, the African Union Summit was entitled “boosting intra-Africa trade” and the idea of having a continental FTA by 2017 was mooted. Similarly, in an attempt to have a properly sequenced process, in view of services negotiations in the EPA, COMESA launched its own services negotiations and members agreed on a clause of regional preferences, so that that whatever would be given to the EU would be extended to the regional partners. This is rather good news for regional integration, but may also be viewed as a boomerang effect for the EU – regional priorities are now seen to prevail over EPAs while the latter has lost traction in Africa.

5. What lessons from EPAs?

The last 10 years of EPA negotiations offer a number of valuable lessons on how trade and development policies, as pursued by the EU, could better contribute to regional integration (see also Bilal, 2012a).

(1) Avoid mixed signals and conflicting incentives

The EU's trade policy vis-à-vis developing countries seems to be rather ambiguous and unclear. On the one hand, at the WTO, the EU was a major supporter of the Doha Development Round, a round for free for developing countries, advocating for greater flexibility and asymmetry of commitments. It even proposed in 2001, to grant duty free quota free market access to all LDCs, through the Everything but Arms Initiative as part of its Generalised System of Preferences. On the other hand, it engaged in EPA negotiations, with the same developing countries, many of which were LDCs. These countries were asked to undertake high levels of tariff cuts in order to meet WTO obligations. The EU showed little flexibility and no political will to address their concerns, which it had itself acknowledged at the WTO. Such mixed signals created a lot of hesitations and frustrations. It resulted in many countries, eligible for unilateral market access under the EBA, to lose interest in the negotiations, at the cost of full regional EPAs. It also caused broader political tensions between the two partners.

On the part of the EU, EPA negotiations were for too long guided by the “principles” underlying free trade, such as long-term welfare creation and overall development. In the meantime, EU had not paid enough attention to the motivations of their African counterparts, which were essentially based on maintaining at least the level of market access they had under the previous regime in order to avoid trade disruption and welfare losses. The contrasting motivations and fundamentally opposing dynamics ultimately guided the outcome of the negotiations, which turned out to be minimalist and less ambitious.

(2) Do not underestimate the challenges for EU partners to negotiate in a regional configuration

The balance of power in terms of negotiation experience strongly tilted in favour of the EU. Indeed, before the EPAs, most African countries had, either individually or collectively, within their respective RECs, never engaged into FTAs negotiations with third countries outside their own regional negotiations.

(3) ‘Better’ can be the enemy of ‘good enough’

The agenda put forward by the EU was probably far too ambitious, often covering issues they have not even addressed in their regional configurations or on which they had totally opposing positions at the WTO. This was the case for some of the so-called Singapore Issues, i.e. competition policy, government procurement and trade and investment. Perhaps the EPAs should have been more modest, starting with few issues of common interests, and ultimately building upon them to have more comprehensive agreements, as countries and regions felt prepared and confident enough about them.

(4) Be more transparent on the balance between interests and development principles

The fact that the EU did not reveal from the start its commercial interests in Africa, but rather was only concerned with development, was a cause of frustration. Although, in general, Africa's share in EU's trade is relatively low - EU's imports from African EPA regions accounted for 2.3% for industrial products and 10.5% in agricultural products in 2009 (EC, 2010) - it remains nevertheless a strategic partner for Europe, in particular for its raw materials, which include commodities such as

sugar, cocoa, cotton and coffee or minerals, metals and fuels. The request of the EU to remove export taxes in the context of EPA negotiations was viewed in the light of EU's Raw Materials Initiative, to secure access to raw materials to maintain jobs and growth in Europe. Although Africa was not the main target of the EU, it felt in the net of measures given its enormous mineral resources potential.

(5) Regional integration cannot be externally driven and is often characterised by the lowest common denominator among partners

One wonders whether the EU fails to understand Africa. Its own history should have told her that while external challenges might trigger interests to join forces to construct regional markets, a deeper regional integration is a fundamentally endogenous process – timing, pace and sequencing is fundamentally an internal affair, although often shaped by global dynamics. This is particularly true if regions are composed of countries that are heterogeneous and have different levels of development. The recent crisis in Europe has confirmed that the strength of integration, is conditional upon countries' capacity to respect and implement regional engagements. Moreover, in Africa, the pace and effective depth of regional integration is too often determined by the lowest common denominator among the regional partners, i.e. the country with the lowest level of commitment and capacity. This is in contrast with the grand declarations and ambitious schemes for integration so common in Africa.

(6) Regional integration is a highly political matter, not just a technical issue

Technical trade negotiations can complement, but are not a substitute for political leadership. Linked to the incentive and capacity dimensions of the regional integration process and negotiations of EPAs, the EU has probably been too ambitious in assuming that a trade negotiations approach, focused on a broad array of technical trade and development dimension, could play a prime role in fostering regional integration. The absence of political leadership on the African side, often both at the national and regional level, is a major cause for the difficulties encountered in the EPA negotiations. Similarly, the central role of the Directorate General for Trade of the European Commission within the EU institutional setting, at the expense of a broader foreign policy and at times development policy perspective, also explains the excessive focus on technical trade approaches as a key tool to foster regional integration.

(7) One instrument (i.e. trade policy) should not aim at addressing too many objectives

EPAs have been conceived as one instrument to achieve a number of different, yet complementary objectives: maintain preferential market access for ACP/Africa exports to the EU, foster development, strengthen regional integration, ensure compatibility with WTO rules, etc. These objectives are coherent and in no way mutually exclusive. On the contrary, they are potentially reinforcing each other. However, in practice they may lead to some trade off. Take the case of regional integration, our key concern here. Should an EPA be concluded primarily to promote, or at least not undermine, regional integration? If so, this may require to significantly lower ambitions, so as to ensure that all countries within a regional are on board and that their various interests and concerns are addressed. Or should an EPA be as ambitious as possible (in terms of market access commitments, scope of the agreement, etc.), with the risk of failing to bring along all regional members and thus undermining regional integration? This is the dilemma that several regions are *de facto* facing. This is an issue for the EU as well as its partners in African regional groupings.

A more modest approach to regional integration might prove ultimately more effective. This may entail less ambitious trade policy (see Messerlin, 2012), notably in terms of the FTA agenda.

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Human rights and sustainable development obligations in EU free trade agreements

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Abstract

Since the early 1990s, the EU's trade agreements have included a 'human rights clause' requiring the parties to respect human rights and democratic principles. More recently, beginning with the 2008 EU-Cariforum Economic Partnership Agreement, they have also included 'sustainable development' chapters, which contain obligations to respect labour and environmental standards. This article considers the extent to which, legally, these two sets of provisions give the EU the means of implementing its obligations to ensure that its external activities respect human rights and pursue the objective of promoting sustainable development. It also considers the desirability of these differences in the EU's approach to the human rights and democratic principles, on the one hand, and labour and environmental standards, on the other.

1. Introduction

Since the early 1990s, the EU's trade agreements have included a 'human rights clause' requiring the parties to respect human rights and democratic principles. More recently, beginning with the 2008 EU-Cariforum Economic Partnership Agreement,¹ they have also included 'sustainable development' chapters, which contain obligations to respect labour and environmental standards. These sets of provisions are a central means by which the EU achieves its 'ethical' foreign policy objectives.² This article considers a slightly different question, which is the extent to which, legally, these two sets of provisions give the EU the means of implementing its obligations to ensure that its external activities respect human rights and pursue the objective of promoting sustainable development. It also considers the differences in the EU's approach to the human rights and democratic principles, on the one hand, and labour and environmental standards, on the other, and the extent to which these different approaches risk undermining the EU's obligation to respect the indivisibility of all human rights.

2. Human rights clauses in trade agreements

2.1 Origins

The EU has long insisted that accession countries comply with human rights and democratic principles, a notable instance being its rebuff in 1962 of Spain's desire for accession on the basis that a non-democratic country could not be considered a 'European country'.³ But it was only later that the EU made this a condition of its external relations with non-accession countries. An important catalyst occurred in 1977, when the EU sought to terminate Stabex payments to Uganda in response to human rights obligations, and discovered that this was not technically possible under the ACP-EU Lomé

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¹ EU-Cariforum Economic Partnership Agreement [2008] OJ L289/I/3.

² Urfan Khaliq, *Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal* (Cambridge: CUP, 2008).

³ Agustín José Menéndez, 'Exporting Rights: The Charter of Fundamental Rights, Membership and Foreign Policy of the European Union,' ARENA Working Papers WP 02/18, 2002, referring to *Rapport de la Commission politique de l'Assemblée Parlementaire Européenne sur les aspects politiques et institutionnels* (15 January 1962), Document 122 (Archives of the European Communities, 07.515:32;X3.075.15), especially para 25 and Bruno Olivi, *L'Europe Difficile* (Gallimard: Paris, 2001), 303.

Convention.⁴ This particular situation was resolved informally, but it led the EU to attempt to persuade its ACP partners to introduce a clause into the Lomé Convention that would enable the suspension or termination of the agreement in the event of human rights abuses. For a variety of reasons, the EU's efforts in this regard were essentially unsuccessful, and even a much lauded human rights clause finally introduced into the Lomé IV Convention 1989 was of little operative value.⁵

Other countries, however, proved more receptive to the EU's policy goals. A properly effective human rights clause appeared in the 1990 Argentina-EU Cooperation Agreement, interestingly, at the behest of Argentina,⁶ itself newly emerged from dictatorship; and, over the next few years, similar clauses were included in new cooperation agreements with other countries.⁷ This development was paralleled closer to home, where, following the collapse of communism in 1989, the EU was busy building relations with its central and eastern European neighbours. The EU adopted a formal external human rights policy in 1991⁸ and set about including operative human rights clauses in new cooperation and association agreements with these countries, and others around the world. It was against this background that in 1995, after almost two decades of negotiations, the revised Lomé IV Convention finally included an operative human rights clause, a more elaborate version of the model developed in agreements with other countries,⁹ which now exists as Articles 9 and 96 of the 2000 Cotonou Agreement.¹⁰

The year 1995 also saw the formal adoption by the EU Council of a concrete policy of adopting operative human rights clauses in all future cooperation and trade agreements.¹¹ The EU has adhered to this policy ever since, although, in more recent cases, it has done so by cross-referencing (sometimes by implication)¹² human rights clauses in existing agreements between the parties.¹³ In addition, the EU has expanded its external human rights conditionality policies to its autonomous instruments granting trade preferences (including the EU's Generalised System of Preferences (GSP)

⁴ Lomé Convention [1976] OJ L25/1. See Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: OUP, 2005), 8-11.

⁵ *ibid.*, 11-15.

⁶ Commission Answer to Written Question No 617/93 [1993] OJ C264/42.

⁷ Bartels, above at n 4, 16-17.

⁸ Commission Communication on Human Rights, Democracy and Development Cooperation Policy, SEC (91) 6; Resolution of the Council and of the Member States meeting in the Council on Human Rights, Democracy and Development, 28 Nov 1991, reported in EC Bulletin 1991-11, 122.

⁹ Article 5(1)(3) and Article 366a of the revised Lomé IV Agreement (commonly known as the Lomé IVbis Agreement), introduced by the Agreement amending the fourth ACP-EC Convention of Lomé [1998] OJ L156/3.

¹⁰ Cotonou Agreement [2000] OJ L317/3, amended in 2005 and 2010. Article 8, establishing a political dialogue, is also relevant.

¹¹ Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries', COM(95) 216 and EU Council Conclusions of 29 May 1995 (reported in EU Bulletin 1995-5, point 1.2.3).

¹² Article 15.14 of the EU-Korea Free Trade Agreement [2011] OJ L127/6 states that '[u]nless specified otherwise, previous agreements between the Member States of the European Union and/or the European Community and/or the European Union and Korea are not superseded or terminated by this Agreement.'

¹³ This policy is understood to be set out in the confidential EU documents: 7008/09, 7008/09 COR 1 and 10491/1/09 REV 1 (RESTREINT UE). See EU Council Document 12450/11 rejecting an application for public access to these documents.

program)¹⁴ and financial and technical cooperation,¹⁵ as well as to financing agreements with developing countries.¹⁶

2.2 Obligations

2.2.1 The ‘essential elements’ clause

The core of all human rights clauses is an ‘essential elements’ clause, which is in relatively standard wording. The following, from the 2012 EU-Central America agreement, is a good example:

Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.¹⁷

The EU’s early agreements contain little else, and it is unfortunate, in some respects, that it was one of these agreements – the 1993 EU-India cooperation agreement – that is the best known, thanks to an ECJ case on the human rights clause in this agreement in 1996.¹⁸ In fact, the human rights clause in this agreement is quite unrepresentative of later human rights clauses, which have quite different forms and legal effects, and much of what the Court said about this clause is of limited relevance to these clauses.¹⁹

One of these later changes, now a standard feature of human rights clauses, is the inclusion of an ‘implementation’ clause, which states that ‘[t]he Parties shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement’.²⁰ This clause derives from what is now Article 4(3) TEU, which has in the context of EU law been interpreted as imposing a variety of additional obligations on the EU Member States, including the obligation to take steps to ensure the effective application of EU law.²¹ This is not to say that an ‘implementation clause’ in an international agreement should be read in exactly the same way as in EU law. On the other hand, such a clause must have some meaning beyond redundantly restating the principle *pacta sunt servanda*.²² Quite what it might mean is difficult to say outside of the context of a specific case, but it could have the effect of imposing on the parties not only a negative duty to ensure that human rights and democratic principles

¹⁴ Reg 732/2008 [2008] OJ L211/1.

¹⁵ Most importantly, the European Neighbourhood and Partnership Instrument (Reg 1638/2006 [2006] OJ L310/1) and the Development Cooperation Instrument (Reg 1905/2006 [2006] OJ L378/41).

¹⁶ Eg Annex I of the 2012 Model General Conditions to Financing Agreements and Art 23(1) of the European Development Fund, at http://ec.europa.eu/europeaid/work/procedures/financing/financing_agreement/index_en.htm.

¹⁷ Article 1 of the EU-Central America Association Agreement, signed 29 June 2012, at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=689>.

¹⁸ Case C-268/94, *Portugal v Council* [1996] ECR I-6177.

¹⁹ To take an example, Article 60 of the Vienna Convention on the Law of Treaties, referred to by the Advocate-General and the parties to the case, is, by its own terms, only a default clause and therefore inapplicable to later versions of the human rights clause, which expressly regulate the consequences of violations of the norms in the essential elements clause. Of course, strictly speaking, Article 60 would not be relevant anyway, given that the EU is not a party to the Vienna Convention 1969, and the Vienna Convention 1986 is not in force. It is the customary international law rule reflected in this provision that would be relevant. Invariably, the academic commentary misses this point, eg, recently, Khaliq, above at n 2, 112-13.

²⁰ Eg Article 355(1) of the EU-Central America agreement, above at n 17.

²¹ For a useful summary, see Christophe Hillion and Ramses Wessel, ‘Restraining External Competences of EU Member States under CFSP’ in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law* (Oxford: Hart, 2008), 92, with further references.

²² Jan Klabbbers, *An Introduction to International Institutional Law* (Cambridge: CUP, 2002), 195.

are *respected* but also a positive duty to ensure that these norms are *ensured* and *fulfilled*.²³ Such an interpretation could, of course, also arise from an interpretation of the human rights and democratic principles at issue in any case.

2.2.2 Monitoring

To date, the agreements containing human rights clauses have not established any specific organs for monitoring the implementation of the clauses. This contrasts with the many other subject specific organs, including organs with a sustainable development mandate, established by these agreements. On the other hand, in some agreements subcommittees on human rights and democratic principles have been established on an *ad hoc* basis.²⁴

However, even in the absence of such specific organs, issues arising under human rights clauses can be discussed within some of the organs that established by the agreement. Most obviously, these would include the primary bilateral organ, namely the Association Council or Joint Council (the names differ). Indeed, in many of the human rights clauses (though not in the clause in the 2012 EU-Colombia/Peru agreement),²⁵ it is mandatory, except in cases of special urgency, wishing to react by adopting ‘appropriate measures’, ‘to submit to the Association Council within thirty days all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.’²⁶ Human rights and democracy issues may also be discussed in other generic organs, where these exist, such as bilateral parliamentary committees and, depending on their mandate, civil society consultative committees.

2.2.3 Bilateral implementation

In most cases, an issue arising under a human rights clause ought to be resolved by one of the parties acting domestically. However, there may also be cases in which the issue arises as a result of the agreement itself. One could envisage market access commitments that encourage deforestation (to use the previous example), or intellectual property obligations that are unduly restrictive of free speech or other human rights, or non-discrimination obligations that prevent a party from legislating in favour of minority groups. Even in these cases, there may be a unilateral solution to the problem. However, in other cases it may be necessary to suspend or amend certain provisions of the agreement.

The question is whether this can be done without need for a renegotiation of the treaty. This depends on the existence of any amendment procedures under the agreement, and, failing these (which do not exist in the relevant agreements), the powers of the organs established under the agreement to revise the agreement. The widest of such powers belong to the Joint Council established under the EU-Cariforum agreement, which enjoys ‘the power to take decisions in respect of all matters covered by the Agreement.’²⁷ By contrast, the Association Council in the EU-Central America agreement only has the more limited power ‘to take decisions in the cases provided for in this Agreement’.²⁸ In the absence of any such ‘cases’ in the agreement relevant to human rights issues, the Association Council

²³ Bartels, above at n 4, at 147-149.

²⁴ The first of these was established in the EU-Morocco Association Agreement, by Association Council Decision No 1/2003 [2003] OJ L79/14, Annex 1.

²⁵ Article 8(3) of the EU-Colombia/Peru Trade Agreement, signed 26 June 2012, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=691>.

²⁶ Eg Article 355(2) of the EU-Central America Agreement, above at n 17.

²⁷ Article 229(1) of the EU-Cariforum Economic agreement, above at n 1. The revision clause in Article 246 of the EU-also implies that the Joint Council has the power to revise the agreement.

²⁸ Article 6(1) of the EU-Central America agreement, above at n 17.

does not appear to have the power to revise the agreement to ensure that the parties are able to comply with their human rights obligations, should this prove necessary.

2.2.3 Unilateral enforcement

The cases just mentioned are the exception. In fact, human rights violations most commonly occur when a state fails to take action that it has the legal power to take. It is for these cases that human rights clauses are designed, insofar as they authorise the other party to respond by means of unilateral ‘appropriate measures’. In most cases, this may be done without even the need for prior consultations.

This is achieved in most of the post-1996 agreements in a somewhat unwieldy way. These agreements deem a violation of the essential elements of the agreement to be a ‘material breach’ of the agreement, which is in turn deemed to be a ‘case of special urgency’²⁹ automatically entitling the other party to adopt ‘appropriate measures’ under a so-called ‘non-execution’ clause.³⁰ More efficiently, the 2012 EU-Peru/Colombia agreement states that ‘any Party may immediately adopt appropriate measures in accordance with international law in case of violation by another Party of the essential elements referred to in Articles 1 and 2 of this Agreement.’³¹

There are conditions on the adoption of ‘appropriate measures’. These measures must be taken in accordance with international law; priority must be given to measures that least disrupt the functioning of the agreement;³² it is usually agreed that ‘suspension would be a measure of last resort’;³³ and it is sometimes also said that the measures must be revoked as soon as the reasons for their adoption have disappeared.³⁴ As to the nature of such measures, these conditions clearly indicate that a wide range of measures is envisaged, including the suspension of the agreement in whole or in part. This corresponds to the purpose of these clauses, which listed a range of measures including trade sanctions.³⁵

It is worth noting that non-execution clauses mentioning ‘appropriate measures’ also permit the suspension not only of the agreement containing the clause, but also other agreements between the parties (and presumably also obligations between the parties under customary international law). This means that, for example, free trade agreements which do not themselves contain an operative human rights clause, or do not cross-reference to an existing human rights clause, are in any case subject to any otherwise binding human rights clause with a non-execution clause. Here, however, it is relevant to note that the 1993 EU-India cooperation agreement, predating the 1996 model, contains an essential elements clause but not a ‘non-execution’ clause. Any EU-India free trade agreement would therefore have to contain its own non-execution clause to ensure that the human rights clause can have full effect.

²⁹ The wording is unfortunate. The phrase ‘special urgency’ implies temporal urgency, not material gravity.

³⁰ Eg Article 355(2)-(5) of the EU-Central America agreement, above at n 17.

³¹ Article 8 of the EU-Colombia/Peru Agreement, above at n 25.

³² This second condition is entirely counterintuitive insofar as an appropriate measure under a human rights clause is adopted specifically to disrupt the normal implementation of the agreement. The explanation is that the condition originates in safeguards clauses, where the measures chosen are defensive, not offensive. In this original context, it makes perfect sense to oblige parties imposing restrictive measures to adopt measures that least affect the other party. See Bartels, above at n 4, 24.

³³ But not in the EU-Colombia/Peru agreement, above at n 25.

³⁴ Article 8(3) of the EU-Colombia/Peru agreement, *ibid*. This wording derives from Article 96(2)(a) of the Cotonou Agreement, above at n 10.

³⁵ Annex 2 of COM (95) 216, above at n 11.

2.2.4 Dispute settlement

While the post-1996 human rights clauses are relatively similar in substance, they differ significantly in the extent to which they, or ‘appropriate measures’, are subject to dispute settlement under the agreement. The Cotonou Agreement and all of the Euro-Mediterranean association agreements in force provide for dispute settlement in relation to the interpretation and application of their human rights clauses, including appropriate measures adopted under these clauses. By contrast, certain others, including most recently the EU-Central America agreement, only permit an affected party to ‘ask that an urgent meeting be called to bring the Parties together within 15 days for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties’.³⁶

The 2012 agreement concluded with Peru/Colombia presents something of a puzzle in this regard. The normal rule (expressed as a jurisdiction clause in Article 299(1) and as an exclusive jurisdiction clause in Article 8(2)) is that the dispute settlement system established in the agreement applies to all disputes relating to the interpretation and application of the agreement. But Article 8(3) provides for an urgent meeting in the same terms as that in the Central America agreements. The question is whether, without more, this should operate as a carve-out from dispute settlement. On balance, the answer is that it probably does not. The ‘urgent meeting’ by no means displaces or renders redundant the otherwise applicable consultation or dispute settlement proceedings in the event of appropriate measures. Indeed, a party that calls such a meeting might have an interest in having these measures subjected to formal dispute settlement. It would therefore appear that, in contrast to the situation in certain of the EU’s free trade agreements, in these agreements disputes relating to the human rights clause are fully subject to dispute settlement proceedings.

2.3 The EU’s practice

Over the past twenty years, human rights clauses have been applied on numerous occasions. In terms of the countries and conduct that has triggered a reaction, the EU’s practice has been limited in a number of respects. First, there has never been any action under a human rights clause in an agreement other than the Cotonou Agreement, except for the suspension of technical meetings under the Uzbekistan Partnership and Cooperation Agreement, a measure taken in response to the Andijan massacre in 2005.³⁷ Second, the occasions on which the clause has been invoked have involved political coups or other violations of democratic principles, in some cases along with human rights abuses. As to the types of measures applied, these have been rather extensive in scope, including delays and suspension of financial cooperation. The effectiveness of these measures has recently been subject to a lengthy examination.³⁸ But more important for present purposes, as will be discussed below, the practice of the EU falls far short in virtually all respects of what is legally possible under these clauses.

3. Sustainable development chapters

3.1 Origins

The EU’s practice of including ‘sustainable development chapters’ in its free trade agreements has more recent origins. The principle of sustainable development is commonly attributed to the 1987

³⁶ Article 355(5) of the EU-Central America Agreement, above at n 17.

³⁷ Article 4 of Council Common Position 2005/792/CFSP concerning restrictive measures against Uzbekistan [2005] OJ L299/72, which however does not cite the human rights clause.

³⁸ Clara Portela, *European Union Sanctions and Foreign Policy: When and Why Do They Work?* (Abingdon: Routledge, 2010).

Brundtland Report,³⁹ and has been an important element of EU policy since the European Commission's 2001 Communication 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development'.⁴⁰ The emphasis in this Communication (adopted at the 2001 Göteborg European Council) was on the internal dimensions of the EU's strategy. The external dimensions were then elaborated in the Commission's 2002 Communication 'Towards a global partnership for sustainable development', issued prior to the 2002 UN World Summit on Sustainable Development held in Johannesburg.⁴¹ The principle of sustainable development also featured prominently in the 2005 European Consensus on Development, which defined common principles for the development policies of the EU and the Member States,⁴² and stated that 'the primary and overarching objective of EU development cooperation is the eradication of poverty in the context of sustainable development'. More recently, since the 2009 Lisbon Treaty, the EU's external policies must pursue the objective of 'foster[ing] sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'.⁴³

The first of the EU's free trade agreements to make reference to the principle of 'sustainable development' was the 1993 EU-Hungary Europe Agreement,⁴⁴ and the principle has appeared regularly as an objective, or in an incidental or interpretive context, in agreements since then. The principle was given an unusually broad definition in the 2000 Cotonou Agreement, which states that '[r]espect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development'.⁴⁵ More conventionally, the EU-Central America agreement states that: '[t]he Parties reaffirm their commitment to achieving sustainable development, whose pillars – economic development, social development and environmental protection – are interdependent and mutually reinforcing.'

It is notable that the principle of sustainable development has never been treated as a concrete obligation in itself: none of the agreements admit the possibility of violating the 'principle of sustainable development'.⁴⁶ Rather, under in the context of this principle and sometimes under its banner, the agreements contain provisions on cooperation as well as, relevantly, concrete obligations to respect and 'strive' to improve multilateral and domestic labour and environmental standards.⁴⁷ Such chapters are now found in the 2008 EU-Cariforum agreement, the 2010 EU-Korea agreement, and the 2012 EU-Central America and EU-Peru/Colombia agreements, and are reportedly being included in agreements still under negotiation. The EU is now seemingly committed, as a matter of policy, to including these provisions in future free trade agreements. But questions remain as to what

³⁹ For a full discussion, see Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 EJIL 377. She notes at 379, n 9, that '[a]lthough the term 'sustainable development' is fully articulated and disseminated by the Brundtland Report, the expression was borrowed from the 1980 World Conservation Strategy (a joint IUCN/WWF/ UNEP document).'

⁴⁰ COM (2001) 264.

⁴¹ COM (2002) 82.

⁴² Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy [2006] OJ C46/1.

⁴³ Article 21(3), referring to Article 21(2)(d) of the Treaty on European Union.

⁴⁴ The principle of 'sustainable development' first appeared in an international trade instrument in the EU-Hungary Europe Agreement [1993] OJ L347/2.

⁴⁵ Article 9 of the Cotonou Agreement, above at n 10.

⁴⁶ This is quite common: see Barral, above at n 39, 385.

⁴⁷ These are not new clauses: in fact, they originate in the NAFTA labour and environment side agreements, and have become common in North and South American trade agreements since then. For account of their evolution, see Lorand Bartels, 'Social Issues: Labour, Environment and Human Rights' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies* (Cambridge: CUP, 2008), 342-366.

value this brings, and, for reasons to be explained, how these chapters relate to the EU's existing policy on human rights clauses.

3.2 *Obligations*

As noted, the sustainable development chapters contain provisions on labour standards and environmental standards. In both cases, the obligations are of two types: minimum obligations to implement certain multilateral obligations, and above this a set of other obligations requiring the parties not to reduce their levels of protection, and encouraging them to raise their levels of protection, subject to a proviso that this is not done for protectionist purposes.

The sustainable development chapter in the EU-Central America agreement is typical. The parties affirm their commitments to the ILO core labour principles⁴⁸ and to certain multilateral environmental agreements;⁴⁹ and they also undertake to 'effectively implement' the fundamental ILO Conventions referred to in the ILO Declaration of Fundamental Principles and Rights at Work of 1998.⁵⁰

Beyond this, the parties undertake not to lower their levels of protection to encourage trade or investment, or to fail to effectively enforce their labour and environmental legislation in a manner affecting trade or investment between the parties;⁵¹ and they undertake that they will 'strive to ensure' that their laws and policies provide for and encourage appropriate but high levels of labour and environmental protection and that they will 'strive to improve' these laws and policies.⁵² The first of these obligations is an effective guarantee against retrogression, when this relates to trade or investment under the agreement. The second is weaker, in the sense that it is only a best endeavours provision, but broader in scope in that it applies to labour and environmental standards even when trade and investment is not affected. But, though weak, it is not meaningless: an overt weakening of existing legislative protections could hardly be said to be consistent with striving to improve these standards.

The sustainable development chapters also contain clauses preventing abuse: for example, the EU-Central America agreement states that 'labour standards should never be invoked or otherwise used for protectionist trade purposes and ... the comparative advantage of any Party should not be

⁴⁸ Article 286(1) of the EU-Central America agreement, above at n 17. These core labour standards are (a) the freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.

⁴⁹ Article 287(2), *ibid.* These are (a) Montreal Protocol on Substances that Deplete the Ozone Layer; (b) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; (c) Stockholm Convention on Persistent Organic Pollutants; (d) Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); (e) Convention on Biological Diversity; (f) Cartagena Protocol on Biosafety to the Convention on Biological Diversity; and (g) Kyoto Protocol to the United Nations Framework Convention on Climate Change. Article 287(3) and (4) provide that the Amendment to Article XXI of CITES must be ratified, and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade must be ratified and implemented.

⁵⁰ Article 286(2), *ibid.* These are (a) Convention 138 concerning Minimum Age for Admission to Employment; (b) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; (c) Convention 105 concerning the Abolition of Forced Labour; (d) Convention 29 concerning Forced or Compulsory Labour; (e) Convention 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value; (f) Convention 111 concerning Discrimination in Respect of Employment and Occupation; (g) Convention 87 concerning Freedom of Association and Protection of the Right to Organise; and (h) Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.

⁵¹ Article 291, *ibid.*

⁵² Article 285, *ibid.*

questioned'.⁵³ Interestingly, sometimes (as in this example) there is only such a clause in relation to labour standards; while in the Korea and Cariforum agreements there is an equivalent clause for environmental standards. It is likely however that any such standards would in any case need to be justified under the general exceptions to the agreement, which contain provisions preventing this type of abuse.

Unlike the other agreements so far concluded containing sustainable development chapters, the EU-Cariforum agreement regulates investment in goods, and in this part of the agreement includes additional sustainable development obligations. The parties are required to act in accordance with core labour standards, not to operate their investments in a manner that circumvents international labour or environmental obligations, and to ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity.⁵⁴ These provisions reiterate the obligations set out in the sustainable development chapter, and their existence is probably explained in terms of a complicated negotiating dynamic. However, the fact that these provisions are located outside of the usual chapter raises interesting questions, discussed below, as to their implementation and enforcement.

How, then, do these provisions relate to the parties' existing obligations, including those under the human rights clause? In terms of the applicable standards (as opposed to implementation and remedies), their novelty concerns the provisions requiring the parties not to undermine their existing labour and environmental standards. It is quite conceivable that a measure may reduce the level of domestic protection in these areas without this amounting to a violation of the norms set out in the human rights clause, or indeed in any applicable multilateral environmental agreement. On the other hand, the provisions based on multilateral standards add nothing substantively new. As far as the ILO core labour standards are concerned, these are already binding on the parties by virtue of their membership of the ILO. In addition, as mentioned, all of these standards are human rights covered, as the European Commission has itself acknowledged, by the human rights clause. The situation with the multilateral environmental agreements is a little different: the obligation to implement these agreements amounts to no more than a reaffirmation of obligations already binding on the parties under those agreements. It seems, then, that the provisions are not as original as they seem. The question, addressed below, is whether such duplication comes at a cost.

2.3 Monitoring

The sustainable development obligations are specifically monitored by a variety of organs established under the agreements. Most important are the bilateral committees established specifically to sustainable development issues. These have mandates of varying breadth. The Trade and Development Committee established by the EU-Cariforum agreement has a broad mandate to discuss sustainable development issues,⁵⁵ and is not therefore limited to discussing issues only insofar as they concern the implementation of the sustainable development chapter. More narrowly, Trade and Sustainable Development Board in the EU-Central America agreement has a mandate to oversee the implementation of the sustainable development chapter, but may be otherwise have a limited jurisdiction.

These bilateral meetings and organs are accompanied by civil society mechanisms, in various forms, ranging from unilateral advisory groups to bilateral meetings of civil society groups (in the case of the EU-Cariforum agreement these meetings take place within a civil society consultative

⁵³ Article 286(4), *ibid.*

⁵⁴ Articles 72 and 73 of the EU-Cariforum agreement, above at n 1.

⁵⁵ Article 230(3)(a) of the EU-Cariforum agreement, above at n 1.

committee specifically designed for this purpose). Interestingly, the mandate of these groups is described in terms of ‘trade-related aspects of sustainable development’. Bearing in mind the wide definition of sustainable development, it is not inconceivable that these organs might legitimately discuss certain issues relating to these matters. Indeed, this could include matters falling under the human rights clause, if the broad definition of ‘sustainable development’ adopted in the Cotonou Agreement is applied.⁵⁶ There may ordinarily be no warrant for such a reading, but in the case of the Cariforum agreement this would be entirely proper, given that the parties are all parties to the Cotonou Agreement as well.

2.4 Bilateral implementation

As mentioned in the context of the human rights clause, it may be that the agreement itself stands in the way of sustainable development principles. For example, a party may have adopted high labour standards, consistent with its right to do so, which have a disproportionate effect on products from the other party. The question would be whether such standards would thereby violate the national treatment obligation in the agreement ensuring that those products must not be granted less favourable treatment than domestic products. It may be that the problem can be resolved by means of interpretation; on the other hand, it may be that there is a violation, and the most appropriate solution is for the parties to agree bilaterally on a solution that permits such standards in the name of sustainable development. Again, the powers of the organs established under the agreement will determine whether such a course of action is possible, and as mentioned, this depends on the agreement.

2.5 Dispute settlement

None of the sustainable development chapters gives the parties the right of unilateral enforcement of the sustainable development obligations, nor (except in the EU-Cariforum agreement, on which see below) is it permissible to resort to the normal dispute settlement procedures established under the agreements. Rather, disputes on these matters are to be resolved in a self-contained system of dispute settlement involving consultations, and then referral to a Panel of Experts.

Such a Panel has the power to examine whether there has been a failure to comply with the relevant obligations, and to draw up a report and to make non-binding recommendations for the solution of the matter. The next steps differ according to the agreement at issue. In the EU-Korea agreement, the report goes to the parties, which ‘shall make their best efforts to accommodate advice or recommendations ... on the implementation of [the sustainable development] chapter’, and to the Domestic Advisory Group.⁵⁷ In the EU-Central America agreement, the report is published, and the relevant party must respond with an appropriate action plan, the implementation of which is then monitored by the Trade and Sustainable Development Board.⁵⁸

Once again, the EU-Cariforum agreement differs from this model. In this agreement, the normal dispute settlement procedures apply, but the suspension of concessions is ruled out.⁵⁹ On the other hand, this remedies carve out only applies to violations of obligations set out in the sustainable development chapter. It does not apply to violations of the sustainable development obligations set out in the chapter on investment in goods. Perhaps by oversight, these obligations are fully subject not only to dispute settlement but also to the usual remedies available under the agreement.

⁵⁶ See above at n 45.

⁵⁷ Article 13.15(2) of the EU-Korea Free Trade Agreement [2011] L127/6.

⁵⁸ Article 301 of the EU-Central America agreement, above at n 17.

⁵⁹ Article 213(2) of the EU-Cariforum agreement, above at n 1.

5. Assessment

5.1 EU obligations

It is important to place the EU's treaty practice, as here described, in its proper legal context. Since the Treaty of Lisbon,⁶⁰ the EU's external policies must respect the principles of '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 ... the principles of the United Nations Charter and international law'.⁶¹ The EU must also, in its external relations, pursue a set of further objectives, including, as mentioned, '[the fostering of] sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.'⁶² Seen from this perspective, the EU's human rights clauses and sustainable development chapters are not simply a matter of discretionary foreign policy. They are mechanisms that, in theory, enable the EU to comply with its obligations under the EU Treaty. But are these mechanisms effective?

In the case of the EU's obligations with respect to human rights and democratic principles, the answer is that they are. Despite certain infelicities in wording, the human rights clause is sufficiently robust and flexible to enable the EU to ensure that it can withdraw from any commitment that would imperil its obligation to respect human rights and democratic principles in its external relations. It is more difficult to answer this question in the context of the EU's commitment to sustainable development and the eradication of poverty. What would happen if the agreement turned out to have negative effects on sustainable development or poverty? To be sure, it is not certain that this would be a violation of an EU obligation, given that the EU is only obliged to 'pursue' the objective of, *inter alia*, reducing poverty. But assuming that the obligation did have a stricter meaning, the EU would have little power to withdraw from commitments that contribute to this situation, nor could it take coercive steps with a view to enforcing the other country's own obligations in this regard.

5.2 Internal coherence

What, then, of the question of internal coherence? Here the situation appears is more mixed. In some respects, of course, the two sets of provisions are indeed different. There is no equivalent for 'democratic principles' in the sustainability chapter; nor does the human rights clause necessarily prevent a treaty party from reducing the level of protection offered by domestic labour and environment legislation.⁶³ However, from a substantive point of view there are also significant areas of overlap between the human rights clause and the provisions concerning labour and environmental standards. International Labour Organization (ILO) core labour standards are also human rights;⁶⁴ and, as the European Commission has itself said, core labour standards are covered by the standard human rights clauses.⁶⁵ Likewise, there is an increasing overlap between human rights and

⁶⁰ Article 21(3) TEU and Article 205 and 208(1) TFEU.

⁶¹ These principles are set out in Article 21(1) TEU.

⁶² These objectives are set out in Article 21(2) TEU.

⁶³ Human rights law provides limited guarantees against 'retrogression'. See, for a relevant discussion, Gillian Moon, 'Fair in Form, but Discriminatory in Operation – WTO Law's Discriminatory Effects on Human Rights In Developing Countries' (2011) 14 JIEL 553.

⁶⁴ Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime (2004) 14 EJIL 457, at 476. Alston also discusses the political and institutional dimensions of this issue, as does Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 European Labour Law Journal, forthcoming.

⁶⁵ European Commission Communication on Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM (2001) 416, at 12.

environmental protection, particularly in the context of indigenous rights and transboundary pollution,⁶⁶ which is also ignored in the EU's model clauses.

The question, then, is whether in such cases it makes sense for such different provisions on implementation and remedies to apply to the same state conduct. Arguably, it is not sensible that, if seen as a violation of core labour standards, state conduct cannot be subjected to dispute settlement or counteracted by a suspension of trade concessions, but it can if it is seen as a violation of human rights violation. Arguably, it is equally lacking in sense that such conduct would be subject to a dedicated monitoring mechanism if it is seen in terms of labour standards, but not if it is seen in human rights terms. Nor is the issue theoretical: US administrators once rejected a petition under the US Generalised System of Preferences in relation to the murder of a trade union leader on the basis that this constituted a violation of 'human rights' rather than of 'worker rights'.⁶⁷ As a matter of policy, and perhaps even of law,⁶⁸ the EU should ensure that there is internal coherence in its external protection of human rights, labour and environmental standards, especially when this protection exists in the very same international agreement.

In sum, in terms of its obligation to conduct an ethical foreign policy the EU's practice with respect to the regulation of social standards in its free trade agreements is a success. But in terms of internal coherence, which is also in some respects, legally required, it leaves much to be desired.

⁶⁶ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 EJIL 613.

⁶⁷ US General Accounting Office, *International Trade: Assessment of the Generalized System of Preferences*, GAO/GGD-95-9, November 1994, 109, at <http://www.gao.gov/assets/160/154744.pdf>, cited in Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart, 2005), 96.

⁶⁸ Article 21 TEU requires the EU to treat all human rights as indivisible. If the EU treats human rights of different types so differently, depending on how they are categorised, at the outside, it might find itself in violation of this obligation as well.

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The integration of sustainable development in trade agreements of the European Union

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Abstract

Sustainable development is recognized as one of the key objectives of the international community nowadays, and determines the integration of environmental and social concerns into all policy fields. Trade is one of the most relevant areas to the implementation of this objective, but at the multilateral sphere the integration of sustainable development measures is still done through a negative integration approach and faces difficulties to move on. This article argues that the regional sphere might be an appropriate channel to move forward with the integration of sustainable development into trade policy, and does so by making a case study of the EU's trade agreements. The article considers the extent to which EU trade agreements have increasingly included sustainable development procedural and substantive provisions, examining three case studies: the association agreement with Chile, the free trade agreement with South Korea and the association agreement with Central America.

1. Introduction

The European Union (EU) has increasingly included sustainable development related rules into its legal framework and aims at integrating it into all policies and regulatory fields. In fact, after the last reforms undertaken in the bloc's legal framework, sustainable development has become an overarching goal and guiding principle, both on the internal and external spheres. The Common Commercial Policy (CCP) is no exception. As one of the main policies of the EU, the CCP is progressively seen not only as a tool for market access and enhanced economic development, but also as a means of implementing broader foreign policy goals.

This paper conducts an analysis on the extent to which the EU has been integrating sustainable development into its trade policy by making a case study with one of the most complex instruments that the bloc has in this field, notably trade agreements signed with third parties. These agreements have become increasingly complex in nature and coverage over the past years, featuring a great variety of non-traditional trade themes and going beyond the WTO standard liberalization. The paper is divided in two main parts: the first part presents an introduction to sustainable development as a goal and principle of international law, and discusses how it has been inserted into the multilateral trade regime, in which its implementation is still slow and tied to the liberalization logic; the second part moves the analysis to the regional level, examining how the EU, considered the most important regional bloc nowadays, has been integrating sustainable development into its trade policy through substantive and procedural measures. This will be done by means of a discussion of three agreements: the Association Agreement signed with Chile in 2002, the Preferential Trade Agreement signed with South Korea in 2009, and the Association Agreement signed with Central America in 2010.

2. Sustainable development as a goal and principle

2.1 Sustainable development and international law

Sustainable development is a concept that encompasses two main normative dimensions: a horizontal/policy dimension represented by the reorientation of the idea of development, prescribing

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that the development process should be focused on the needs of human beings and the realization of human rights, rather than promoting solely economic development of the state; in addition, an inter-generational/temporal dimension that determines the need to make this process sustainable, allowing for economic development while also assuring environmental protection and social justice and ensuring the rights of future generations to meet their needs of a decent life just as the current one. This concept has been progressively developed and mainstreamed within the international community, especially through a series of international conferences and declarations under the auspices of the United Nations (UN),¹ and is reflected in the famous definition provided by the World Commission on Environment and Development in 1987: *development that meets the needs of the present without compromising the ability of future generations to meet their own needs; it contains two key concepts: the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.*² The concept of sustainable development summarizes this idea of promoting a balance between economic development, social justice and environmental protection and assure the sustainability of the development process, and prescribes a series of substantive and procedural measures that aim at guiding decision making by the international community.³ In fact, its relevance has just been confirmed on the occasion of the recent United Nations Conference on Sustainable Development (Rio+20), in which, despite all the criticism regarding the outcomes, the international community has “renewed” the commitment to the promotion of an *economically, socially and environmentally sustainable future for our planet and for present and future generations*, acknowledging the need to further mainstream sustainable development at all levels.⁴

Despite its normative appeal, there is no binding definition of sustainable development in international law, as most of the documents referring to its meaning at the international level are *soft law*, leading to a debate regarding its status as a principle of international law and to the precise content of its implications. While the recognition of this concept as principle still faces criticism,⁵ it seems more relevant to highlight the impacts it has as a guiding norm. In this regard, sustainable development has been recognized as a norm operating in international law in a twofold manner: firstly, as an emerging area of international law on its own right, given the substantive amount of legal instruments that are based on its normative assumptions or created to implement them (or both). Thus, “sustainable development law” is considered a set of substantive and procedural norms at the intersection of international economic, social and environmental law, which help to reconcile these separate fields. Secondly, it can be considered as a “meta-principle” acting upon other existing

¹ The main ones are: Stockholm UN Convention on the Human Environment of 1972; the Rio de Janeiro UN Convention on the Environment and Development of 1992 (The Earth Summit); the Johannesburg UN Summit on Sustainable Development of 2002.

² Report of the WCED to the UNGA, recognized by UNGA Resolution 42/187, available at <http://www.un-documents.net/wced-ocf.htm>.

³ The 1992 Rio Declaration principles summarize these prescriptions, i.e., in terms of substantive measures: Principle 4, determining that environmental protection should be an integral part of development process; Principle 11, determining the enactment of effective environmental legislation, and 13, asking for the development of law relating to environmental liability; in terms of procedural measures, Principle 10, requiring means of enabling public participation in decision making and access to justice; and 17, determining the use of environmental impact assessment procedures.

⁴ UNCSD Outcome Document, “The Future We Want”, UN Document A/66/L.56, UNGA 66th Session, July 24th 2012. Available at: <http://www.uncsd2012.org/thefuturewewant.html>.

⁵ V Lowe, ‘Sustainable development and unsustainable arguments, in A. Boyle and D Freestone (eds.) *International law and sustainable development: past achievements and future challenges*, Oxford University Press, 1999, is probably one of the most skeptic commentators, noting that sustainable development can hardly be seen as a norm or a set of norms, which nevertheless do have potential and influence, especially in adjudication. On the other extreme of the discussion, former ICJ Judge C.J. Weeramantry in the, in which he states that sustainable development is beyond doubt a principle of modern international law. Separate opinion on ICJ Case Hungary x Slovakia, 1997 (Gabcikovo Nagymaros Project).

principles and rules, exercising a type of interstitial normativity, requiring the reconciliation and balance of the conflicting interests of economic growth, environmental protection and social justice, for present and future generations.⁶

Thus, it is in this guidance capacity that lies the importance of sustainable development, both as an objective and a guiding principle recognized by and widely spread within the international community, and encompassed by international law – in its capacity of instrument to pursue the common goals of the international community. In an attempt to clarify the legal aspects of what sustainable development implies, the International Law Association (ILA) released in 2002 the *New Delhi Declaration on the Principles of International Law Related to Sustainable Development*, highlighting seven legal sub-principles which work towards the achievement of sustainable development goals: 1. The duty of States to ensure sustainable use of natural resources; 2. Equity and eradication of poverty; 3. The common but differentiated responsibilities of all the actors involved in the development process; 4. The precautionary approach to human health, natural resources and ecosystems; 5. Public participation and access to information and justice; 6. Good governance and 7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.⁷

Nowadays, sustainable development and its sub-principles have been extensively incorporated into international law, being present in the agenda of regional and multilateral organizations, in international treaties and national legislations worldwide, and cited by international dispute resolution bodies. Nevertheless, no specific regime or framework has been created to implement these goals, which have instead been inserted into other regimes and treaties. Thus, among the sub-principles cited above, the ‘Integration Principle’ is of paramount importance: it determines the integration of environmental and social concerns into all levels of governance and decision-making. The ILA committee described it as *the very backbone of the concept of sustainable development*⁸ and others have identified it as a core principle inherent to that concept⁹, while the other six principles are considered an expression of this overarching principle.

In this regard, this paper makes a case study on how trade law and policy is becoming integrated with sustainable development concerns, both using substantial provisions, such as integration of environmental and social concerns into trade agreements, and procedural tools such as procedures of impact assessment of the effects of regulatory measures, recognized as a procedural expression of sustainable development, giving practical meaning to the principles of precaution, public participation, good governance and integration of environmental and social issues on decision making processes.

2.2 Sustainable development and its integration in the world trade regime

The justification of looking into the trade sphere as a case study of sustainable development integration is twofold: firstly, international trade can have a significant effect on economic growth and development, and the notion of trade as welfare enhancing is one of the most fundamental doctrines in modern economics.¹⁰ Trade liberalization has also the potential to facilitate the implementation of

⁶ MC Cordonier Segger, *Sustainable development law: principles, practices and prospects*, Oxford University Press, 2004, pp. 45-50 and 368-71.

⁷ ILA Resolution 3/2002: *New Delhi Declaration Of Principles Of International Law Relating to Sustainable Development*, in ILA, Report of the Seventieth Conference, New Delhi (London: ILA, 2002), available at: <http://www.ila-hq.org>.

⁸ ILA, op cit.

⁹ P Sands, *International Law in the Field of Sustainable Development*, British Yearbook of International Law 1994, p. 303-336; N Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, The Hague Academy of International Law, 2008, p. 217, 362.

¹⁰ J Stiglitz, *Fair Trade for All: How Trade Can Promote Development*, Oxford University Press, 2005.

sustainable development objectives such as the transition to a green economy, by fostering the exchange of environmentally friendly goods and services, increasing resource efficiency, and generating economic opportunities and employment, thus contributing to poverty eradication.¹¹ Secondly, the international trade regime has become one of the most important regimes of international law, and given its relevance for the world economy, it is of great importance that it integrates these sustainable development concerns.

Nevertheless, the international trade regime and its framework organization, the WTO, are not, respectively, a development regime or organization, despite the fact that its main objective, the progressive liberalization of international trade, can have said impacts in the development process. The General Agreement on Tariffs and Trade (GATT), the core agreement of the WTO legal framework, was designed to reduce the tariffs applied by its members. It is, in fact, a negative integration contract, as members are free to unilaterally define their policies that might affect trade – such as environmental, social or competition policies.¹² The advent of the WTO expanded the areas regulated by the trade system, and acknowledged to a greater extent the impact it has on development issues. The Marrakesh Agreement's preamble seemed to have expanded these goals, stating that the organization sought to *expand the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [the Parties'] respective needs and concerns at different levels of economic development*.¹³ The Doha Ministerial Declaration of 2001 went further, stating that safeguarding an open non-discriminatory trading system and pursuing sustainable development can, and must, be mutually supportive, and identified sustainable development as an objective of the members.¹⁴

In this regard, several legal instruments within the WTO deal with development issues, to the extent that one commentator argues that there has been a 'legalization' of development in the trade regime, which can be interpreted in two ways.¹⁵ The first of them was the introduction of legal norms concerning special and differential treatment to developing countries in the WTO system (SDT). The second one concerns the attempts to bring into the WTO's sphere non traditional trade themes, making issues such as environmental protection and a concern of the organization and thus having legal value on trade disputes. Regarding the former, there are two legal rules establishing exceptions to the general framework of the GATT regime for non-discrimination (MFN): the measures determining SDT to developing countries, and Article XXIV which allows for preferential treatment when countries form a Free Trade Area (which will be explored further below). As concerns the second types of measures, the actual legal provision that deals with issues related to sustainable development is GATT Article XX, which lays down General Exceptions on a number of specific instances in which WTO members may be exempted from GATT rules. Two exceptions are of particular relevance to development: paragraphs (b) and (g) of Article XX. Pursuant to these two paragraphs, WTO members may adopt policy measures that are inconsistent with GATT disciplines, but necessary to protect human, animal or plant life or health (paragraph (b)), or relating to the conservation of exhaustible natural resources (paragraph (g)). GATT Article XX on General Exceptions consists of two cumulative requirements. For a GATT inconsistent environmental measure to be justified under

¹¹ UNEP, ITC and ICTSD; (2012); *Trade and Environment Briefings: Trade and Green Economy*; ICTSD Programme on Global Economic Policy and Institutions; Policy Brief No. 1; International Centre for Trade and Sustainable Development, Geneva, Switzerland, www.ictsd.org.

¹² P Mavroidis et al., *The Law of the World Trade Organization (WTO): Documents, Cases and Analysis*, Thomson/West, 2010, p. 44-60.

¹³ Preamble of the Marrakesh Agreement establishing the WTO in 1994.

¹⁴ Doha Ministerial Declaration, para. 6.

¹⁵ A Alavi, *Legalization of development in the WTO: between law and politics*. Global trade law series Kluwer Law International, chapter 3, "developing countries special status in the GATT and WTO". Is this a complete reference?

Article XX, a member must perform a two-tier analysis proving: first, that its measure falls under at least one of the exceptions (e.g. paragraphs (b) to (g), two of the ten exceptions under Article XX); and, then, that the measure satisfies the requirements of the introductory paragraph (the *chapeau* of Article XX), i.e. that it is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, and is not a disguised restriction on international trade.¹⁶

Despite the fact that sustainable development issues have made their way into the WTO legal system, being recognized and relevant as legitimate objectives to be pursued by member states including when affecting trade policy, the actual promotion of this goal, and especially its integrative component, would require more than negative integration measures, but rather positive integration initiatives. In this regard, the Doha Round negotiations include several relevant aspects for sustainable development, such as positive policies for liberalization of trade in ‘environmental goods and services’ (EGS), technology transfer for developing countries, revision of subsidies to benefit clean technologies, and others, but has been in a stalemate that has been proving difficult to solve. Thus, while the goal of sustainable development has been expressly incorporated, WTO law is not concerned with a comprehensive promotion of this issue.¹⁷ It would seem like the WTO aims to contribute to the achievement of sustainable development through its activities and within its mandate to achieve an open, non-discriminatory international regime of trade in goods and services.¹⁸

While at the multilateral level the integration of sustainable development is still slow, at the regional level several innovations included in regional blocs and regional trade agreements have been advancing these issues over the past years, with several positive policies being developed within this field. The next sections present case studies from the field of EU trade policy.

2.3 Sustainable development and the European Union

Sustainable development and the principle of integration have been included in the treaties of the European Union indirectly since the Treaty of Maastricht of 1992, and directly mentioned since the Treaty of Amsterdam in 1998.¹⁹ Nowadays, the Lisbon Treaty reaffirmed this commitment, and in the

¹⁶ A prominent example for the operation of the sustainable development objective in WTO law can be found in the *US – Shrimp* dispute concerning the WTO consistency of US trade restrictions imposed on shrimp imports in order to protect sea turtles which may get caught during shrimp fishing. In its decision, the WTO Appellate Body referred to the preamble of the WTO Agreement and noted that sustainable development has been generally accepted as integrating economic and social development and environmental protection, and that where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought. In this regard, sustainable development as one element of the multiple objectives of the WTO agreement guided the Appellate Body’s interpretation of the term ‘exhaustible natural resources’ in Article XX (g) GATT to include the protection of living species such as sea turtles. WTO Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (6 November 1998), para. 114.

¹⁷ T Broude, *Elements of the Principle of Integration in WTO Jurisprudence: Another Look at the Shrimp Cases*, Report of the International Law Association Conference in Toronto, 2006.

¹⁸ A Cosbey, ‘A sustainable development roadmap for the WTO’, International Institute for Sustainable Development, 2009, available at www.iisd.org.

¹⁹ The Treaty of Amsterdam introduced a direct link to it in Article 2 of the Treaty of the EU, which determined that “*The Union shall set itself the following objectives: to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion*”; in addition, Article 2 of the Treaty on the EC stated that “*the Community shall have as its task (...) to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States*”; finally,

common provisions that are part of the Treaty on the European Union, Article 3(3) states that *The Union shall establish an internal market. It shall work for the sustainable development of Europe. In addition, on the external dimension, Article 3(5) states that, in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.* Moreover, under Title V, covering the general provisions on external action, Article 21.2 determines that *the Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; and (h) promote an international system based on stronger multilateral cooperation and good global governance* (emphasis added).

These legal instruments show that sustainable development became a guiding principle of EU policies in general, being granted a place in the *constitutional* treaties. Nevertheless, no definition of the meaning of sustainable development has been provided in primary law, being found only in policy documents drafted afterwards. A first “Sustainable Development Strategy” (SDS) was presented in 2001, complemented in 2005 by the *Declaration on the guiding principles for sustainable development*,²⁰ a renewed SDS in 2006,²¹ and finally a review of the 2006 SDS in 2009, assessing the stage of implementation of the strategies on the seven keys areas and proposing new focal points. As regards the external agenda, the external dimension of sustainable development was cited among *new challenges which are not covered or only marginally in the SDS*, with particular attention to the contribution to a low-carbon and low-input economy and a shift towards sustainable consumption patterns, as well as the strengthening of the international dimension of sustainable development and efforts to combat global poverty.²²

Based on this framework, the EU has increasingly sought to integrate sustainable development concerns into its trade policy, both in terms of substantial and procedural measures. As regards substantive measures, sustainable development issues have found their way into the basic tools of EU external trade policy, the trade agreements that the EU signs with third parties, and the Global System of Preferences (GSP) schemes that have been created over the past years. In terms of procedural tools, the EU has been developing a procedure for ‘impact assessments’ (IA) for all regulatory measures, which has started with the analysis of trade agreements. Firstly, the EU enacted two Directives which created forms of IAs targeting its Member States: the *Environmental Impact Assessment Directive* enacted in 1986²³ was the first binding international instrument to provide details on the nature and scope of environmental impact assessments, its use, and participation rights in the process, being

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the new Article 6 stated that “*environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development*”.

²⁰ Council document 10255/1/05, available at <http://register.consilium.europa.eu>.

²¹ Council document 10917/06. In the context of the follow up procedures established, the Commission published a report, COM(2007) 642, available as Council document 14238/07, in which it evaluates progress of the commitments established at the SDS, showing “relatively modest progress on the ground”, but more encouraging initiatives at EU and member states level.

²² European Commission, Communication from the Commission to the Parliament, the Council, the ECOSOC and the Committee of the Regions, Mainstreaming sustainable development into EU policies: review of the 2006 SDS, COM (2009) 400.

²³ Directive 85/337/EEC, OJ L175, July 1985.

considered as a first generation process concerned with mitigating the impacts of major development projects. Following, in 2001 the Directive establishing a *Strategic Environmental Assessment* procedure was enacted, representing a second-generation process, which extended the scope of assessment also to public plans and programs.²⁴ A second step was taken when the Commission established an IA procedure to its own activities in 2002, following up on a model that was being developed by the Directorate General for Trade (DG TRADE) regarding external trade policies since 1999.²⁵ This new procedure had two innovative aspects: it was to be applied to all policy and legislative proposals of the Commission, thus having a considerably far reaching scope and impact; moreover, it was based on a *sustainable development* rationale, meaning that it included the economic and social spheres in addition to the environmental one, and created a mechanism of public participation in the procedure.²⁶ The *Sustainability Impact Assessment* (SIA) was a response to the call for regulatory and sustainable development tools, *an aid to decision-making, not a substitute for political judgment* which would not necessarily generate clear-cut conclusions or recommendations, but provide an important input by informing decision-makers of the consequences of policy choices, being “an integral part of the process of designing policy proposals and making decision-makers and the public aware of the likely impacts.”²⁷ These measures will be further discussed below in the context of the case study on EU trade agreements.

3. Case study: the integration of sustainable development in EU Free Trade Agreements

This section turns to a case study on how the objective of sustainable development is implemented via the EU’s external trade policy, and, more specifically, through the trade agreements, which are one of the most sophisticated trade instruments that the EU uses both to advance trade liberalization and market access, but also to achieve other policy objectives. In order to do so, three trade agreements will be analyzed in order to examine how sustainable development concerns, and above all its integrative aspects, were introduced, in two ways: a procedural component, carried out via the SIAs; and a substantive element, via the inclusion of *Trade and Sustainable Development* chapters. The three agreements chosen are: the Association Agreement (AA) signed with Chile, which was the first comprehensive agreement of this kind to be concluded by the EU and to go through a SIA procedure; the Free Trade Agreement (FTA) signed with South Korea, considered as the EU’s *flagship agreement* given its deep integration and broad coverage; and the AA signed with the Central American countries, the first bi-regional AA concluded at this point and among the most advanced in terms of references to sustainable development.

3.1 The Association Agreement with Chile

When the EU and Chile concluded an Association Agreement in 2002, which entered into force in February 2003, it became the most comprehensive FTA the EU had signed up to that point. This might seem surprising, as the EU was involved in other relevant negotiations such as with MERCOSUR. However, as one commentator argues, it was a combination of factors, such as Chile’s economic openness and the structure of its economic relations with the EU that enabled this agreement to go beyond deals with other parties, aided by the fact that in the EU–Chile relationship there were fewer

²⁴ Directive 2001/42/EC, OJ, June 2001.

²⁵ DG Trade had been developing since 1999 a “sustainability impact assessment (SIA) for major trade agreement negotiations, mainly the Doha Round of the WTO. See <http://ec.europa.eu/trade/analysis/sustainability-impact-assessments>.

²⁶ COM (2002)276.

²⁷ COM (2002)276.

sensitive agricultural products to exclude from the negotiations.²⁸ It was also the first agreement of this kind to go through the SIA procedure, which was presented in December 2002, aiming '*to identify the implications of the trade measures of the EU-Chile Association Agreement for the long-term economic, social and environmental development of both partners to the agreement. The objective of this examination is to optimize the outcome of the trade measures through the definition of measures aimed at mitigating any negative impacts and enhancing any positive repercussions of the trade measures.*' The study concluded that the overall economic impact of the EU-Chile Association agreement would be beneficial but some sectors would need adaptation and mitigation strategies.²⁹

The EU-Chile AA is broad and comprehensive, following a three-pillar model focused on political dialogue, cooperation and trade chapters that would become usual for other association agreements afterwards. Furthermore, it was one of the first to contain direct references to sustainable development. In the preamble the contracting parties already highlight *the need to promote economic and social progress for their peoples, taking into account the principle of sustainable development and environmental protection requirements*. Article 1 stated that the promotion of sustainable economic and social development and the equitable distribution of the benefits of the association would be considered guiding principles for the implementation of the agreement, but no specific chapter was included in this regard. Most of the sustainable development related provisions are in fact in the cooperation chapter, where the parties included among the objectives the promotion of *social development, which should go hand in hand with economic development and the protection of the environment*. In addition, the *importance of economic, financial and technical cooperation, as a means of contributing towards implementing the objectives and principles derived from this Agreement* was highlighted. The chapter is long and measures included are comprehensive, including includes issues such as cooperation on sustainable environmental management, renewable energy and technology transfer.

In terms of trade, the scope of this AA transcended that of other previous EU FTAs as both parties liberalize 90% of all trade flows from the first day of the entry into force of the Agreement, going beyond WTO commitments, and most of the 300 pages of the Agreement are devoted to trade and issues such as investment promotion (Article 21), science and technology (Title II), financial services (Article 121), Intellectual Property rights (Title VI). The relevance of analyzing this particular agreement as a first case study is, however, to show that, as an early example of an attempt to integrate sustainable development measures, the emphasis was more on including it as an objective to be pursued through cooperation, and as a principle informing the rest of the provisions. The next cases will demonstrate that a more specific approach has been developed by the EU to integrate this issue through trade related measures.

3.2 The Free Trade Agreement with South Korea

In October 2006 the Commission released the 'Global Europe Communication', having at its core a desire to negotiate a new generation of FTAs focusing on economies of high exporting potential for EU businesses. These FTAs should be ambitious in eliminating tariffs, as well as far reaching in the liberalization of services and investment, and in finding novel ways of effectively tackling non-tariff barriers. In this context, the negotiations with South Korea, the EU's fourth-largest trading partner outside Europe, have been launched in 2007 and concluded in 2009. The Agreement has entered into force in 2011.

The negotiations were also followed by a SIA procedure, whose results stated that the convergence in development levels and the broad similarity in the distribution of income between the EU and Korea

²⁸ M Garcia, 'Incidents Along the Path: Understanding the rationale behind the EU – Chile Association Agreement', JCMS Volume 49, Number 3, Blackwell, 2011, p. 501-524.

²⁹ EU – Chile AA Final Report, available at: http://trade.ec.europa.eu/doclib/docs/2010/may/tradoc_146109.pdf

would tend to limit significant social impacts on either side. The innovation in this study though was related to the recommendations and policy proposals made related to sustainable development, in which a suggestion to include a sustainable development part within the trade chapter was made for the first time. This *Sustainable Development and Trade* part of the trade provisions was to include a commitment to cooperate on core labour standards and areas where core ILO conventions not yet ratified by the parties and multilateral environmental conventions; complementary efforts to cooperate in responses to multilateral environmental challenges; liberalization of environmental goods and services; and the development of a *Sustainable Development Council* representing stakeholders in the EU and Korea to review the provisions in the agreement and ensure transparency.³⁰ And, in fact, these recommendations made their way into the agreement.

This FTA is considered the most comprehensive one ever negotiated by the EU, with import duties eliminated on nearly all products and far-reaching liberalization of trade in services, including provisions on investments both in services and industrial sectors, strong disciplines in important areas such as the protection of intellectual property (including geographical indications), public procurement, competition rules, transparency of regulation and sustainable development. In addition, the FTA includes several provisions on sustainable development. In Article 1 the parties *commit, in the recognition that sustainable development is an overarching objective, to the development of international trade in such a way as to contribute to the objective of sustainable development and strive to ensure that this objective is integrated and reflected at every level of the Parties' trade relationship*. In this regard, a chapter on *Trade and Sustainable Development* was inserted. This chapter features mainly three types of provisions. Firstly, commitments on both sides to labour and environmental agreements and standards. Secondly, a provision stating that the parties *shall strive to facilitate and promote 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. The Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability*. Thirdly, provisions of procedural nature, such as a determination of a continuous review of sustainability impacts through SIAs, and provisions setting up institutional structures to implement and monitor the commitments between the parties, including through civil society participation. Finally, a cooperation mechanism was set up in Annex 13, to promote the achievement of the objectives of the *trade and sustainable development chapter* and to assist in the fulfilment of their obligations pursuant to it.

3.3 The Association Agreement with Central America

The EU and the Central American (CA) region agreed to negotiate an association agreement (AA) in 2004, with negotiations being launched in 2007 and successfully concluded at the 2010 Summit between the EU and Latin American countries in Madrid - in which other important decisions regarding relations with other actors of the region were taken, among which the re-launch negotiations for an EU-MERCOSUR Association Agreement, and political approval to the conclusion of a trade agreement between the EU and the Andean Countries (Peru and Colombia). The EU – CA AA is particularly relevant for EU external relations since it is the first ‘bi-regional’ AA to be finalized up to this point within the ‘interregional’ approach to international relations adopted by the EU since the 1990’s.³¹

³⁰ EU – South Korea FTA Final Report, available at: http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141660.pdf.

³¹ See, in this regard, F Söderbaum et al., ‘The EU as a Global Actor and the dynamics of Interregionalism: a comparative analysis’, in F Söderbaum et al., *The EU as a global player: the politics of interregionalism*, Routledge, 2006.

A SIA procedure was also done for this agreement, and its results were presented in September 2009.³² The study concluded that the AA was *expected to be positive for both the EU and all Central American countries and the deeper the integration, the more beneficial the effects are expected to be in the long-run*. However, the conclusions were also wary of possible negative social and environmental impacts on both sides. Therefore, the SIA has suggested the inclusion of a trade and sustainable development chapter, as had already been done in the SIA undertaken for the South Korea FTA, and this recommendation has also been included later on in the text of the final agreement signed.

The EU-CA AA follows the three-pillar format of political dialogue, cooperation and trade. Article 1 states that [t]he Parties confirm their commitment to the promotion of sustainable development, which is a guiding principle for the implementation of this Agreement, and sustainable development related measures are widely present in the text. The cooperation chapter explicitly states that promoting economic growth with a view to furthering sustainable development, reducing the imbalances between and within the Parties and developing synergies between the two regions should be among the priorities of cooperation. In this regard, the chapter comprises nine subchapters, many of which address key issues for sustainable development: democracy, human rights and good governance; justice, freedom and security; social development and social cohesion; migration; environment, natural disasters and climate change; economic and trade development; regional integration; culture and audio-visual cooperation; and the knowledge society, and includes innovative measures such as support for organic farming and climate change.

The Trade Chapter is also a comprehensive, *WTO+* type, including liberalization on trade in goods and services. In addition, once again a sub-chapter on *trade and sustainable development* (Title VIII) has been included, with the parties explicitly manifesting their view of a *benefit of considering trade related social and environmental issues as part of a global approach to trade and sustainable development*. This chapter features mainly three types of provisions, being similar but even more comprehensive compared to the one in the South Korea FTA. Firstly, commitments on both sides to labour and environmental agreements and standards. Secondly, trade related provisions, whereby the parties *shall endeavour to: a) consider those situations in which the elimination or the reduction of obstacles to trade would benefit trade and sustainable development, taking into account, in particular, the interactions between environmental measures and market access; 2. (b) facilitate and promote trade and foreign direct investment in environmental technologies and services, renewable-energy and energy-efficient products and services, including through addressing related non-tariff barriers; (c) facilitate and promote trade in products that respond to sustainability considerations, including products that are the subject of schemes such as fair and ethical trade schemes, eco-labelling, organic production, and including those schemes involving corporate social responsibility and accountability; and (d) facilitate and promote the development of practices and programmes aiming at fostering appropriate economic returns from the conservation and sustainable use of the environment, such as ecotourism*. In addition, specific measures considering trade in fish products and trade in forest products are included, addressing particular issues and making reference to multilateral conventions. Thirdly, provisions of procedural nature, such as a determination of a continuous review of sustainability impacts through SIAs, and provisions setting up institutional structures to implement and monitor the commitments between the parties, including through civil society participation.

3.4 The relevance of these provisions

As the measures highlighted above show, there has been a significant increase in the integration of sustainable development in the EU trade policy, manifested in the enhanced level of sustainable

³² EU – Central America AA Final Report, available at <http://ec.europa.eu/trade/analysis/sustainability-impact-assessments/assessments/>.

development related measures that were included in the trade agreements subject to analysis in this paper. This integration has been undertaken through procedural and substantive provisions. In terms of procedural provisions, the SIAs accompanying the negotiations of these agreements can be cited as the main innovation. This type of *ex ante* analysis is an increasing trend not only for trade policies, and the EU model of SIA is considered as the most sophisticated model of impact assessment, including social and environmental concerns on both parties of the agreement. Despite the fact that the recommendations of SIAs are not binding on the parties and thus their real added-value and impact is questioned and uncertain, as a procedure their real purpose is to provide information to stakeholders and allow for a more informed decision making process, as well as provide a channel for the participation of the public in the debate, thus rendering the policy making process more transparent and participatory. Moreover, the policy recommendations seem to have been adopted in the cases analyzed here, showing a practical and positive impact. In addition, other types of procedural measures have been included in the agreements analyzed, such as procedures for the supervision of these agreements by joint bodies and civil society, and continuous SIA processes.

Furthermore, the integration of sustainable development provisions has taken place via substantive provisions, namely the inclusion of sustainable development measures within the texts of the agreements. Firstly, through preambular and introductory provisions, where sustainable development has been portrayed among the objectives of the agreements and as a guiding principle informing their implementation. This type of provisions generally offers indicates the object and purpose of the agreements themselves, providing guidance to the parties, and any dispute settlement bodies, on how they might interpret the Agreement in the event of a dispute. Secondly, provisions on cooperation and trade-related measures have been progressively been inserted in EU trade agreements. While in the Chile AA these provisions were still relegated to the Cooperation Chapter, after the significant upgrade of sustainable development as a guiding principle of the EU via the institutional reforms highlighted above, the South Korea and Central America agreements have much more straightforward measures and a specific chapter related to sustainable development within the Trade Chapter.

As regards the *trade and sustainable development chapters*, they contain mainly three types of provisions: firstly, a determination of cooperation and commitment to ratify, implement and enforce existing agreements and standards in the social and environmental fields. While this can be questioned as a best approach, an increased commitment in this area is a welcome means to push for the effectiveness of the said agreements. More interesting though is the commitment to facilitate and incentive the liberalization of trade on goods and services that might have a beneficial impact on social and environmental issues, such as liberalization of *environmental goods and services (EGS)* and *fair trade* products. While these commitments has been made as a quasi soft law obligation, without a precise definition of modalities or timelines, these provisions represent a starting point that can be used to move forward with these issues.

The liberalization of EGS, for instance, despite featuring as an important point within the Doha negotiations, has not progressed at the multilateral level. The objective of paragraph 31(iii) of the 2001 WTO Doha Declaration, which called for the *reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services* was to create a “win- win-win” situation for trade, the environment and development. The mandate, however, defined neither what environmental goods and services are nor the speed or depth of liberalization to be achieved. In fact, no official list or definition of EGS has been agreed upon so far, and despite the efforts to move forward with the Doha mandate, the average world tariffs on EGS are bound at a level of 8.7 percent, almost three times higher than the average applied rate for all goods – considering full use of preferences – at 3 percent. Nevertheless, the EGS have a great value for the move towards a ‘green economy’: In 2006, the global market for environmental goods and services was valued at US\$690 billion, with some analysts expecting it to rise to US\$1.9 trillion by 2020, with a potential to grow especially in developing

countries.³³ Thus, if a progress in this area can be achieved in the context of a regional trade agreement, it will represent an important building block for sustainable development.

4. Conclusions

The analysis undertaken in this paper allows concluding that the regional sphere constitutes a valuable means to move forward with the implementation of sustainable development and the integration of it into trade law and policy. The measures analyzed within the field of EU trade policy go well beyond the negative integration approach undertaken by the WTO to date, and have an important role to play in advancing green economy objectives further in relation to the multilateral framework. These regional trade agreements have been incorporating integrated frameworks, which provide sustainable development measures tailored to their specific context.

There has been a significant increase in the breadth of the trade and sustainable development measures included in the agreements analyzed, which went from being only cooperation measures supporting the achievement of sustainable development objectives, to more explicit trade related measures targeting specific issues that are considered as important to the sustainable development agenda identified by the contracting parties. At the same time, most of these measures are drafted in 'soft' language and open-ended obligations. In this regard, a multilateral framework would still be important to ensure coherence and effectiveness in relation to the wider sphere, and national measures have an important role to play in assuring the implementation of these provisions.

³³ See, in this regard, UNEP, ITC and ICTSD; (2012); *Trade and Environment Briefings: Trade in Environmental Goods*; ICTSD Programme on Global Economic Policy and Institutions; Policy Brief No. 6; International Centre for Trade and Sustainable Development, Geneva, Switzerland, www.ictsd.org not sure this is a complete reference that adheres to your style.

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Annex

Table A

This table summarizes the sustainable development (SD) provisions included in each of the three agreements analyzed, including the fact that they went through a SIA procedure, how sustainable development is stated as a guiding principle of the agreement and how the trade and SD provisions are structured.

	Chile AA	Korea FTA	Central America AA
SIA	√	√	√
Sustainable Development stated as:	Guiding principle: ‘The promotion of sust. economic and social development and the equitable distribution of the benefits of the Association are guiding principles for the implementation of this Agreement’	Objective: ‘to commit, in the recognition that SD is an overarching objective, to the development of international trade in such a way as to contribute to the objective of SD and strive to ensure that this objective is integrated and reflected at every level of the Parties’ trade relationship;’	Principle: ‘The Parties confirm their commitment to the promotion of SD, which is a guiding principle for the implementation of this Agreement, taking notably into account the MDGs. The Parties shall ensure that an appropriate balance is struck between the economic, social and environmental components of SD.’ + Objective
Trade & SD Chapter	X	√	√
Cooperation on SD	√	√	√

Table B

This table summarizes the main provisions included in the Trade and SD Chapters of the EU – South Korea FTA and the EU – Central America AA

Trade & SD Chapter content	Korea	Central America
Objective: Development of int. trade in a way as to contribute to SD and integration of SD in at every level of relationship	√	√
Right to regulate and levels of protection	√	√
Commitment to enforce Multilateral labor standards and agreements	√	Greater detail, list of conventions and agreements
Commitment to enforce Multilateral environmental Standards and agreements	√	Greater detail, list of conventions and agreements
Commitment to undertake trade favoring SD: ‘The parties shall:’	‘Strive to facilitate and promote: trade and FDI in env. Goods and services; trade in goods that contribute to SD (labels, CSR)’	‘Endeavor to facilitate and promote: trade and FDI in env. Tech. and services; trade in products that respond to SD considerations; the development of practices and programs aiming at fostering return for conservation and sust. Use of the env. + Trade in forest products (commit to work together to improve law enforcement and gov.) + Trade in fish products (adhere to and implement UNCLOS); cooperate; exchange info.
Upholding levels of protection	√	√
Use of scientific information (precautionary princ.)	√	√
Transparency	√	X
SIAs	√	√
Institutional mechanisms: Committee Trade&SD Civil society	√	√
Differentiated DSM	√	√
Cooperation	Annex 13 on SD Cooperation	Chapter of the AA

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