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Special Issue: United States' Free Trade Agreements: A Silent (R)Evolution?

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Editorial

The trade policy of the United States (U.S.) traditionally relied almost exclusively on multilateral negotiations in the context of the General Agreement on Tariffs and Trade (GATT) and avoided bilateral free trade agreements (FTAs), except with countries whose import tariffs had little effect on the direction of trade.[1] This changed in 1985 when the United States concluded a free trade agreement with Israel. As Gantz explains, "the year 1985 marked a pivotal period in U.S. foreign trade policy. The United States began to depart from its long-standing opposition to regional trade agreements."[2] The conclusion of the Canada-United States Free Trade Agreement (CUSFTA) in 1987 led to the conclusion of the North American Free Trade Agreement (NAFTA) in 1994 and, subsequently, to the Free Trade Areas of the Americas initiative.[3] After 2000, the United States sought to densify their FTAs network and by 2015 gradually concluded bilateral[4] and plurilateral[5] free trade agreements with a total of 25 countries. The Transatlantic Trade and Investment Partnership (TTIP), currently under negotiation, will be added to this network. Interestingly enough, the United States concluded free trade agreements mostly with economically and politically weaker countries that had much to gain from access to the U.S. market and had little significance for U.S. trade.[6] In contrast, the United States have no free trade agreements with some of their major trading partners, namely, China and the European Union even though the United Kingdom, Germany, the Netherlands, Belgium and France in the aggregate account for more than China in total export value for goods.[7]

In his introduction in this volume, Gantz attributes the change in the U.S. policy to the slow progress of the European countries towards economic integration in the 1970s and the early 1980s, as well as to the increase of the European trade power and the lack of European support for a new GATT negotiating round, leading

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1 Sidney Weintraub, *Some Implications of U.S. Trade Agreements with Chile and Singapore* 8 (LAEBA, Working Paper No.14, Jun. 2003), *available at* http://www19.iadb.org/intal/intalcdi/PE/2010/06219.pdf (last visited Jul. 20, 2016).

2 David Gantz, *The 'Bipartisan Trade Deal,' Trade Promotion Authority and the Future of U.S. Free Trade Agreements*, 28 St. Louis U. L. Rev. 116 (2008).

3 Weintraub, *supra* note 1, at 8.

4 Australia (2005), Bahrain (2006), Canada (1987), Chile (2004), Colombia (2011), Israel (1985), Jordan (2001), South Korea (2011), Morocco (2006), Oman (2006), Panama (2011), Peru (2007), Singapore (2004).

5 NAFTA with Canada, Mexico (1994), Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Dominican Republic (2006) and the Trans-Pacific Partnership (TTP) with Australia, Brunei Darussalam, Chile, Japan, Malaysia, New Zealand, Peru, Singapore, Vietnam (2015).

6 Bernard K. Gordon, *By Invitation Only: Cozy Free Trade Deals Subvert Global Integration*, Yale Global Online, Feb. 13, 2003, *available at* http://yaleglobal.yale.edu/content/invitation-only-cozy-free-trade-deals-subvert-global-integration (last visited Jul. 20, 2016).

7 *See*, *Top U.S. Trade Partners Ranked by 2014 U.S. Total Export Value for Goods*, *available at* http://www.trade.gov/mas/ian/build/groups/public/@tg_ian/documents/webcontent/tg_ian_003364.pdf (last visited Jul. 20, 2016).

the United States to take regional initiatives. Concerns over the U.S. expansion led Europeans to agree to new multilateral negotiations while the stalemate of the Uruguay Round offered the United States, Canada and Mexico the opportunity to conclude the NAFTA. Subsequently, after the failure of the Doha Development Round, the United States saw in free trade agreements more than a second best approach to trade liberalization, an opportunity to broaden trade liberalization to the global level and influence the content of future international trade rules.[8] Griffith, Steinberg & Zysman explain in that respect that "[b]y negotiating deals one-by-one with individual countries, the US was able to leverage its power, securing deeper liberalization and a more complex trade agenda than could be advanced in the [World Trade Organization] WTO, where US trade bargaining power was more diffused than in one-on-one negotiations." Furthermore, pursuing the strategy of competitive liberalization, the United States expected that "once a critical mass of bilateral agreements were achieved, states not party to these agreements would be inclined to liberalize along similar lines in order to avoid trade and investment diversion, and to remain competitive in a global economy."[9] According to Bergsten, the United States thus hoped "to place pressure on non-members of individual free trade agreements either to join the group itself or to conclude broader agreement."[10]

This change of the U.S. policy may have wide-ranging repercussions for the future international rules of trade. Already, the size of the U.S. economy and the consequent desire of other countries to become preferential U.S. trading partners[11] allowed the proliferation of U.S. free trade agreements. Since the 2000s, the extension of the U.S. FTAs network along with the reaction of the European Union (EU) to the risk of losing privileged access to markets covered by the U.S. free trade agreements and the consequent "competitive attitude between the EU and the US, in terms of gaining preferential market access and extending regulatory rules to emerging countries,"[12] led to the generalized shift from multilateral negotiations to plurilateral and bilateral preferential trade agreements (PTAs). Weintraub claims that "the United States over the past few years concluded as a policy matter that it should be prepared to negotiate in many forums - global, as in the World Trade Organization … regional, as in the Free Trade Areas of the Americas … plurilateral, as in the ongoing negotiations … to achieve a U.S.-Central American Free Trade Area … and bilaterally, as it did with Jordan and now with Singapore."[13] This shift to bilateralism and regionalism was interpreted as a division of labor, placing liberalization "at the level where it is easiest to achieve, for whatever reason (geographical proximity, power relations, etc.), while maintaining regulation at the

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8 David Gantz, *Introduction to U.S. Free Trade Agreements*, 5 Br. J. Am. Legal Stud. 302-06 (2016).

9 Melissa K. Griffith, Richard Steinberg & John Zysman, *Great Power Politics in A Global Economy: Origins and Consequences of the TPP and TTIP*, The Berkeley Roundtable on the International Economy, *available at* http://www.brie.berkeley.edu/wp-content/uploads/2015/02/Great-Power-Politics-in-a-Global-Economy-Origins-and-Consequences-of-the-TPP-and-TTIP.pdf (last visited Jul. 20, 2016).

10 Fred C. Bergsten, *A Competitive Approach to Free Trade*, Financial Times, Dec. 4, 2002, *available at* https://piie.com/commentary/op-eds/competitive-approach-free-trade.

11 Gordon, *supra* note 6.

12 André Sapir, *Europe and the Global Economy*, in Fragmented Power: Europe and the Global Economy 13 (André Sapir ed., 2007).

13 Weintraub, *supra* note 1, at 8.

global level", an argument deduced from references to WTO rules in most free trade agreements.[14] However, the proliferation of free trade agreements, apart from the risk of discrepancies between the different agreements as a result of the so-called spaghetti bowl phenomenon,[15] may lead to marginalization of the WTO as a privileged forum of negotiation of international trade rules.

Along with this vertical forum shifting, the United States - and the European Union - using their increased bargaining power, introduced bilateral commitments going beyond those that their partners have accepted at the multilateral level (WTO-Plus) as well as provisions dealing with issues lying outside the current WTO mandate (WTO-Extra). The first relate to the liberalization of trade in goods and services, whereas the second relate to investment protection, competition policy, labor standards, and protection of the environment.[16] To some extent, the United States traded WTO-Plus provisions in return for WTO-Extra obligations. They thus achieved with economically and politically weaker partners what they could not achieve through the WTO.[17] Indeed, the U.S. free trade agreements are amongst the most prominent examples of asymmetric preferential trade agreements.[18] The gains reaped by the United States include the increased access to their trading partners' markets without them having to liberalize in return traditionally protected sectors such as agriculture, steel and textiles.[19] Furthermore, the United States exported their regulatory rules in a number of areas,[20] in order to further their domestic interests or respond to domestic concerns. In relation to intellectual property rules (IPRs), for example, Mercurio rightly explains that "[a]s a result of the strong and unwavering resistance" of developing countries during the Seattle and the Doha Rounds "the US has again shifted its negotiating focus and sought to use bilateralism/regionalism to increase IPRs by requiring FTA partners to implement TRIPS-Plus provisions."[21] These provisions are not necessarily beneficial to U.S. trading partners. In this volume, Tully observes that by concluding bilateral and regional agreements, the United States "is gaining greater influence over the domestic health care and drug coverage programs of its trading partners."[22] Cai adds that the recent U.S. free trade

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14 Hélène Ruiz-Fabri, *Regulating trade, Investment and Money*, *in* The Cambridge Companion to International Law 357 (James Crawford & Martti Koskenniemi eds., 2012).

15 Jagdish Bhagwati, Termites in the Trading System: How Preferential Agreements Undermine Free Trade 61-70 (2008).

16 Henrik Horn, Petros C. Mavroidis & André Sapir, *EU and U.S. Preferential Trade Agreements: Deepening or Widening of WTO Commitments*, in Preferential Trade Agreements: A Law and Economics Analysis 151-52 (Kyle W. Bagwell & Petros C. Mavroidis eds., 2011).

17 *Cf*. Meredith Kolsky Lewies, *The Politics and Indirect Effects of Asymmetrical Bargaining Power in Free Trade Agreements*, in The Politics of International Economic Law 19 (Tomer Broude, Marc L. Busch & Amelia Porges eds., 2011).

18 Vladimir G. Sherov-Ignatiev, & Sergei F. Sutyrin, *Peculiarities and rationale of asymmetric regional trade agreements*, WTO Research and Analysis, https://www.wto.org/english/res_e/publications_e/wtr11_forum_e/wtr11_2aug11_a_e.htm (last visited Jul. 20, 2016).

19 Weintraub, *supra* note 1, at 9; Gantz, *supra*, note 2, at 118.

20 Horn, Mavroidis & Sapir, *supra* note 16, at 169, Sapir *supra*, note 12, at 12.

21 Bryan Mercurio, *TRIPS-Plus Provisions in FTAs: Recent Trends*, in Regional Trade Agreements and the WTO Legal System 219 (Lorand Bartels & Federico Ortino eds., 2006).

22 Stephen R. Tully, *Free Trade Agreements with the United States: 8 Lessons for Prospective Parties from Australia's Experience*, 5 Br. J. Am. Legal Stud. 406 (2016).

agreements introduce regulatory coherence obligations that promote a uniform OECD-inspired model of regulation that is already part of the U.S. regulatory toolbox, thus extending its reach to the U.S. trading partners.[23]

Amidst the continuing stalemate of the global trade negotiations, one wonders what the effect of the proliferation of U.S. free trade agreements for the future international rules of trade will be. Will the densification of U.S. - and EU - PTAs networks lead to the disintegration of the WTO or will their rules be absorbed by future WTO agreements? Panezi in this volume explains that preferential trade agreements were formally allowed by the WTO on the assumption that "more liberalization, even if it occurs on the bilateral level, is better than no liberalization at all."[24] Sapir by contrast, underlines that U.S. and EU preferential trade agreements present a systemic challenge to the WTO[25] and WTO officials themselves have voiced concerns over the risks of their proliferation.[26] The densification of these networks could lead to the establishment of plurilateral rules involving the United States, the European Union and their respective partners or even to the creation of a U.S./EU-led trade organization with WTO rules remaining a second best choice for trading with the United States and the European Union. The Trans-Pacific Partnership Agreement (TPP) and the TTIP, as Pitschas in this volume explains, represent "a watershed for the multilateral trade system, just as TPP,"[27] and may be the first steps towards that development.

Nevertheless, one cannot exclude the possibility of a transition from bilateral and plurilateral to multilateral rules, as was the case with GATT.[28] If, as Sapir claims, one of the main objectives of the TTIP "is for the EU and the US to change gear and adopt a more cooperative attitude at a time when their global economic leadership is more and more called into question by the emergence of new economic powers,"[29] the TTIP may then constitute the Trojan horse for them to regain control over multilateral trade negotiations. Some of their trading partners will voluntarily align with them whereas others will be coerced towards the multilateralization of what they have already agreed on the bilateral and the plurilateral levels, a strategy that has been used before in the case of TRIPS.[30] The competitive liberalization strategy, envisaging that non-partners will join the group or conclude a broader agreement, accommodates both developments. Last but not least, one should not underestimate how U.S. free trade agreements may serve as models for future international trade

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23 Phoenix X.F. Cai, *Regulatory Coherence and Standardization Mechanisms in the Trans-Pacific Partnership*, 5 Br. J. Am. Leg. Stud. 511 (2016).

24 Maria Panezi, *The Two Noble Kinsmen: Internal and Legal Transparency in the WTO and Their Connection to Preferential and Regional Trade Agreements*, 5 Br. J. Am. Leg. Stud. 554 (2016).

25 Sapir, *supra* note 12, at 12.

26 Horn, Mavroidis & Sapir, *supra* note 16, at 151.

27 Christian Pitschas, *Transatlantic Trade and Investment Partnership (TTIP): The Devil in Disguise or a Golden Opportunity to Build a Transatlantic Marketplace?*, 5 Br. J. Am. Leg. Stud. 340 (2016).

28 John M. Kline & Rodney D. Ludema, *Building a Multilateral Framework for Investment: Comparing the Development of Trade and Investment Accords*, 6 Transnat'l Corp. 8 (1997).

29 Sapir, *supra* note 12, at 13.

30 Susan K. Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA and TPP*, 18 J. Intell. Prop. L. 452 (2013).

and investment rules. In this volume, Monardes, amongst others, points out the influence of NAFTA in the free trade agreements concluded among Latin American and between Latin American countries and Asia Pacific countries.[31] Schill and Bray explain that NAFTA and the U.S. Model Bilateral Investment Treaties have been the source of inspiration of the recent Mega-Regionals and other important trade and investment agreements.[32] Finally, Voon and Sheargold observe the likelihood of TPP influencing many current and future PTAs' negotiations.[33]

The shift from multilateralism to regionalism, plurilateralism and bilateralism in international trade negotiations, amongst others, changed the focus of the academic debate. The challenge of free trade agreements rather than of the WTO now occupy most of the discussions of the relevant epistemic communities all over the world; a trend that is likely to intensify since the conclusion of the TTP and the advancement of the negotiations on the TTIP. This special issue of the *British Journal of American Legal Studies*, conceived just before the unexpected conclusion of the TTP negotiations, responds to the need for research on the recent U.S. free trade agreements. It does not intend to provide a comprehensive analysis of the problems related to the rise of these agreements or of the content of the agreements themselves. Its aim is rather to focus on selected issues arising from the different obligations included in these agreements. Twelve distinguished international trade and investment law scholars from accros the world were invited to explore key aspects of particular U.S. free trade agreements. Contributors were not restricted by a research agenda, their independence was respected and hence their approaches do not necessarily converge, even though all share similar concerns in relation to the expansion of the U.S. free trade agreements.

In his introduction David A. Gantz explores the historical changes in U.S. trade policy and the shift from the support of multilateral rules to the embracement of regional and bilateral trade agreements. Christian Pitschas focuses on the on-going negotiations for the TTIP and on the possible impact of the TTIP on the multilateral trading system and developing countries. Tania Voon and Elizabeth Sheargold analyze the motives and the negotiation dynamics of the chapters relating to investment, services, intellectual property and regulatory coherence of the recently concluded TPP. Rodrigo Monardes analyzes the liberalization of trade in services under the NAFTA negative list approach on the basis of the Chile-United States Free Trade Agreement. Relying on the experience of the Australia-United States Free Trade Agreement, Stephen R. Tully discusses the standards of intellectual property protection and their impact for U.S. trading partners. Haydn Davies analyzes the effects of investor-state dispute settlement mechanisms of NAFTA, the European Union-Canada Comprehensive Economic Trade Agreement, the TTP and the draft TTIP on national environmental rules and, in particular, on the precautionary principle. Stephan W. Schill and Heather L. Bray focus on the

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31 Rodrigo Monardes, *Challenges for Countries in Trade in Services' Negotiations with the NAFTA Approach: The Experience of Chile in the Free Trade Agreement with the United States*, 5 Br. J. Am. Leg. Stud. 390-92 (2016).

32 Stephan W. Schill & Heather L. Bray, *The Brave New (American) World of International Investment Law: Substantive Investment Protection Standards in Mega-Regionals*, 5 Br. J. Am. Leg. Stud. 424 (2016).

33 Tania Voon & Elizabeth Sheargold, *The Trans-Pacific Partnership*, 5 Br. J. Am. Leg. Stud. 370 (2016).

influence of NAFTA and U.S. practice on the substantive rules governing investor-state relations of the Mega-Regionals. Jaemin Lee explores the dispute settlement' provisions of the free trade agreements concluded between the United States and Korea, Peru, Panama and Colombia. Using the TPP as her primary example, Phoenix X. F. Cai analyzes regulatory coherence obligations and the role of international standard setting organizations. Maria Panezi, finally, examines the relation between preferential trade agreements and WTO rules with particular focus on the problem of transparency and the limits of the Doha Transparency Mechanisms.

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Introduction To U.S. Free Trade Agreements

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ABSTRACT

This introduction explores the historical changes in the trade policies of the United States (U.S.), namely, the shift from the support of multilateral rules to the embracement of regional trade agreements and provides an overview of the political and economic considerations behind the conclusion of the major U.S. free trade agreements.

CONTENTS

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I. Introduction

This article explores the historical changes in trade policies that brought the United States government from a staunch supporter of trade liberalization under the General Agreement on Tariffs and Trade (GATT) (and generally an opponent of liberalization through regional agreements[1]), to an enthusiastic negotiator of regional trade agreements, all over a period of about 35 years.[2] Since 1985, the United States (U.S.) has concluded free trade agreements (FTAs) with a total of nearly thirty nations, including most recently the Trans-Pacific Partnership (TPP).[3] Slowly progressing negotiations are underway with the European Union (EU), which if and when successful would add another twenty-eight countries as FTA partners.[4] U.S. policy has also shifted from seeing free trade agreements as a second best approach to trade liberalization to one where, after the failure of the WTO's Doha Development Round, the focus is decidedly on the regional agreements, most significantly the TPP and the Transatlantic Trade and Investment Partnership (TTIP). In addition to the trade liberalization that has taken place in free trade agreements, the United States Government views the most recent free trade agreements as a positive force. If the process is successful, it could eventually bring broader trade liberalization from the regional to the global level, and assure that the United States has a major role in setting the rules for international trade in the future.

II. Free Trade Agreements in the General Agreement on Tariffs and Trade

A GATT without an exception for customs unions would not have been consistent with post World War II foreign policy in Europe. In addition to the U.S. Marshall Plan and the efforts of the World Bank, both designed to support the economic and industrial reconstruction of Europe, the United States strongly supported the economic unification of Western Europe as an antidote to a possible World War III. The Marshall Plan aid was channeled primarily through a common European program, rather than on a country-by-country basis.[5] Further, the United States opposed French efforts to prevent Germany from again becoming an industrial

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1 *See Canada-US Automotive Products Agreement,* Jan. 1965, Historica Canada, *available at* http://www.thecanadianencyclopedia.ca/en/article/canada-us-automotive-products-agreement.

2 Much of this history is discussed in detail in David A. Gantz, Regional Trade Agreements: Law, Policy and Practice (2009) [hereinafter Gantz, RTAs].

3 Trans-pacific Partnership Agreement [Australia, Brunei, Canada, Chile, Japan, Korea, Malaysia, Mexico, Peru, Singapore, United States and Vietnam], Feb. 4, 2016, *available at* https://ustr.gov/tpp (last visited Mar. 26, 2016).

4 *See EU Commission,* The Transatlantic Trade Investment Partnership, *available at* http://ec.europa.eu/trade/policy/in-focus/ttip (last visited Mar. 26, 2016). Should the U.K. withdraw from the EU, as seems highly likely as of October 2016, the number would of course be reduced to 27.

5 *See* Robert Wilde, *The Marshall Plan, available at* http://europeanhistory.about.com/od/coldwar/p/prmarshallplan.htm (last visited Jan. 15, 2016).

power.[6] European economic union was not of course a U.S. idea. Churchill, among others, suggested in 1946 that a (customs) union of France and Germany could be the initial step in a broader union of European nations.[7]

Still, possible future European economic integration was not the only or perhaps even the most significant driving force. Professor John Jackson observed that some countries treated regional agreements as exceptions to Most-Favored-Nation (MFN) treatment well before the GATT was drafted. The United States sought a "dismantling" of trade preferences in the 1946-47 GATT negotiations and in the ill-fated International Trade Organization (ITO) Charter, where particular concerns had arisen with respect to the preferences extended to members of the British Commonwealth.[8] According to Jackson, even the United States "recognized the legitimacy of an exception for customs unions," and was willing to permit such arrangements "without opening the door to the introduction of all preferential systems under the guise of a customs union."[9] Professor Petros Mavroidis further suggests that some negotiators at the conference wanted to regulate "frontier traffic" (trade between adjacent countries) while others saw the exception as a tool to legitimate preexisting arrangements or to further economic development, or even as a kind of insurance policy in the event that the new multilateral system were to break down.[10] Although the United States had pressed for a requirement of immediate adoption of the customs union, other delegations urged that there be a transition or interim period. This latter view ultimately prevailed in Article XXIV. It was at the Havana Conference, where the International Trade Organization agreement was drafted, that the idea of a free trade area was added to the exception for customs unions.

In the course of the drafting of the General Agreement on Tariffs and Trade in 1946 and 1947, the United States thus accepted the necessity of including in the GATT an exception to the fundamental non-discrimination principle of most favored nation treatment, with the U.S. delegate (probably Harry Hawkins) instrumental in proposing the draft of what eventually became Article XXIV.[11] The decision was made to include in Article XXIV language that would permit the deviation from MFN treatment only under what were believed to be narrow circumstances. The most important of these included requirements that the free trade area or customs union would achieve coverage of substantially all intra-regional trade within a reasonable period of time, and would preclude the Parties from increasing tariffs and non-tariff barriers for goods imported from outside the region.[12]

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6 *See* Damian Chalmers, 1 European Union Law: Law and EU Government 8-9 (1998) (relating U.S. involvement in shaping an economically integrated Europe in the 1940s).

7 *Id.* at 9.

8 *See* Jackson, at 576-580 (discussing the drafting of Article XXIV).

9 *Id.* at 577.

10 Petros C. Mavroidis, I The Regulation of International Trade: Gatt 293 (2016).

11 *Id.* at 292.

12 GATT, art. XXIV(5(b), XXIV(8)(b).

III. The United States' Embrace of Free Trade Agreements

The United States came relatively late to the conclusion that regional trade agreements[13] were a desirable and even necessary element of a comprehensive trade liberalization policy. Throughout multiple GATT negotiating "rounds" designed to achieve global tariff and non-tariff barrier reductions, at least through the Tokyo Round (1973-79), the United States remained a strong supporter of the multilateral trading system. The shift toward Regional Trade Agreements (RTAs) began only in the mid-1980s.

This change can be attributed primarily to two factors. First, the European Economic Community (now European Union), which had made only relatively slow progress toward deeper economic integration in the 1970s and early 1980s, finally took the necessary steps toward a full common market with the Single Market Initiative, adopted after much discussion and debate in 1986, for implementation in 1992. The establishment of what eventually would be a true European Union had a significant demonstration effect elsewhere in the world.[14] The United States, although a long-term supporter of European integration, could not fail to grasp the importance of Europe's enhanced access to relatively low-wage production with the accession of Ireland (1973), Greece (1979) and Spain and Portugal (1986)[15] and the implications for Europe's competitiveness with the Western Hemisphere and with Asia.

These considerations were also reinforced by U.S. frustration from 1982-1985 in efforts to achieve further global trade liberalization through the GATT in Geneva, primarily because of a lack of support for a new GATT negotiating round from the (internally preoccupied) Europeans. U.S. Trade Representative and former Senator William Brock and his allies in the U.S. Government decided to respond to this rebuff by championing regional initiatives with the Israel and then Canada FTAs. The Reagan Administration also enacted unilateral tariff preferences for nearby developing countries in Central America and the Caribbean through the Caribbean Basin Initiative.[16] The logic then as today with the WTO's failed Doha Round was that if the then-preferred global freer trade initiatives could not move forward, regional trade arrangements could provide a viable alternative.[17]

The strategy worked in the mid-1980s. Concerns about the United States' new bilateral course, which could have been expanded beyond Israel and

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13 In this discussion the term "regional trade agreements" is used as on the WTO website to refer to those agreements that are not multilateral in natures such as those concluded under the auspices of the GATT/WTO in Geneva. (*See* WTO.org, last visited Jan. 8, 2016). This includes the true RTAs such as NAFTA, where the Parties share common borders, as with NAFTA, and those that cross several regions, such as the U.S. FTA with Singapore and Australia, and the Trans-Pacific Partnership. *See* Robert V. Fioentino et al., *The Changing Landscape of Regional Trade Agreements: 2006 Update,* WTO Discussion Paper no. 12 (2006), *available at* https://www.wto.org/english/res_e/discussion_papers12a_e.pdf.

14 Jeffrey A. Frankel, Regional Trading Blocs in the World Economic System 4-5 (Inst. for Int'l Economics, 1997).

15 Paolo Mengozzi, European Community Law 3 (1992).

16 *Id.* 5-6. These developments are also discussed in William A. Lovett, Alfred E. Eckes, Jr. & Richard Brinkman, U.S. Trade Policy: History, Theory and the WTO 94-95 (M.E. Sharpe, 1999).

17 *See also infra*, part III on the U.S.-Israel Free Trade Agreement.

Canada, likely prompted the Europeans to agree a new round of multilateral trade negotiations (in 1986).[18] However, the new policy accepting the desirability of regional trade agreements ultimately continued well beyond the United States-Canada Free Trade Agreement (CFTA)[19] to the North American Free Trade Agreement (NAFTA),[20] which was negotiated and concluded by the first Bush Administration in 1991-92 but ultimately steered through Congress by the Clinton Administration in 1993. It is difficult to know whether in the absence for several years of progress in concluding the Uruguay Round NAFTA would have gone forward, even after three years of more or less satisfactory operation of the CFTA. Still, the Uruguay Round GATT negotiations were largely stalled from 1991-1992 primarily because of disagreements between the United States and the European Communities over reduction of agricultural subsidies, along with wider differences over services, market access, anti-dumping and a new institution.[21] This two-year delay provided the United States, Canada and Mexico with a convenient window to conclude the NAFTA negotiations.[22] By the time the Uruguay Round impasse over agriculture was resolved through the so-called Blair House Accord in November 1992,[23] paving the way for concluding the signing of the Uruguay Round Agreements in April 1994, NAFTA was well on its way to entering into force.

This is not to suggest that with the success of the NAFTA negotiations the U.S. Government embarked on a continuing process of negotiating additional free trade agreements. It was widely believed by those in the Clinton Administration and many observers that NAFTA could and would be expanded to include other Western Hemisphere states (beginning with Chile). However, this did not happen, in large part because the Republican Congress refused to renew President Clinton's "fast track" negotiating authority once it expired in mid-1994.[24] (In fairness to the Republicans in Congress, renewal would have been a mixed blessing for the Clinton Administration, since several of the President's core constituencies, labor and environmental groups, generally opposed further trade liberalization.)[25]

The highly ambitious Clinton-sponsored negotiations for a Free Trade Area of the Americas (FTAA) beginning in December 1994 achieved little progress during

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18 *See* Lovett et al., *supra* note 16, at 100.

19 United States-Canada Free Trade Agreement, Dec. 1997-Jan. 1998 [U.S.-Can.], 27 I.L.M. 281 (1998), *also available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf (last visited Jan. 13, 2016).

20 North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mexico-Canada, 32 I.L.M. 289 (1993), *also available at* https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement.

21 *See Understanding the WTO: The Uruguay Round,* World Trade Organization *available at* https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

22 The negotiations began in February 1991, with the agreement signed in December 1992. *See North American Free Trade Agreement,* Chronology of Events, NAFTANow.org, *available at* http://www.naftanow.org/about/default_en.asp.

23 *See Understanding the WTO: The Uruguay Round, supra* note 21 (noting that "The US and EU settled most of their differences on agriculture in a deal known informally as the 'Blair House accord.'").

24 *See* Gantz, RTAs, *supra* note 2, ch. 5 (political factors) & ch. 12 (MERCOSUR)

25 For a discussion of the failed efforts to include Chile in NAFTA, *see* Ralph Folsom, Michael Gordon & David Gantz, NAFTA and Free Trade in the Americas: A Problem-Oriented Coursebook 772-796 (2d ed. 2005).

the remaining years of the Clinton Administration, and encountered no greater success under the George W. Bush Administration, even after fast track was renewed as Trade Promotion Authority in 2002.[26] The reasons for this failure are many. Still, the most significant was the inability of the United States and Brazil to agree on a way forward. The United States was insisting on better access for U.S. goods to the Brazilian market but unwilling to address several long-standing anti-dumping orders affecting, *inter alia,* steel and orange juice, or to agree in a regional trade agreement to significantly reduce or eliminate agricultural subsidies.[27] In retrospect, one wonders whether even had the economic disagreements been resolved Brazil would have welcomed a broad free trade agreement that inevitably would have been dominated by the superior economic and political power of the United States. The alternative course of action chosen by Brazil in the first decade of the twenty-first century, to establish broader FTA relationships with all of the South American nations except for the Guyanas, probably made better political sense for Brazil.[28]

The Clinton Administration, even without fast track, did manage to achieve some significant RTA initiatives, including the signing of a free trade agreement with Jordan and a bilateral trade agreement with Vietnam, both in 1999.[29] Several last-minute Clinton administration FTA initiatives, with Singapore and Chile, were enthusiastically and successfully pursued by the George W. Bush Administration, which embraced the concept of regional trade agreements more fully than any previous U.S. administration.

Between 1999 and 2007, the United States concluded free trade agreements with Jordan (JFTA),[30] Singapore,[31] Chile[32], Central America and the Dominican Republic (CAFTA-DR),[33] Morocco,[34] Peru,[35] Australia,[36] Colombia,[37] Oman,[38]

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26 *See* Free Trade Area of the Americas, *available at* http://www.ftaa-alca.org/alca_e.asp (last visited Jan. 19, 2016) (providing history, negotiating texts and other information on the FTAA).

27 *See* Kevin C. Kennedy, *The FTAA Negotiations: A Melodrama in Five Acts,* 1 Loyola Int'l L. Rev. 121 (2004).

28 *See* Gantz, RTAs, *supra* note 2, RTAs, ch. 12 (MERCOSUR).

29 For Vietnam, a variant of fast track applicable to non-market economies remained in force. *See* Trade Act of 1974, secs. 151, 404, 405, 407, Publ. L. 93-618), 19 U.S.C. §§ 2191 et seq.

30 Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Oct. 24, 2000, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/jordan-fta/final-text .

31 United States-Singapore Free Trade Agreement, May 6, 2003, U.S.-Sing., *available at* https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text.

32 United States-Chile Free Trade Agreement, Jun. 6, 2003, U.S.-Chile, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text.

33 Central American-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, U.S.-Dom. Rep.-Guat.-El Salvador- Hond.-Nicaragua, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text.

34 United States-Morocco Free Trade Agreement, Jun. 15, 2004, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text.

35 United States-Peru Trade Promotion Agreement, Apr. 12, 2006, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text.

36 United States-Australia Free Trade Agreement, May 18, 2004, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text.

37 United States-Colombia Trade Promotion Agreement, Nov. 22, 2006, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text.

38 United States-Oman Free Trade Agreement, Jan. 18, 2006, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/oman-fta/final-text.

Bahrain,[39] Panama[40] and South Korea.[41] The Congressional approval and entry into force of those with Panama, Colombia and South Korea were significantly delayed by various factors, mostly U.S. labor union and civil society concerns with the lack of security provided by then then-Colombian government to labor union officials, who were being murdered in significant numbers. All three of these agreements were finally submitted to Congress by the Obama Administration in September 2011, and approved shortly thereafter.[42] Negotiations also took place at various levels of intensity with other countries, including Thailand, Malaysia, the United Arab Emirates and South Africa, all without success.[43]

The ultimately successful multi-year initiative of the Obama Administration to conclude the TPP negotiations, discussed by Tania Voon and Elisabeth Sheargold in this issue, is the latest and most significant free trade agreement concluded by the United States or any other nation since NAFTA more than twenty years earlier. The twelve TPP Parties represent nearly 40% of total world trade in goods, amounting to about $1.8 trillion worth in 2012.[44] The other major, equally significant economically negotiation in which the United States is a party, the TTIP, discussed by Christian Pitschas in this issue, is moving at a much slower pace and seems unlikely to be concluded before 2018 if at all. Predictions as to the extent to which the United States will continue to pursue regional trade agreements in the coming years are virtually impossible, as the answer depends on who is elected president in November 2016 and the extent to which that administration, and the members of Congress and the Senate, are supporters of further trade liberalization. If by the end of 2018 the TPP has been approved by Congress and entered into force, and the TTIP negotiations have been concluded, this would be strong evidence that the US shift in focus from multilateral trade agreements to regional trade agreements

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39 Agreement between the Government of the United States and the Government of the Kingdom of Bahrain on the Establishment of a Free Trade Agreement, Sep. 14, 2004, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/bahrain-fta/final-text.

40 Panama Trade Promotion Agreement, June 28, 2007, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text.

41 United States-Korea Free Trade Agreement, Jun. 30, 2007, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text.

42 *See Congress Approves 3 Free Trade Agreements,* Oct. 11, 2011, CBSNews.com, *available at* http://www.cbsnews.com/news/congress-approves-3-free-trade-agreements.

43 For example, President Bush announced on October 20, 2003 his intention to negotiate a free trade agreement with Thailand. *See* White House, *Fact Sheet on Free Trade with Thailand, available at* http://georgewbush-whitehouse.archives.gov/news/releases/2003/10/20031020-27.html (last visited Jan. 19, 2016). Prime Minister Thaksin Shinawatra was deposed in a coup in 2006 and the negotiations were never concluded. Negotiations also took place for several years with the Union of South Africa, but ultimately failed due to South Africa's unwillingness to include commitments on intellectual property, services and investment. Ultimately, the United States and South Africa settled for a "Trade, Investment and Development Cooperative Agreement". *See* U.S. Department of States, *U.S. Relations with South Africa,* Oct. 7, 2015, *available at* http://www.state.gov/r/pa/ei/bgn/2898.htm; Gantz, RTAs, *supra* note 2, at 450-51. Malaysia is a Party to the TPP.

44 *See USTR Fact Sheet: Economic Benefits of Trans-Pacific Partnership,* Dec. 10, 2013, *available at* http://iipdigital.usembassy.gov/st/english/texttrans/2013/12/20131211288766.html#axzz3xjv4JdaC.

is complete even if occasional multilateral or plurilateral agreements are concluded periodically under WTO auspices in Geneva. The alternative could instead be at least a temporary abandonment of major trade agreements by a new president, whether regional or global.

IV. The U.S.-Israel Free Trade Agreement

The Israel agreement was the first U.S. foray into free trade agreements. It was concluded more for foreign policy and national security reasons than economic benefits *per se*, although some U.S. exporters were concerned that because of a 1975 FTA between the European Union and Israel[45] some American trade interests would be disadvantaged because of the reduction or elimination of most duties on two-way non-agricultural trade.[46] Israel first proposed a free trade agreement with the United States in 1981 and Congress quickly authorized the negotiation and conclusion of the agreement under the United States' "fast track" trade negotiating authority.[47] Unlike future trade agreements, the IFTA apparently received the unanimous treatment of Congress. The decision to conclude a free trade agreement was undoubtedly influenced by the "strong political and military ties" that existed between Israel and the United States since Israel's creation as an independent state in 1948.[48] Both the United States and Israel saw the agreement as a means of strengthening Israel's always vulnerable position in the Middle East against Arab and Soviet opposition, and supporting the only democratic government in the region.[49]

On the economic side, concerns were raised that Israel might be hurt if the U.S. Generalized System of [unilateral tariff] preferences were not renewed by the Congress, or if the Arab boycott of Israel expanded. The negotiation of an agreement with Israel also appeared to provide a relatively low risk opportunity for the United States to experiment with its first free trade agreement.[50] Other factors may have been less important, including the belief that it would be politically beneficial for the United States to be negotiating with what at the time was a developing country, given the pressures of many developing nations to establish a "new economic order" that was considered potentially harmful to U.S. interests.[51]

This first U.S. FTA was far less ambitious that the Canada-United States Free Trade Agreement a few years later and less comprehensive still than NAFTA, as noted below. The IFTA contained only twenty-three articles and four annexes. It did

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45 May 20, 1975 [Israel-EEC], 18 O.J. Eur. Comm. (No. L. 136) 1 (1975).

46 Ira Nickelsberg, *The Ability to Use Israel's Preferential Trade Status with both the United States and the European Community to Overcome Potential Trade Barriers,* 24 Geo. Wash. J. Int'l L. & Econ. 371, 372 (1990).

47 Trade and Tariff Act of 19784, §§401-406, 19 U.S.C.A. §2112 & Note (West 1985).

48 Yair Baranes, *The Motivations and the Models: A Comparison of the Israel-U.S. Free Trade Agreement and the North American Free Trade Agreement*, 17 N.Y.L. Sch. J. Int'l & Comp. L. 145, 146 (1997).

49 *See* Gantz, Regional Trade Agreements, *supra* note 2, at 209.

50 *Id.*

51 Roberto Aponte Toro, *The U.S.-Israel FTA: The First Step in U.S.A. New Offensive for "Freer Trade,"* 63 Rev. Jur. U.P.R. 89, 100 (1994).

not cover most agricultural trade or investment but it did apply to some services and intellectual property, taking it well beyond the 1947 GATT.[52]

V. Canada-United States Free Trade Agreement

In contrast to the IFTA, the CFTA was deep and comprehensive for the time, when many other free trade agreements at the same time or later covered only trade in goods.[53] At the outset, it is notable that this CFTA was the fourth free trade agreement negotiated between the United States and Canada between the 1850s and 1988, the first long before either nation had any serious interest in regional trade arrangements except with each other.[54] This history suggests that one of CFTA's most remarkable features was that it was ratified by both Parties and entered into force rather than being abandoned by one or the other government before it could be ratified. Free trade was actually implemented to some degree while Canada was still under the political control of Great Britain in 1855, but the United States Congress voted in 1866 to cancel the treaty.[55] (Perhaps the frustration with the slow pace of the approval of new GATT negotiations in the mid-1980s affected Canada as well as the United States with regard to its embrace of CFTA.)

One of the more significant antecedents to the CFTA was the 1956 Automotive Products Agreement, which established freer trade (subject to many complex obligations and restrictions for manufacturers) for Canada and the United States to facilitate the integration of the U.S. and Canadian auto and auto parts market, as noted earlier.[56] Since the Agreement did not meet the requirements of GATT, Article XXIV, a GATT waiver was sought and received (by the United States but not by Canada).[57]

The CFTA was broader than the IFTA. CFTA covered in addition to trade in manufactured goods (where all tariffs were to be eliminated in no more than ten years) many agricultural goods, limited coverage of immigration, services (including financial services), intellectual property and investment protection (although not investor-state dispute settlement-ISDS), along with state-to-state dispute settlement and a special mechanism for review of unfair trade disputes.[58] The twenty chapters

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52 *See also* Aponte, *supra* note 51, at 101.

53 *See* Argentina-Chile Free Trade Agreement, Aug. 2, 1991 (covering only trade in goods and excluding most agriculture, services and intellectual property, in only ten substantive chapters), *available at* http://www.sice.oas.org/Trade/argchi/indice_s.asp.

54 For a discussion of the CFTA and its antecedents, *see* Ralph Folsom, Michael Gordon & David Gantz, NAFTA and Free Trade in the Americas 10-12, 15-19 (2d ed. 2005)

55 *See The Reciprocity Treaty of 1854, Historical, Peace and Conflict, available at* http://www.histori.ca/peace/page.do?pageID=345.

56 *See Canada-US Automotive Products Agreement,* Jan. 1965, Historica Canada, *available at* http://www.thecanadianencyclopedia.ca/en/article/canada-us-automotive-products-agreement.

57 *See* Jacqueline D. Krikorian, *Canada and the WTO: Multilateral, Governance, Public Policy Making and the WTO Auto Pact Case,* Case Study no. 9, *available at* https://www.wto.org/english/res_e/booksp_e/casestudies_e/case9_e.htm.

58 Canada-United States Free Trade Agreement, Jan. 2, 1998, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf.

(rather than articles) represented a far more extensive regional trade agreement than any other negotiated beforehand save for the treaties establishing the European Communities.

VI. North American Free Trade Agreement

NAFTA is important for any number of reasons, including the then enormous scope of trilateral trade and the expanded coverage over CFTA concluded less than five years earlier. NAFTA went much further, adding ISDS, government procurement, comprehensive intellectual property, government procurement, a wide range of cross-border services, protection of energy trade and telecommunications in the text of the agreement,[59] and side agreements addressing labor and environmental issues, unique subjects for regional trade agreements at the time, signed simultaneously.[60]

VII. The Jordan and other Middle Eastern Free Trade Agreements

The Clinton Administration's single successful new FTA negotiation was a free trade agreement with Jordan, the first at the time with an Arab nation and the first U.S.-initiated agreement to follow the conclusion of the WTO's Uruguay Round. As the first post-NAFTA agreement, the JFTA was also the first to include enforceable environmental and environment provisions in the body of the agreement and the first to address e-commerce issues.[61] The JFTA consists of a preamble, nineteen articles, three annexes and a variety of joint statements, memoranda of understanding and various side letters. By comparison with NAFTA, and with subsequent U.S. FTAs such as those with Chile, Singapore and CAFTA-DR, the JFTA is a compact package. This widely differing approach, while similar to that of the JFTA, presumably reflected the preferences of the Clinton Administration for a much less comprehensive free trade agreement.

JFTA also remains the only U.S. FTA that was concluded in the absence of "fast-track" provisions,[62] in the final months (October 2000) of the Clinton Administration. The political complexities surrounding the negotiation and U.S. implementation of the JFTA were significant. The JFTA was linked to the Middle East peace negotiations taking place simultaneously, a major foreign policy initiative of the Clinton Administration's final year. The approval of the JFTA by

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59 NAFTA, *supra* note 20, passim.

60 North American Agreement on Labor Consultation, Dec. 15, 1992, *available at* http://www.naalc.org/naalc/naalc-full-text.htm; North American Agreement on Environmental Cooperation, Dec. 15, 1992, *available at* http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567.

61 JFTA, *supra* note 30, arts. 5, 6, 7, respectively.

62 Trade Act of 1974, as amended, 19 U.S.C. §§ 3801-3807 (2002) (expired Jun. 30, 2007).

the U.S. Congress[63] after more than a year of bickering over the appropriateness of including labor and environmental provisions in a trade agreement, occurred less than a month after the September 11, 2001 attack on the World Trade Center in New York. This was anything but coincidence. The JFTA, according to one report, was "intended to show U.S. appreciation of Jordan's efforts in supporting the Mideast peace process and in combating international terrorism … The rush to pass the Jordan trade pact illustrates how the Sept. 11 attacks recalibrated, at least for a time, the politics of normally divisive issues such as trade."[64] The Bush Administration also saw the JFTA as another means of advancing its anti-terrorism campaign.[65]

The post-Jordan U.S. FTAs with Morocco, Bahrain and Oman represented a key element in a broader U.S. political and economic strategy. That strategy was designed to encourage economic development and democracy in the Middle East and North Africa, with most of the same political/security considerations that were material in the conclusion of the JFTA. President Bush proposed in May 2003 the establishment of a United States-Middle East Free Trade Area within a decade, so as "to re-ignite economic growth and expanded opportunity in the Middle East."[66] The 9/11 Commission included a recommendation that "A comprehensive U.S. strategy to counter terrorism should include economic policies that encourage development, more open societies, and opportunities for people to improve the lives of their families and to enhance prospects for their children's future."[67] The broader Middle Eastern FTA initiative faltered; negotiations with the United Arab Emirates were abandoned and discussions with Egypt were never initiated.[68]

However, the FTA negotiations with Morocco were completed. Bahrain and Oman were also well-qualified candidates, in part because both had acceded to the WTO, Bahrain as an original member in 1995, and Oman in 2000.[69] The Morocco, Bahrain and Oman FTAs[70] share far more similarities than differences with each other and with contemporary free trade agreements negotiated by the United States with developing countries in Latin America, particularly Chile and CAFTA-DR, discussed elsewhere in this or other chapters.

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63 United States-Jordan Free Trade Area Implementation Act, Pl. 107-43, 107th Cong., 1st sess., 115 Stat. 2431, 19 U.S.C. § 2112 Note (2001).

64 Warren Vieth & Janet Hook, *Senate Passes Free-Trade Pact with Key Ally Jordan,* Los Angeles Times, Sep. 25, 2001, at A-8 [hereinafter "Vieth & Hook"].

65 *Id.*

66 White House Fact Sheet, Proposed Middle East Initiatives, May 9, 2003, at 1, *available at* http://2001-2009.state.gov/p/nea/rls/20573.htm (last visited Mar. 26, 2016).

67 9/11 Commission Final Report, Jul. 22, 2004, at 378-379, *available at* http://www.9-11commission.gov/report (last visited Mar. 26, 2016).

68 *See* Gary G. Yerkey, *Some Progress Likely on 5th Anniversary of Bush MEFTA Initiative; No New FTAs,* 25 Int'l Trade Rep. (BNA) 102 (Jan. 17, 2008) (reporting that UAE discussions were suspended because of difficulties over investment, and deferred indefinitely with Egypt for political reasons).

69 *Members and Observers*, World Trade Organization, Nov. 30, 2015, *available at* https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Mar. 26, 2016).

70 *See supra* notes 34, 38 & 39.

VIII. The Bush Era Free Trade Agreements in Latin America and Asia

As Rodrigo Monardes discusses in this issue, the U.S. FTA with Chile (and a simultaneous free trade agreement with Singapore) were the first fully comprehensive free trade agreements to follow NAFTA. The decision of the Clinton Administration in its last several months of office to propose formally the negotiation of these two agreements, knowing that they could not be seriously pursued until President Bush took office, undoubtedly reflected a final realization - if one were needed - that NAFTA was never going to be expanded, to Chile or any other country. It probably also reflected the inevitable conclusion that the Free Trade Agreement of the Americas, initiated by President Clinton in December 1994 at a Presidential summit in Miami, was doomed to fail.[71]

However, the Bush Administration, with USTR under the able, perhaps even visionary, leadership of Ambassador Robert Zoellick, almost immediately pursued the negotiations with Chile and Singapore, and concluded both negotiations in 2003. These were followed, in addition to the Middle Eastern agreements noted above, with an agreement with the five Central American nations and the Dominican Republic (CAFTA-DR). Shortly thereafter, free trade agreements with Colombia, Panama and Peru in Latin America (the "willing" after the end of the FTAA negotiations) were concluded. Korea, because of its growing economic might and less open markets, particularly toward foreign investment, offered potentially significant benefits to the United States and its stakeholders, and signed a free trade agreement with the United States in June 2007. Ultimately this comprised nine additional countries, all of which had had historically close (and in the case of the CAFTA-DR Parties, sometimes unpleasant) relations with the United States.

The CAFTA-DR, the U.S. FTA with the most significant developmental focus, is not discussed in detail because of its structural and substantive similarity with the Chile agreement and to a significant degree those concluded with Colombia, Korea, Panama and Peru all discussed by Jaemin Lee in this issue. CAFTA-DR was a decade ago considered equally or more important as a vehicle for economic development as it was for trade expansion *per se.* Such areas as rule of law, "trade capacity building," customs procedures, regulatory transparency, private property rights, competition, "civil society" participation, environmental protection, and labor law were all given priority coverage by the United States Government.[72]

The political path in Congress to the approval of these agreements was anything but straightforward. CAFTA-DR passed the House by only a few votes. Of the other four, concluded no later than 2007, only one, Peru, was approved by the end of the Bush Administration. The "Bipartisan Trade Deal" reached between the Bush White House and the Democratic Congressional leadership in May 2007 dictated some changes in the labor, environmental, intellectual property and a few other provisions.[73] As a result the free trade agreement with Peru was enacted

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71 *See* Kennedy, *The Free Trade Agreement of the Americas, supra* note 27.

72 *See* USTR, *The Case for CAFTA,* Feb. 2005, at 1, *available at* https://ustr.gov/archive/assets/Trade_Agreements/Regional/CAFTA/Briefing_Book/asset_upload_file235_7178.pdf.

73 Bipartisan Trade Deal, May 2007, *available at* https://ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf.

by Congress in November 2007, but the other three waited nearly four years for compromises to be worked out between the Obama Administration and a newly Republican House of Representatives in 2011.[74]

IX. The Trans-Pacific Partnership

While the NAFTA has never been significantly modified or amended after more than 20 years, updating may finally be on the horizon indirectly through changes and other innovations in the TPP, many of which, as with investment, labor, environment and rules of origin, among others, would bring about major changes in NAFTA. That being said some 75%-80% of the content of NAFTA is found in most subsequent U.S. FTAs as well as in the TPP. Thus, for lawyers, academics and business persons who wish to understand and appreciate the TPP, one of the best ways to begin is to study the NAFTA, about which thousands of books and articles have been written on almost every aspect of the Agreement.

Thus, even though the TPP consists of 30 chapters rather than 22, much of what is found in NAFTA is also found in the post-Jordan U.S. agreements and the TPP. There is in fact a continuum of gradually increasing coverage of enforceable labor and environmental obligations (all part of the agreement itself) after NAFTA. Another major area of innovation is in changes to the ISDS provisions that represent a significant swing of the pendulum from broad investor protection to greater flexibility for governments in avoiding the risk of having to pay compensation as indirect expropriations or regulatory takings for non-discriminatory measures to protect public health or the environment. As well, the subsequent free trade agreements incorporate a variety of TRIPS-Plus expanded protections in certain areas of intellectual property, all discussed as noted earlier. The most significant new disciplines reflected in the TPP may be chapters dealing with ecommerce, state-owned enterprises, corruption and small and medium sized enterprises, but the SME chapter does not go much beyond creating a committee.[75] While the scope of chapters on telecommunications, ecommerce, competition, capacity building, business facilitation, regulatory coherence and transparency has been somewhat expanded in TPP, similar provisions are found in recent U.S. FTAs such as those with Colombia, Korea, Panama and Peru.

The TPP, which was signed February 4, 2016, will probably not enter into force until sometime in 2018 at the earliest. Among other significant factors is the requirement that the agreement not enter into force under most likely scenarios unless and until at least six signatories, accounting for at least 85% of the combined GDP (thus including both the United States and Japan), have notified their acceptance of the agreement.[76] The Trade Promotion Authority legislation, which will permit the TPP to be submitted to Congress for an up-or-down vote and without the possibility

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[74] *See e.g.,* HR 3080 - United States-Korea Free Trade Agreement Implementation Act, P.L. 112-41, Oct. 21, 2011.

[75] TPP, chs. 17, 24.

[76] *Id*. art. 30.5(2).

of Amendment, was enacted in June 2015.[77] However, in itself TPA does not assure that either President Obama or his successor (if she or he so desires) will be able to persuade a majority of both the Senate and House to support the TPP.

X. Transatlantic Trade and Investment Partnership?

The TTIP offers the significant attraction of further expanding an economic partnership that nearly fifty percent of the worlds' aggregate output, nearly $1 trillion in annual bilateral trade (only modestly less than NAFTA) an estimated $4 trillion in two-way investment and 13 million jobs, all according to the EU Commission.[78] Should it be possible for the 28/27-member EU and the United States, with total combined population of over 800 million persons, to conclude this agreement, one could reasonably expect that the agreement could affect the content of future multilateral and plurilateral trade negotiations in Geneva, even if that impact is five or ten years away. This assertion assumes that the TTIP will address in unprecedented depth such areas as regulatory coordination and coherence, anti-competition, financial and other services, agricultural market access and investment, among others. For many definitions of success, the first two in particular should go beyond the scope of the treatment of those issues in the TPP or any other free trade agreement concluded by the European Union or the United States. Thus, as an EU Parliamentary study has asserted, the TTIP "has the potential to remake political and legal relationships between the European Union and the United States and pave the way to a new form of global economic governance based on international regulatory cooperation."[79]

Unfortunately, meaningful assessment of the TTIP negotiations with any degree of confidence is impossible at present (October 2016). The negotiations are moving at a very slow pace. At the 12th TTIP negotiating session held in Brussels in February 2016, various issues were discussed, including regulatory cooperation, standards, sanitary and phytosanitary measures, competition, customs and trade facilitation, state-to-state dispute settlement, small and medium sized enterprises, and the most controversial of all, investment protection.[80] Given the higher priorities being devoted by the Obama Administration to securing enactment by the Congress of the TPP, the final TTIP negotiations will almost certainly be deferred at least

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77 The Trade Adjustment Assistance (TAA) bill passed the House the second time as a separate bill by a vote of 286-138, with strong backing this time from the Democrats. *House Approves TAA-Preferences Bill 286-138, with Strong Democratic Support,* World Trade Online, Jun. 25, 2015. (H.R. 1295 renews TAA for six years).

78 $3.7 trillion in two-way investment according to Shayerah Ilias Akhtar & Vivian C. Jones, *Transatlantic Trade and Investment Partnership Negotiations*, Cong. Research Service, Feb. 4, 2014, ii.

79 Alberto Alemanno, *The Transatlantic Trade and Investment Partnership and Parliamentary Regulatory Cooperation, European Parliament*, Apr. 2014, 5, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423562.

80 *See* Statement by the EU Chief Negotiator Ignacio Garcia Bercero Following the Conclusion of the 12th TPP Negotiating Round, Feb. 29, 2016, *available at* http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154325.pdf.

until a new U.S. president has taken office in 2017. Moreover, U.S. Congressional leaders have accused the EU of a pattern of "hostage taking," in which European leaders "are expressing an inability and unwillingness" to complete the negotiations in 2016. Deficiencies in the EU negotiating positions asserted by congressional sources include an alleged unwillingness to fully eliminate tariffs; make enforceable commitments on digital trade; include an acceptable means of settling investment disputes; and strengthen commitments on sanitary and phytosanitary issues.[81] Thus, the question remains whether the European Union and the United States have the mutual political will to conclude an agreement that effectively addresses the key issues or will ultimately settle for some sort of "TTIP Lite."

[81] Rosella Brevetti, *Congressional Leaders Charge EU with 'Hostage Taking" in Trade Talks,* 33 Int'l Trade Reporter (BBNA) 1425 (Oct. 6, 2016).

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Transatlantic Trade and Investment Partnership (TTIP): The Devil in Disguise or a Golden Opportunity to Build a Transatlantic Marketplace?

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ABSTRACT

The European Union (EU) and the United States are currently negotiating a free-trade agreement, the so-called Transatlantic Trade and Investment Partnership (TTIP). These negotiations have to be seen in perspective, since a number of other - bilateral and plurilateral - trade deals are being pursued at the same time. All these negotiations point to a worrisome aspect: the World Trade Organisation's failure to come to a meaningful agreement in the Doha-round negotiations, in terms of market access, new rules and development. Like the Trans-Pacific Partnership (TPP), TTIP would stand out among the crowd of trade agreements because of the sheer volume of trade and investment flows across the Atlantic and the declared intention to boost regulatory cooperation and compatibility which is expected to bring the bulk of TTIP's economic benefits. However, the prospect of concluding such a transatlantic agreement raises many concerns; the public in the European Union and the United States fears that TTIP could undermine existing levels of protection in areas such as health and the environment and impinge on either side's "right to regulate". Moreover, questions are being posed as to what TTIP would mean for the multilateral trading system and how it would affect third countries, especially developing countries. Against this backdrop, this article addresses the following issues in relation to TTIP: the vision underlying the negotiations; the European Commission's negotiating mandate; the structure of the negotiations and their state of play; the Union's competence for concluding TTIP and whether it is shared with EU Member States; and finally TTIP's impact on the multilateral trading system and developing countries.

CONTENTS

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I. Introduction

The negotiations between the European Union (E.U.) and the United States of America (U.S.) regarding a free-trade agreement called the Transatlantic Trade and Investment Partnership (TTIP) were launched in 2013 and are ongoing. Both parties have declared their intention to finish the negotiations by the end of 2016 but this timeline seems unrealistic in view of the (number of) unresolved issues.[1] Given the parties' willingness to negotiate a comprehensive and ambitious agreement,[2] it is understandable that the negotiations are not yet completed. There is another reason, though, why the two sides have not yet been able to wrap up their talks: in parallel to their negotiations on TTIP, both parties have pursued further negotiations, at bilateral, plurilateral and multilateral level, which have sapped energy and resources.

At the multilateral level, the European Union and the United States were actively engaged in the Doha-round negotiations until the WTO Ministerial Conference in Nairobi at the end of 2015.[3] At the plurilateral level, the European Union and the United States have been involved in the negotiations concerning a revised Information Technology Agreement (ITA 2), which were concluded in Nairobi, and are major players in the negotiations on a Trade in Services Agreement (TiSA) and an Environmental Goods Agreement (EGA), respectively.[4] Moreover, the United States have strongly pushed for concluding another plurilateral agreement, the Trans-Pacific Partnership (TPP), which was signed in autumn last year;[5] the current U.S. government hopes to receive the assent of U.S. Congress before the next U.S. President is sworn in.[6] At the bilateral level, the European Union has

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1 *EU, US Negotiators Push for 2016 Deal, Though "TTIP Light" Not an Option*, 20 Bridges Weekly 1 (May 4, 2016). In a speech before the summer break, Cecilia Malmström stated: "… we are prepared to make the political choices needed to close this deal by the end of the year. But we can only do that if we get the right result. We will not conclude a TTIP light; we want an agreement that will gain approval on both sides". *TTIP: The Finish Line and How to Get There* 2-3 (event at Atlantic Council, Washington D.C., Jun. 29, 2016), *available at* http://trade.ec.europa.eu/doclib/press/.

2 European Commission, Conclusion of the 13th TTIP Negotiation Round 29 April 2016, Statement by Ignacio Garcia Bercero, EU Chief Negotiator for TTIP, *available at* http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154480.pdf. "It needs to be the most ambitious, balanced and comprehensive agreement ever concluded by either us or the US", *id*., at 2.

3 *Trade Talks Lead to 'Death of Doha and the Birth of a New WTO'*, Financial Times, Dec. 21, 2015, at 4.

4 On ITA 2, *see* the WTO Ministerial Declaration on the Expansion of Trade in Information Technology Products, WT/MIN(15)/25, Dec. 16, 2015, *available at* https://www.wto.org/english/news_e/news15_e/ita_16dec15_e.htm. On TiSA, *see* the Report of the Commission on the 19th TiSA negotiation round Jul. 8 - 18, 2016, *available at* http://ec.europa.eu/trade/policy/in-focus/tisa; on EGA, *see* the Commission's Report from the 15th round of negotiations for an Environmental Goods Agreement (EGA), *available at* http://ec.europa.eu/trade/policy/policy-making/sustainable-development (last visited Sept. 29, 2016).

5 *After TPP Deal Reached in Atlanta, Focus Shifts to Ratification*, 19 Bridges Weekly 1 (Oct. 8, 2015).

6 *Obama "Confident" of TPP Passage, Touting Trade Benefits During Asia Trip*, 20 Bridges Weekly 1 (May 26, 2016). For both economic and geopolitical reasons, it

recently concluded negotiations on a free-trade agreement with Vietnam and is in negotiations with Japan concerning a free-trade agreement which both sides hope to finish before the end of 2016.[7]

The aforementioned negotiations at bilateral and plurilateral level, including on TTIP, have a common denominator: World Trade Organization (WTO) Members' failure to achieve a breakthrough in the Doha-round negotiations, even after almost fifteen years since their inception in 2001.[8] While some limited progress has been made since then, notably in the area of trade facilitation,[9] agreement in the crucial negotiating areas - non-agricultural market access, agriculture and services - is elusive. This sobering state of affairs has been demonstrated once again by the last WTO Ministerial Conference in Nairobi whose ministerial declaration lays bare the deep divisions among WTO Members over the question of how to continue these negotiations.[10] For the moment, the Doha-round negotiations are on hold and WTO Members pause for reflecting on the way forward in these negotiations.[11]

The realization that the Doha-round negotiations are lost in a maze of diverging interests has prompted a number of mostly developed countries, first and foremost the European Union and the United States, to seek different solutions, as is evidenced by the aforementioned negotiating initiatives. At the plurilateral level, the negotiations focus on single issues, such as trade in services or environmental goods, and are conducted among a group of countries which are willing to come to a meaningful agreement as quickly as possible; indeed, parties to the plurilateral

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stands to reason that TPP is more important to the United States than TTIP, Gideon Rachman, *Obama and the End of the Anglosphere*, Financial Times, Apr. 26, 2016, at 9.

7 *EU, Japan Leaders Call for Trade Talks to Conclude in 2016*, 20 Bridges Weekly 1 (May 4, 2016); *see also* The Commission's Report of the 16th EU-Japan FTA/EPA Negotiating Round Apr. 11 - 20, 2016, *available at* http://ec.europa.eu/trade/policy/countries-and-regions/countries/japan.

8 *The Doha Round Finally Dies a Merciful Death*, Financial Times, Dec. 22, 2015, at 8.

9 *See* WTO, *Annual Report 2016*, 83, *available at* https://www.wto.org/english/res_e/publications_e/anrep16_e.htm; WTO, *World Trade Report 2015, Speeding up Trade: Benefits and Challenges of Implementing the WTO Trade Facilitation Agreement*, *available at* https://www.wto.org/english/res_e/publications_e/wtr15_e.htm. *See also* Antonia Eliason, *The Trade Facilitation Agreement: A New Hope for the World Trade Organization*, 14 World Trade Rev. 643-70 (2015).

10 The Ministerial Declaration of the WTO Ministerial Conference in Nairobi notes: "We recognize that many Members reaffirm the Doha Development Agenda … and reaffirm their full commitment to conclude the DDA on that basis. Other Members do not reaffirm the Doha mandates, as they believe new approaches are necessary to achieve meaningful outcomes in multilateral negotiations. Members have different views on how to address the negotiations." WTO, Nairobi Ministerial Declaration of 19 December 2015, WT/MIN(15)/DEC, para. 30, (Dec. 21, 2015), *available at* https://www.wto.org/english/thewto_e/minist_e/mc10_e/nairobipackage_e.htm.

11 Cecilia Malmström, *The WTO after Nairobi - Your Views on the Way Ahead* 3-4 (speech at the Civil Society Dialogue meeting on Apr. 26, 2016), *available at* http://trade.ec.europa.eu/doclib/html/154474.htm. But after the meeting of OECD ministers in early June 2016, the WTO DG Roberto Azevêdo called on WTO Members to move to the next stage by starting to "make concrete proposals on what they would like to see in terms of outcomes at the 11th Ministerial Conference and beyond", Ministers Support Call for Intensified Efforts to Find Possible Areas of Agreement for MC 11, WTO 2016 News Items, Jun. 2, 2016, *available at* https://www.wto.org/english/news_e/news16_e/minis_02jun16_e.htm.

negotiations on services (TiSA) and environmental goods (EGA) aim for their conclusion by the end of 2016.[12] The noteworthy exception in this respect is TPP, since it is a comprehensive, deep integration agreement. At the bilateral level, the negotiations pursue a deep integration between two parties; a recent example is the Comprehensive Economic and Trade Agreement (CETA) which was concluded by the European Union and Canada.[13]

TTIP, too, is supposed to be a deep integration agreement, in terms of its level of market access, scope of regulatory cooperation and breadth of rules. Yet TTIP stands out for two reasons: the huge volume of trade and investment flows between the European Union and the United States,[14] and the intensity and density of regulatory cooperation sought by both parties.[15] This is why TTIP is sometimes referred to as a "mega deal". The other mega deal is TPP whose economic weight and degree of deep integration, if it entered into force, would be similar to that of TTIP.[16]

However, TTIP's character as a mega deal entails a number of negative connotations, which are echoed in relation to TPP. One such connotation is related to the impact that TTIP could have on the multilateral trading system. In this regard, it is questioned whether the European Union and United States would neglect their (joint) responsibility for the latter system and instead focus their attention on their bilateral trade relationship.[17] Another, albeit slightly contrary, concern is whether the European Union and United States would attempt to impose their bilateral rules on the multilateral trading system.[18] Also, developing countries are wondering whether their preferential trading relationships with either of the two parties,

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12 OECD, 2016 Ministerial Council Statement, *Enhancing Productivity Through Inclusive Growth*, para. 17, *available at* http://www.oecd.org/mcm.

13 See the information on CETA available on the Commission's website *available at* http://ec.europa.eu/trade/policy/in-focus/ceta (last visited Jun. 10, 2016).

14 Memorandum of the European Commission, *European Union and United States to Launch Negotiations for a Transatlantic Trade and Investment Partnership*, Feb. 13, 2013, *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#_documents [hereinafter European Commission's Memorandum (Feb. 13, 2013)] "Together, the European Union and the United States account for about half of the world GDP (47%) and one third of global trade flows."

15 Press Release, Karel De Gucht, Transatlantic Trade and Investment Partnership (TTIP) - Solving the Regulatory Puzzle (Speech/13/801, Oct. 10, 2013), *available at* http://ec.europa.eu/trade/trade-policy-and-you/publications; Cecilia Malmström, *TTIP on Track* 2-3, Speech at Bruegel TTIP Workshop (Mar. 12, 2015), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1275&title=Speech-TTIP-On-Track; Cecilia Malmström, *Trade in the 21st Century: The Challenge of Regulatory Convergence* (speech, Mar. 19, 2015), *available at* http://ec.europa.eu/trade/trade-policy-and-you/publications.

16 *See* Jeffrey J. Schott, *Understanding the Trans-Pacific Partnership: An Overview*, PIIE (May 3-5, 2016), https://piie.com/research/trade-investment/trans-pacific-partnership; *See also* Hans Günter Hilpert, *Einigung auf ein Transpazifisches Freihandelsabkommen*, 86 SWP-Aktuell, (Oct. 2015), *available at* http://www.swp-berlin.org/fileadmin/contents/products/aktuell/2015A86_hlp.pdf.

17 Hendrik Kafsack, *In den Krallen des Chlorhuhns*, Frankfurter Allgemeine Zeitung, Feb. 20, 2014, at 9; Marcel Fratzscher, *Europe's Free Trade Deal with America Could be a Costly Error*, Financial Times, Feb. 22, 2013, at 9.

18 *See* Christian Pitschas, *Transatlantic Trade and Investment Partnership Agreement and the Development of International Standards*, 6 Eur. Y.B Int'l Econ. L. 161, 168-69, 183-85 (2015).

especially tariff preferences unilaterally enjoyed by them in the European Union and the United States, will be adversely affected by any market opening that the European Union and the United States exclusively grant each other.[19]

But the concerns with TTIP do not stop there. In the European Union in particular, the public in many Member States is worried about what TTIP might mean for them. Three issues seem to attract particular attention: (i) the transparency of the negotiations, (ii) the level of protection in areas such as health, environment, food, and data protection, and (iii) the rules on investment protection and the role of investor-to-state dispute settlement (ISDS) with respect to regulation for legitimate public policy objectives and its relationship with the domestic judicial system.[20] The public debate on these and other topics is fierce, although sometimes misinformed and misguided.

Against this backdrop, this article seeks to approach TTIP by looking into the following issues:

- What is the basic idea behind TTIP, and on what basis does the European Commission negotiate with the United States?
- How are the negotiations structured, and how far have they advanced?
- Would TTIP fall within the EU's exclusive competence for common commercial policy, or would it be a "mixed agreement" which has to be ratified by all EU Member States?
- What impact would TTIP have on the multilateral trading system in general and developing countries in particular?

II. Basic Idea Behind TTIP

In November 2011, the European Union and the United States established a high level working group on jobs and growth (HLWG).[21] The HLWG was asked to pinpoint "policies and measures" that would increase transatlantic trade so as to stimulate economic growth, create jobs and enhance competitiveness.[22] After

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19 See the preliminary analysis by Jim Rollo, Max Mendez Parra & Sarah Ollerenshaw, *The Transatlantic Trade and Investment Partnership: Implications for LDCs and Small States*, 102 Commonwealth Trade Hot Topics (2013), *available at* http://www.thecommonwealth-ilibrary.org/commonwealth/trade/trade-hot-topics_20719914. They suggest that the loss of market share or deterioration in terms of trade on EU and U.S. markets are likely to be small, *id*. at 6.

20 *See* Cecilia Malmström, *TTIP for the Business Community*, 4, Speech at the Swedish Enterprise Event (May 24, 2016), *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#_documents); *Transatlantic Trade: Why a Deal is Hard to Strike*, Financial Times, Apr. 26, 2016, at 2; *Public Cast Doubt on EU-US Trade Deal*, Financial Times, Apr. 10, 2014, at 4.

21 European Commission's Memorandum (Feb. 13, 2013), *supra* note 14.

22 High Level Working Group on Jobs and Growth, Final Report (Feb. 11, 2013), 1, *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#negotiation-rounds.

consultations with various stakeholders, public and private, from both sides of the Atlantic, the HLWG issued its final report in early February 2013.

The final report recommended that the European Union and the United States commence negotiations on a "comprehensive, ambitious agreement that addresses a broad range of bilateral trade and investment issues, including regulatory issues, and contributes to the development of global rules."[23] This recommendation is based on the assumption that a transatlantic agreement of this kind "could generate new business and employment by significantly expanding trade and investment opportunities in both economies."[24] Achieving this objective would necessitate opening further the markets on both sides of the Atlantic as well as promoting regulatory cooperation and coherence with a view to "moving progressively toward a more integrated transatlantic marketplace."[25] In addition to these economic considerations, the final report noted that "the extraordinarily close strategic partnership between the United States and Europe" would be strengthened by concluding such an agreement.[26]

In light of these goals, the final report identified three general themes for a comprehensive trade and investment agreement:

- market access,
- non-tariff barriers (NTBs) and regulatory issues, and
- rules and principles relating to global trade.[27]

As regards market access, a traditional subject of free-trade agreements, the final report stated that obstacles relating to goods, services, investment and procurement should be addressed in a manner that "goes beyond what the United States and the European Union have achieved in previous trade agreements."[28] Thus, there is an expectation that TTIP should lead to an unprecedented level of market access. Given that the markets of the European Union and the United States are relatively open, a further opening of these markets would require both parties to make concessions in those sectors that they consider as sensitive, in particular as regards services and government procurement.

In respect of NTBs and regulatory issues, a somewhat more recent phenomenon of free-trade agreements, the final report noted that regulatory cooperation, i.e. cooperation between regulators / regulatory authorities, and greater regulatory compatibility (through means such as equivalence, mutual recognition and harmonization) are key in reducing administrative burdens and compliance costs arising from existing regulations, while safeguarding "the levels of health, safety, and environmental protection that each side deems appropriate."[29] In this respect, the final report singled out a number of elements which should be the focus of negotiations:

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23 *Id*. at 6.
24 *Id*. at 2.
25 *Id*. at 3.
26 *Id*. at 2.
27 *Id*.
28 *Id*.
29 *Id*. at 3.

- chapters on technical barriers to trade (TBT) and sanitary and phytosanitary (SPS) measures, which build on the corresponding agreements of the WTO but include additional ("WTO plus") commitments,
- a horizontal chapter on good regulatory practices,
- sector-specific chapters with targeted rules for selected goods and services sectors, and
- an institutional framework for future dialogue on regulatory cooperation and compatibility.[30]

As regards rules and principles relating to global trade, the final report took the view that such rules and principles "would also contribute to the progressive strengthening of the multilateral trading system."[31] According to the final report, those rules and principles should address a host of issues, including intellectual property rights, environment and labour, customs and trade facilitation, competition policy, state-owned enterprises, raw materials and energy, localization barriers to trade, small and medium-sized enterprises, and transparency.[32]

The HLWG's final report spells out, in a nutshell, the reasons that speak in favour of negotiating a transatlantic free-trade agreement. These reasons are both economic and political in nature. To a large extent, the economic benefit would come from enhancing the regulatory cooperation and compatibility between the European Union and the United States.[33] Yet it is exactly this regulatory part many European and American citizens are concerned about, as they fear a loss of regulatory autonomy and a lowering of safety standards. The European Commission insists, however, that TTIP would not undermine European standards in areas such as the environment and public health but rather maintain parties' "right to regulate" so as to pursue their legitimate public policy objectives.[34] Nonetheless, one wonders

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30 *Id*. at 4.

31 *Id*. at 5.

32 *Id*. at 5-6.

33 European Commission's Memorandum (Feb. 13, 2013), *supra* note 14, notes that "studies show that the additional cost burden due to such regulatory differences is equivalent to a tariff of more than 10%, and even 20% for some sectors, whereas classic tariffs are at around 4%". Memorandum of the European Commission*, Member States Endorse EU-US Trade and Investment Negotiations*, Jun. 14 2013, *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#negotiation-rounds [hereinafter European Commission's Memorandum (Jun. 14, 2013)] states that the "regulatory area is where the highest potential economic benefit lies". Economic analysis commissioned by the Commission estimates that up to 80% of the expected economic benefits would result from eliminating or reducing non-tariff barriers, *see* Transatlantic Trade and Investment Partnership, The Economic Analysis Explained 6, (Sept. 2013), *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#economic-benefits. *See also* Chris Giles, *In Trade, Geography Matters More Than You Think*, Financial Times, Feb. 25, 2016, at 9.

34 European Commission, *TTIP Explained* (Mar. 19, 2015), 2 (*available at* http://trade.ec.europa.eu/doclib/docs/2014/may/tradoc_152462.pdf; TTIP round 11, Statement by EU Chief Negotiator Ignacio Garcia Bercero, (Miami, Oct. 23, 2015), *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#negotiation-rounds: "The cooperation is only possible if the level of protection for citizens stays the same or improves … Any form of regulatory cooperation will not change the way we regulate on public policies such as food safety or data privacy. Nor will it affect legislative processes or the independence of our regulators", *id*. at 1-2.

whether the HLWG did not underestimate foreseeable public opposition against closer regulatory cooperation and compatibility as an immediate component of a transatlantic agreement instead of opting for a more cautious approach by establishing procedural rules in the agreement that would pave the way for future discussions on a more integrated transatlantic approach to regulation.

On the trade policy side, the HLWG envisages the development of rules and principles that would not only be applicable to the bilateral transatlantic trade relationship but constitute a template for similar rules at the multilateral level. Indeed, representatives of both parties have stressed several times since the negotiations were launched that TTIP should set forth "global" rules on emerging trade issues where no multilateral rules yet exist.[35] Interestingly, the same approach is followed by TPP, as was emphasised by U.S. President *Barack Obama*.[36] Nevertheless, other countries may feel rather uncomfortable with the notion that two major trading powers aspire to define, within a purely bilateral context, rules that are intended also to serve as blueprint for the multilateral context.

III. Negotiating Mandate of the European Commission

Shortly after the release of the HLWG's final report, the EU Council adopted the negotiating directives for the Commission, the so-called negotiating mandate.[37] It provides binding guidance to the Commission for the negotiations, in terms of the negotiating objectives as well as the negotiating areas. Initially, the negotiating mandate was not made public for reasons of confidentiality. In the meantime, the

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35 Joe Biden, *We Cannot Afford to Stand on the Sidelines of Trade*, Financial Times, Feb. 28, 2014, at 9 ("We have an opportunity to shape the path of global commerce to spread our values and benefit our people, and we should seize it"); Karel De Gucht, *The Transatlantic Trade and Investment Partnership: The Real Debate* 4 (Speech/14/406, May 22, 2014), *available at* http://trade.ec.europa.eu/doclib/cfm/doclib_search.cfm#more-criteria; ("We, the European Union, want to keep our place in the world. And if we want to continue to shape the norms, rules, standards and disciplines that are so important in a globalised economy, we have to realise that we cannot do this without partners. If the two strongest economies in the world agree on something, then that provides a very strong basis to start talking with the rest of the world"); Malmström, *TTIP on Track*, *supra* note 15, at 3 ("Our idea here is to establish disciplines that would set gold standards … and for these, in many cases, to be a starting point for future negotiations on global rules"); Malmström, *TTIP for the Business Community*, *supra* note 20, at 4 ("Both the EU and the US believe in open markets, in the rule of law and in high standards of regulatory protection. TTIP can help us ensure that those principles are reflected in global standards in the future").

36 "The TPP means that America will write the rules of the road in the 21st century. When it comes to Asia … the rulebook is up for grabs. And if we don't pass this agreement - if America doesn't write those rules - then countries like China will. And that would only threaten American jobs and workers and undermine American leadership around the world", quoted in: *TPP Debate Ramps up Following Public Release of Trade Deal Text* 19 Bridges Weekly 7 (Nov. 12, 2015).

37 European Commission's Memorandum (Jun. 14, 2013), *supra* note 33.

negotiating mandate has been published, for the sake of transparency.[38] It should be noted that the negotiating mandate does not contain any surprises, at least not to the informed observer, as it essentially confirms the objectives put forward by the HLWG's final report. Nonetheless, the publication is useful in that it dispels any suspicion whether the European Union might pursue secret goals in these negotiations.

Pursuant to the negotiating mandate, the "agreement shall provide for the reciprocal liberalisation of trade in goods and services as well as rules on trade-related issues, with a high level of ambition going beyond existing WTO commitments."[39] Next, the negotiating mandate calls for a preamble that underlines the "common principles and values" of the parties, including their right to take measures necessary to achieve "legitimate public policy objectives on the basis of the level of protection of health, safety, labour, consumers, the environment and the promotion of cultural diversity … that they deem appropriate."[40] Further, the negotiating mandate states that the EU objectives consist of increasing trade and investment between the European Union and the United States "through increased market access and greater regulatory compatibility and setting the path for global standards."[41] Accordingly, the agreement should consist of three core components, namely market access, NTBs and regulatory issues, and rules.[42]

The market access component should cover: (i) trade in goods, (ii) trade in services and establishment, (iii) investment protection, and (iv) public procurement. As regards trade in goods, an elimination of "all duties on bilateral trade" is envisaged, with "options for the treatment of the most sensitive products, including tariff rate quotas."[43] As regards trade in services, the negotiating mandate directs the Commission to seek "the highest level of liberalisation captured in existing FTAs … while achieving new market access by tackling remaining long-standing market access barriers, recognising the sensitive nature of certain sectors."[44] Audiovisual services, however, are not covered.[45] In the field of investment protection, the negotiations should be conducted "on the basis of the highest levels of liberalisation and highest standards of protection that both Parties have negotiated to date."[46] But a caveat applies to ISDS: its inclusion "will depend on whether a satisfactory solution … is achieved."[47] In the area of public procurement, the negotiations should aim for "maximum ambition" by seeking enhanced mutual access "at all administrative levels (national, regional and local)."[48] Moreover, the public procurement chapter should address "local content or local production requirement,

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38 Council of the EU, *Directives for the Negotiation on the Transatlantic Trade and Investment Partnership Between the European Union and the United States of America*, 11103/13 DCL 1, (Oct. 9, 2014), *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#eu-position.

39 *Id*. para. 3.

40 *Id*. para. 6.

41 *Id*. para. 7.

42 *Id*. para. 5.

43 *Id*. para. 10.

44 *Id*. para. 15.

45 *Id*. para. 21.

46 *Id*. para. 22

47 *Id*.

48 *Id*. para. 24.

including Buy America(n) provisions, … and existing carve-outs, including for small and medium-sized enterprises."[49]

The agreement's second component on NTBs and regulatory issues should aim for an "ambitious level of regulatory compatibility for goods and services … and enhanced cooperation between regulators."[50] However, this has to be "without prejudice to the right to regulate."[51] In addition to provisions on SPS measures and TBT, the agreement should encompass "cross-cutting" rules on regulatory coherence and transparency that allow for "efficient, cost-effective, and more compatible regulations for goods and services."[52] Moreover, regulatory differences in specific goods and services sectors should be diminished through "harmonisation, equivalence, or mutual recognition, where appropriate."[53] Also, a framework for "guiding further work on regulatory issues" should be set up.[54] The rules agreed on regulatory cooperation and compatibility ought to be "binding on all regulators and other competent authorities of both Parties."[55]

The agreement's third component on rules should cover a number of issues, in particular intellectual property rights, trade and sustainable development, and customs and trade facilitation. As regards intellectual property rights, the agreement should provide for "enhanced protection and recognition of EU Geographical Indications."[56] Further, the "labour and environmental aspects of trade and sustainable development" should be addressed by the agreement.[57] In the area of customs and trade facilitation, the parties' commitments are expected to go beyond "commitments negotiated in the WTO."[58]

In sum, the negotiating mandate reflects the idea that TTIP should lead to a comprehensive and deep economic integration between the European Union and the United States. While this goal has been pursued already in the Union's trade relations with other countries, such as South Korea, Singapore, and, most recently, Canada, TTIP would take the idea even a step further because of the scope and extent of the transatlantic trade and investment relationship. To achieve said goal, the negotiations should pursue an ambitious outcome in terms of market access for goods and services, possibly going beyond the level of market access achieved under other free-trade agreements of either the European Union or the United States, and lead to a significantly enhanced cooperation between the European Union and the United States on the way they regulate, including through increased cooperation between the respective regulatory authorities, common rules for the process of designing new regulatory measures and an elimination or reduction of existing regulatory differences in specific goods and services sectors.

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49 *Id*.
50 *Id*. para. 25.
51 *Id*.
52 *Id*.
53 *Id*.
54 *Id*. para. 26.
55 *Id*. para. 27.
56 *Id*. para. 29.
57 *Id*. para. 31.
58 *Id*. para. 34.

IV. Negotiations' Structure and State of Play

The structure of the negotiations follows the agreement's prospective content. Accordingly, three main parts may be discerned.[59] The first part is about market access. Negotiations on market access relate to trade in goods, including customs duties and rules of origin, services and public procurement. The second part concerns regulatory cooperation and compatibility. Negotiations in this area are two-pronged: they seek to establish horizontal as well as sector-specific disciplines. The third part relates to rules on various subject-matters, including investment protection and ISDS, which both the HLWG's final report and the EU's negotiating mandate initially envisaged as part of the market access negotiations.

A. Market Access

1. Trade in Goods

There are two main targets in this area: eliminating customs duties and aligning rules of origin.

While the average rate of customs duties applied by both negotiating parties is rather low, at around 5% *ad valorem* for EU duties and 3.5% *ad valorem* for U.S. duties,[60] even the elimination of these relatively low customs duties would result in tangible economic benefits given the magnitude of transatlantic trade flows.[61] In addition, there are product categories, including high value goods and agricultural products, for which customs duties are significantly higher, in some cases even prohibitively high (i.e. higher than 100% *ad valorem*).[62] The idea is to eliminate the vast majority of customs duties (97% of tariff lines, according to the parties' revised market access offers)[63] immediately as of the entry into force of the agreement and to gradually eliminate or reduce the remaining customs duties.[64] In order to create a commercially viable market access for those sensitive (agricultural) goods for which customs duties would not be eliminated or reduced, tariff quotas with preferential in-quota tariffs would be provided for.[65]

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59 European Commission, *Inside TTIP. An Overview and Chapter-by-Chapter Guide in Plain English* 9 (2015), *available at* http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153635.pdf.

60 European Commission's Memorandum (Jun. 14, 2013), *supra* note 33.

61 European Commission, *TTIP Explained*, *supra* note 34, at 1; Malmström, *TTIP for the Business Community*, *supra* note 20, at 2.

62 European Commission, *Inside TTIP*, *supra* note 59, at 12.

63 European Commission, *The Transatlantic Trade and Investment Partnership (TTIP) - State of Play* 4, (Apr. 27, 2016, *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#transparency.

64 European Commission, *National Treatment and Market Access for Goods in TTIP. An Explanatory Note* 2 (Mar. 21, 2016, updated on Mar. 22, 2016); European Commission, *Report of the 13th Round of Negotiations for the Transatlantic Trade and Investment Partnership* 4, May 24, 2016, *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#negotiation-rounds.

65 European Commission, *National Treatment and Market Access for Goods in TTIP*, *supra* note 64, at 2.

E.U. and U.S. rules of origin differ in their approach to determining where products have been manufactured. The goal is to align them and facilitate their application, while taking into account the needs of industries and considering the potential scope for cumulation[66] with third countries that have concluded free-trade agreements with both the European Union and the United States.[67] The most recent discussions concerning rules of origin addressed: general provisions, origin procedures and product specific rules.[68]

2. Trade in Services

The services industry accounts for more than 60% of economic activity in both the European Union and the United States,[69] and they are the world's largest exporters of services. Both sides therefore are keen to obtain greater access to each other's services sectors, irrespective of the fact that services already account for a considerable share of transatlantic trade, with the European Union being the main services exporter to the United States and *vice versa*.[70] At the same time, trade in services is strongly affected by domestic regulation of services.[71] Consequently, both parties contemplate improving existing disciplines for domestic regulatory measures as well as introducing new disciplines in this respect.[72]

With respect to market access, the objective is twofold: ensuring reciprocal market access at a level corresponding to the highest level of liberalisation bound under existing EU and U.S. free-trade agreements and tackling long-standing market access barriers.[73] The European Union also strives for better market access for professional service providers (mode 4).[74] To this end, the EU's (revised) services offer contains commitments on market access (using a *positive* list approach) and commitments on most-favoured nation treatment and national treatment (using a *negative* list approach).[75]

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66 The term "cumulation" refers to those rules of origin that allow components from and processing in certain third countries to be considered for the acquisition or maintenance of preferential origin (definition according to the customs glossary of European Commission's DG TAXUD, *available at* http://ec.europa.eu/taxation_customs/glossary/customs-glossary_en).

67 Council of the EU, *Negotiation Directives*, *supra* note 38, para. 11; European Commission, *Inside TTIP*, *supra* note 59, at 16.

68 European Commission, *Report of the 13th Round of Negotiations*, *supra* note 64, at 6-7.

69 European Commission, *Inside TTIP*, *supra* note 59, at 13.

70 European Commission, *Reading Guide. Publication of the EU Proposal on Services, Investment and E-commerce for the Transatlantic Trade and Investment Partnership* 1, (Jul. 31, 2015), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#part-1-services.

71 *See* WTO, *Disciplines on Domestic Regulation Pursuant to GATS Article VI.4*, para. 2 (Jun. 2011), *available at* https://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm. *See also* Martin Wolf, *Unilateral Free Trade is a Dangerous Fantasy*, Financial Times, Jun. 10, 2016, at 9.

72 European Commission, *Inside TTIP*, *supra* note 59, at 13-14.

73 Council of the EU, *Negotiation Directives*, *supra* note 38, para. 15.

74 European Commission, *Inside TTIP*, *supra* note 59, at 13.

75 European Commission, *Reading Guide*, *supra* note 70, at 3-4 (the EU's revised offer sets forth reservations for certain sectors where quantitative limitations or discriminatory measures may be maintained or introduced in the future; conversely, a ratchet clause

The EU's (revised) offer also includes a so-called "public utilities reservation" that allows Member States to maintain or introduce quantitative limitations and discriminatory measures in relation to public health, public education, and social services as well as the management, collection, purification and distribution of water, thereby granting them full discretion in organising and regulating the provision of those services.[76] This "carve-out" for public services corresponds to a joint statement on public services made by Trade Commissioner *Malmström* and USTR *Froman*.[77] The European Union has not made any commitments in the audiovisual services sector. However, in spite of having exchanged revised services offers so far, the level of market access offered by either side still appears to be unsatisfactory when measured against the abovementioned benchmark.[78]

Negotiations address the domestic regulation of services because of its pervasive effect on services trade.[79] In this respect, one objective is to elaborate on existing multilateral disciplines under GATS, in particular regarding licensing requirements and procedures so as to ensure a transparent, objective and expeditious treatment of applications.[80] The other objective consists of devising disciplines on domestic regulation in particular services sectors, including telecoms, e-commerce, financial services, postal and courier services.[81] Moreover, both parties attempt to come up with rules for the mutual recognition of professional qualification requirements.[82]

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applies to some sectors, thereby making future liberalization binding). On the different approaches to scheduling services commitments used in free-trade agreements, see European Commission, *Services and Investment in EU Trade Deals. Using 'Positive' and 'Negative' Lists* (Apr. 2016, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#part-1-services.

76 European Commission, *Reading Guide*, *supra* note 70, at 2. *See also* European Commission, *Protecting Public Services in TTIP and Other EU Trade Agreements*, Jul. 13, 2015, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#part-1-services.

77 Joint Statement on Public Services, Mar. 20, 2015, *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#eu-position ("Furthermore, no EU or U.S. trade agreement requires governments to privatize any service, or prevents governments from expanding the range of services they supply to the public. Moreover, these agreements do not prevent governments from providing public services previously supplied by private service suppliers; contracting a public service to private providers does not mean that it becomes irreversibly part of the commercial sector").

78 European Commission, *Transatlantic Trade & Investment Partnership Advisory Group,* Meeting Report 19 May 2016, at 3, *available at* http://trade.ec.europa.eu/doclib/docs/2016/may/tradoc_154553.pdf.

79 *See* Hildegunn K. Nordås, *Services Trade Restrictiveness Index (STRI): The Trade Effect of Regulatory Differences*, 189 OECD Trade Policy Papers 5 (2016) (pointing out: "as the border restrictions on services trade and investment come down, regulatory cooperation could make the most significant contribution to reducing services trade costs going forward"). *See also New Global Trade Under Old National Rules*, Financial Times, Mar. 7, 2016, at 8.

80 European Commission, *Inside TTIP*, *supra* note 59, at 13; *see also* European Commission, *Report of the 13th Round of Negotiations*, *supra* note 64, at 6.

81 European Commission, *Inside TTIP*, *supra* note 59, at 14; *see also* Commission, *Report of the 13th Round of Negotiations*, *supra* note 64, at 5-6. It is unclear, however, whether regulatory cooperation in financial services would be part of TTIP, *see* European Commission, *TTIP Advisory Group*, *supra* note 78, at 3.

82 European Commission, *Report of the 13th Round of Negotiations*, *supra* note 64, at 5.

In this context, it is interesting to note that the European Union and the United States are also major proponents of the plurilateral TiSA negotiations which run in parallel to the TTIP negotiations. The former negotiations also aim for an ambitious outcome in terms of market access, reflecting the actual level of existing liberalization, and enhanced disciplines on domestic regulation.[83] Yet the initial market access offers submitted by TiSA negotiating parties seem to have been rather disappointing compared to the officially stated goal, and even the revised market access offers, while constituting an improvement, do not seem to meet the initial expectation.[84] In contrast, TiSA negotiating parties appear to have made more headway on disciplines for domestic regulation.[85] It is recalled that TiSA negotiating parties seek to conclude their negotiations by the end of 2016.[86]

3. Public Procurement

Next to services, market access in public procurement holds the biggest potential for new economic opportunities. This potential stems from the fact that public procurement stands for a very sizeable portion of GDP both in the European Union and the United States, and their respective market access commitments in the framework of the revised Government Procurement Agreement of the WTO leave room for some (significant) improvement.[87] It is not surprising, therefore, that the European Union strongly insists on getting better access to the U.S. public procurement market, especially at the sub-federal level, by addressing the various restrictions and exceptions that are in place in this area.[88]

As effective access to the public procurement market hinges on transparency, a further necessary condition for the European Union is increased transparency of public procurement opportunities in the United States which lack a single central electronic publication medium.[89] However, negotiations on market access in public

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83 Memorandum of the European Commission, *Negotiations for a Plurilateral Agreement on Trade in Services* 2 (Feb. 15, 2013), *available at* http://ec.europa.eu/trade/policy/in-focus/tisa (last visited Jun. 14, 2016). *See* Rudolf Adlung, *The Trade in Services Agreement (TiSA) and Its Compatibility with GATS: An Assessment Based on Current Evidence*, 14 World Trade Review 617-41 (2015).

84 European Commission, *Civil Society Dialogue, Meeting on TiSA* 1 (Dec. 11, 2015, *available at* http://trade.ec.europa.eu/civilsoc/meetlist.cfm#year-2015. Revised market access offers were submitted in early May 2016 and discussed at the 18th negotiating round, European Commission, *Report of the 18th TiSA Negotiation Round, 26 May - 3 June 2016,* 1-2, *available at* http://ec.europa.eu/trade/policy/in-focus/tisa.

85 European Commission, *Report of the 17th TiSA negotiation round*, *supra* note 4, at 1-2; European Commission, *Report of the 18th TiSA Negotiation Round*, *supra* note 84, at 2-3.

86 *Services Trade in Focus as TISA, TTIP, RCEP Aim for 2016 Conclusion* 20 Bridges Weekly 1 (Mar. 4, 2016).

87 European Commission, *Inside TTIP*, *supra* note 59, at 15; European Commission, *TTIP - State of Play*, *supra* note 63, at 5.

88 Council of the EU, *Negotiation Directives*, *supra* note 38, para. 24. In her speech to the Atlantic Council in Washington D.C. on Jun. 29, 2016, Cecilia Malmström emphasized again the importance the EU attaches to gaining market access to the U.S. government procurement market at all levels of government: "An ambitious outcome that creates new opportunities at the federal and state level is a *sine qua non*", *supra* note 1, at 3.

89 European Commission, *Report of the 13th Round of Negotiations*, *supra* note 64, at 5; European Commission, *TTIP Advisory Group*, *supra* note 78, at 3.

procurement seem to have run into difficulties.[90] Whether these difficulties can be overcome is an open question, given the constitutional constraints of the U.S. government in influencing government procurement policies at the sub-federal level.[91]

B. Regulatory Cooperation and Compatibility

The second part of the intended TTIP agreement would consist of two sections: one section would contain horizontal chapters, whereas the other section would comprise nine sector specific chapters.[92] Both the horizontal and the sectoral chapters pursue the overarching objective of establishing principles for closer cooperation between regulatory authorities on both sides of the Atlantic, including in an international context, and greater compatibility of regulations adopted by both parties.[93] But neither closer regulatory cooperation nor greater regulatory compatibility is supposed to negate or undermine either side's right to regulate or set the level of protection it deems appropriate.[94]

It is assumed that closer regulatory cooperation and greater regulatory compatibility would: (i) render the process of adopting regulations more transparent, while taking the interests of the other side and interested parties into account, (ii) minimize unnecessary regulatory differences and lead to more effective and better regulation, (iii) reduce compliance costs for the economic operators affected by those regulations, (iv) allow for greater competition and exploitation of economies of scale and scope, and (v) ultimately raise the quality of goods and services.[95]

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90 European Commission, *TTIP - State of Play*, *supra* note 63, at 5. *See TTIP and the End of the Year*, 25 Washington Trade Daily 2 (Jun. 15, 2016). The EU chief negotiator for TTIP acknowledged at the end of the 14th negotiation round that: "… we are still very far from achieving that goal", i.e. substantial improvements in market access at all levels of government, Conclusion of the 14th TTIP Negotiation Round 15 July 2016. Statement by Ignacio Garcia Bercero, EU Chief Negotiator for TTIP, at 2, *available at* http://ec.europa.eu/trade/policy/in-focus/ttip.

91 *See* Hans-Joachim Prieβ, *Neuerungen des Agreement on Government Procurement*, *in* Die WTO nach Bali - Chancen und Risiken 105, 113 (Dirk Ehlers, Christian Pitschas & Hans-Michael Wolffgang eds., 2015).

92 European Commission, *Inside TTIP*, *supra* note 59, at 17.

93 *Id*. at 18.

94 *Id*. The EU chief negotiator stated categorically at the end of the 14th negotiation round: "Cooperation will only be possible if the level of protection for citizens improves, or at least stays the same", Conclusion of the 14th TTIP Negotiation Round 15 July 2016, *supra* note 90, at 2.

95 *Id*. *See also* European Commission, *Regulatory Cooperation in TTIP: The Benefits* 2 (Mar. 21, 2016), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#regulatory-cooperation); Daniel R. Pérez & Susan E. Dudley, *Experiences in International Regulatory Cooperation: Benefits, Limitations, and Best Practices* 4-5 Regulatory Studies, *available at* https://regulatorystudies.columbian.gwu.edu/us-eu-regulatory-cooperation-lessons-and-opportunities (last visited Jun. 15, 2016); Wolf, *supra* note 71.

1. Horizontal Chapters

The horizontal section would comprise three (or four) chapters: a chapter on good regulatory practices and regulatory cooperation (which could possibly be split into two chapters), a chapter on TBT and a chapter on SPS measures.[96] The first chapter would establish principles on good regulatory practices which are meant to promote good governance in the regulatory process by strengthening transparency, predictability and accountability, including through prior information on planned regulatory measures, consultation with stakeholders and the public, and *ex ante* as well as *ex post* impact assessment.[97] Such principles are not a new topic in free trade agreements: they are contained, for example, in some of the free-trade agreements concluded by the European Union and the United States and a regular feature of the discussions among WTO Members in the TBT Committee.[98]

Moreover, the first (or second) chapter would set forth rules on how regulators should cooperate, including through exchange of information and a commitment to assess the regulatory measures proposed by the other side as to their merits.[99] Furthermore, the European Union proposes that the chapter on regulatory cooperation should include an institutional mechanism, such as a regulatory cooperation body, which would be composed of representatives of EU and U.S. regulatory authorities and act as a forum for exchange and the setting of priorities but without decision-making power.[100] Importantly, the chapter(s) on good regulatory practices and regulatory cooperation would not be subject to the dispute settlement system of the intended TTIP agreement.[101] The European Union and the United States have consolidated their respective texts on both good regulatory practices and regulatory cooperation, but so far their positions seem to be closer on the former issue.[102]

The second and third chapters would set out commitments on TBT and SPS measures, building on, but going beyond, the corresponding multilateral trade agreements in Annex 1 A to the WTO Agreement.[103] In the area of TBT, different

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96 European Commission, *Inside TTIP*, *supra* note 59, at 17.

97 European Commission, *Good Regulatory Practices (GRPs) in TTIP. An Introduction to the EU's Revised Proposal* 2 (Mar. 21, 2016), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#regulatory-cooperation.

98 *Id*. at 2-3; WTO, Committee on Technical Barriers to Trade, *Seventh Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4*, 2-3 (G/TBT/37, 3 December 2015), *available at* https://www.wto.org/english/tratop_e/tbt_e/tbt_triennial_reviews_e.htm (last visited Jun. 15, 2016); Committee on Technical Barriers to Trade, *Thematic Session on Good Regulatory Practice* (G/TBT/GEN/191, 17 March 2016), *available at* https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm.

99 European Commission, *Regulatory Cooperation in TTIP: The Benefits*, *supra* note 95, at 4-5.

100 European Commission, *Regulatory Cooperation in TTIP: The Benefits*, *supra* note 95, at 3; European Commission*, TTIP and Regulation: An Overview* 9 (Feb. 10, 2015), available at http://trade.ec.europa.eu/doclib/docs/2015/february/tradoc_153121.pdf.

101 European Commission, *Regulatory Cooperation in TTIP: The Benefits*, *supra* note 95, at 6; European Commission*, Good Regulatory Practices (GRPs) in TTIP*, *supra* note 97, at 6.

102 Statement by EU Chief Negotiator for TTIP, 29 April 2016, *supra* note 2, at 1; European Commission, *TTIP Advisory Group*, *supra* note 78, at 4.

103 European Commission, *TTIP and Regulation*, *supra* note 100, at 10-11.

conformity assessment procedures and standards in the European Union and the United States are major obstacles in transatlantic trade. Accordingly, the European Union seeks to eliminate or reduce duplicative or overly burdensome conformity assessment procedures, ease the use of international standards in transatlantic trade, increase cooperation between standard-setting bodies in the European Union and the United States when developing new standards, and ensure easy access to information on technical regulations and standards applied in both the European Union and the United States.[104] These issues continue to dominate the negotiations in this particular area.[105]

As regards SPS measures, the verification, certification and approval procedures applied in the United States are deemed rather stringent by the European Union. The European Union would like to improve the speed, predictability and transparency of those procedures, by establishing a single approval procedure for all EU exports, and ensuring that the equivalence of EU and U.S. testing procedures and inspections is recognised.[106] Also, regulatory cooperation on SPS measures should play a key role. The European Union strongly insists that the SPS chapter of TTIP will not result in a lowering of EU food safety rules or a modification of the authorisation process for the growing and selling of genetically modified plants required under EU rules.[107] Moreover, the European Union affirms that the SPS chapter should contain animal welfare provisions.[108] Discussions on verification and certification procedures as well as the institutional aspects of the SPS chapter appear to be the least sensitive.[109]

2. Sectoral Chapters

The sector-specific section would comprise nine chapters on the following industries: (i) chemicals, (ii) cosmetics, (iii) engineering products, (iv) information and communication technologies, (v) medical devices, (vi) pesticides, (vii) pharmaceuticals, (viii) textiles, and (ix) vehicles.[110] These chapters would include rules on regulatory cooperation and regulatory compatibility specifically addressing those issues that are relevant to the industries concerned.[111]

As in the case of the horizontal chapters, the sector-specific chapters are not an invention but form part of other free-trade agreements, for example those concluded by the European Union in the last couple of years.[112] So far, there seems

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104 European Commission, *Inside TTIP*, *supra* note 59, at 20; European Commission, *TTIP - State of Play*, *supra* note 63, at 5.

105 Commission, *Report of the 13th Round of Negotiations*, *supra* note 64, at 8-9; European Commission, *TTIP Advisory Group*, *supra* note 78, at 4.

106 European Commission, *Inside TTIP*, *supra* note 59, at 21; European Commission, *TTIP and Regulation*, *supra* note 100, at 11-12.

107 European Commission, *Inside TTIP*, *supra* note 59, at 22.

108 European Commission, *Report of the 13th Round of Negotiations*, *supra* note 64, at 9.

109 European Commission, *TTIP Advisory Group*, *supra* note 78, at 4.

110 European Commission, *Inside TTIP*, *supra* note 59, at 17; European Commission, *TTIP and Regulation*, *supra* note 100, at 12-17.

111 European Commission, *Inside TTIP*, *supra* note 59, at 22-34; European Commission, *TTIP and Regulation*, *supra* note 100, at 12-17.

112 These include CETA, *see* European Commission, *CETA - Summary of the Final Negotiating Results* 18 (February 2016), *available at* http://ec.europa.eu/trade/policy/

to be good progress in the negotiations regarding chemicals, medical devices, pharmaceuticals, textiles and vehicles, whereas less progress has been achieved in the other four sectors.[113]

C. RULES

As previously pointed out, the rules part of TTIP would encompass several matters, most notably investment protection and ISDS. The inclusion of "investment" in the name of the intended transatlantic agreement provides an indication of the importance of investment protection and ISDS for the transatlantic economic relationship.[114] In this respect, it must be noted that "investment protection" forms part of "investment", rather than being a self-standing issue, in the most recent free-trade agreements of the European Union, namely CETA and the EU-Vietnam FTA.[115] This might be the same for TTIP: according to the EU proposal, investment protection and ISDS would be a component of the chapter on investment which, in turn, would belong to the title on trade in services, investment and e-commerce.[116] Nonetheless, in its information to the public on TTIP, the European Commission treats investment protection and ISDS as if it were a self-standing chapter of the rules part.[117]

Irrespective of the exact location of investment protection and ISDS within the TTIP architecture, the European Union suspended negotiations on this particular issue at the end of 2013 and launched a consultation process with its Member States

in-focus/ceta; EU-Singapore FTA, *see* European Commission, *An Informal Overview over the Content of the EU-Singapore FTA* 4-6 (20 Sept. 2013), *available at* http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore; EU - Korea FTA, *see* European Commission, *EU-South Korea Free Trade Agreement: A Quick Reading Guide* 3-5 (Oct. 2010), *available at* http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea.

113 European Commission, *TTIP Advisory Group*, *supra* note 78, at 5. After the last negotiating round at the end of April 2016, the EU chief negotiator for TTIP noted in this respect: "A lot of technical work has been done, but quite substantial work is also still ahead of us", *supra* note 2, at 2.

114 *See* Cecilia Malmström, *Opening Remarks: Discussion on Investment in TTIP* 2-3 Speech at the meeting of the International Trade Committee of the European Parliament, (Mar. 18, 2015), *available at* http://ec.europa.eu/trade/trade-policy-and-you/publications.

115 Sections D and F of CETA chapter 8 on investment contain rules on investment protection and the resolution of investment disputes between investors and states, respectively (the CETA text is available at http://ec.europa.eu/trade/policy/in-focus/ceta (last visited Jun. 20, 2016); as regards the EU-Vietnam FTA, sections two and three of chapter II on investment (which belongs to the title on trade in services, investment and e-commerce) set forth rules on investment protection and the resolution of investment disputes, respectively (the text of the EU-Vietnam FTA is *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (last visited Jun. 20, 2016).

116 *See* EU Proposal on Investment Protection and Resolution of Investment Disputes (Nov. 12, 2015), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#rules [hereinafter EU Proposal]

117 *See* The Overview of the EU Positions and Texts in the TTIP Negotiations *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230 (last visited Jun., 20, 2016).

and their national parliaments, the European Parliament and the public.[118] This decision was a result of growing unease within the European Union on the effect that arbitration proceedings, and ensuing awards, in investor-to-state disputes under bilateral investment treaties - and by extension under similar rules in TTIP - could have on the right to regulate,[119] notwithstanding the fact that ISDS is a traditional feature of more than 1400 bilateral investment treaties that EU Member States have concluded in the past.[120] The consultation process raised a number of questions as to how the current system of investment protection and ISDS could be reformed in order to address the concerns in this respect.

As a result of the consultation process, the Commission presented a draft proposal to the Council and the European Parliament which was published in September 2015.[121] The proposal relates to both investment protection as well as ISDS. As regards investment protection, the proposal is moderately reformist, since the standards of protection set out in the proposal are mostly traditional ones.[122] But these standards are more clearly defined than has been the case so far, account being taken of prior case law in this area; this is especially true for the standards of "fair and equitable treatment" as well as "expropriation."[123] What is truly new, however, is a provision that safeguards parties' right to regulate in the public interest and, as a corollary, the right to change the existing legal and regulatory framework, even if such a change negatively affects investors' expectations of profit.[124] Also, the proposal envisages a provision that exempts EU rules on state aid from the standards of protection so that the latter do not constitute a hindrance to enforcing the EU rules on state aid.[125] A quick comparison of the standards of protection, as set out in the EU proposal, with the standards of protection provided for in TPP chapter 9 on investment shows that they largely correspond to each other, notwithstanding certain differences.

The EU proposal is much more radical with respect to ISDS in that it completely abandons the present system of *ad hoc* arbitrations in favour of an Investment Court system; this drastic change must be seen against the Union's ultimate intention to improve the international investment dispute resolution system through the creation of a permanent multilateral International Investment Court.[126] The European

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118 European Commission, *Inside TTIP*, *supra* note 59, at 42; European Commission*, TTIP - State of Play*, *supra* note 63, at 6.

119 *See* Malmström, *Discussion on Investment in TTIP, supra* note 114, at 3-4.

120 European Commission, *Inside TTIP*, *supra* note 59, at 41; Malmström, *Discussion on Investment in TTIP*, *supra* note 114, at 1.

121 Press Release, European Commission, *Commission Proposes a New Investment Court System for TTIP and Other EU Trade and Investment Negotiations* (Sept. 16, 2015), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364.

122 *See* European Commission, *Reading Guide Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and Investment Partnership (TTIP)*, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1365 (last visited Jun. 20, 2016).

123 *Id*.

124 *Id*. *See also,* EU Proposal, *supra* note 116, ch. II, sec. 2, art. 2.2.

125 European Commission, *Reading Guide*, *supra* note 122; EU Proposal, *supra* note 116, ch. II, sec. 2, arts 2.3 and 2.4.

126 European Commission, *Reading Guide*, *supra* note 122. *See also* Cecilia Malmström who stressed in her speech to the Atlantic Council in Washington D.C. that the EU's new investment court system "is a step towards the global reform we need, ultimately leading to a global court", *supra* note 1, at 5.

Union proposes a two-tiered system, consisting of an "Investment Tribunal", as first instance, and an "Appeal Tribunal" with the authority to hear appeals.[127] This system is similar to the two-tiered system of judicial protection at Union level or the equally two-tiered system of the WTO dispute settlement mechanism.

The Investment Tribunal would be composed of 15 judges, three of whom would be randomly assigned to a particular case.[128] Importantly, the Investment Tribunal would not be empowered to order the repeal, cessation or modification of the treatment found to be in breach of an applicable standard of protection.[129] Moreover, the disputing party's domestic law would not be part of the applicable law, and the Investment Tribunal would not have jurisdiction to determine the legality of a challenged measure under the disputing party's domestic law.[130] Where the Investment Tribunal would have to ascertain the meaning of the disputing party's domestic law as a matter of *fact*, it would be bound to follow the prevailing interpretation made by the courts or authorities of that party.[131] In addition, the meaning given to the relevant domestic law by the Investment Tribunal would not be binding upon the courts or authorities of the disputing party.[132]

The Appeal Tribunal would be composed of six judges, of whom three, assigned at random, would sit to hear an appeal.[133] The grounds for appeal would be limited to: (i) errors of the Investment Tribunal in interpreting or applying the applicable law, (ii) manifest errors of the Investment Tribunal in appreciating the facts, including the appreciation of relevant domestic law, and (iii) those provided for in Article 52 of the ICSID Convention, in so far as they are not covered by the aforementioned two grounds of appeal.[134] The judges of the Investment Tribunal and the Appeal Tribunal would have to comply with ethical rules as well as a code of conduct.[135]

Apart from the foregoing features, the EU proposal also seeks to introduce other reforms to the way investment dispute settlement proceedings are conducted, amongst others by proposing a ban on forum shopping, full transparency of investment dispute proceedings, early dismissal of unfounded claims, intervention by third parties and the "loser pays" principle.[136] These proposed reforms are similar to new features found in TPP chapter 9 on investment.

Negotiations on investment protection and ISDS resumed in February 2016; during the twelfth round of negotiations, discussions focused on comparing the textual proposals of both sides with a view to identifying those areas that need further substantive discussions as well as those areas where there is convergence.[137] Discussions then continued during the thirteenth and fourteenth

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127 *Id*.
128 EU Proposal, *supra* note 116, ch. II, sec. 3, arts 9. 2, 9.6, 9.7.
129 *Id*. at ch. II, sec. 3, art. 28.1.
130 *Id*. at ch. II, sec. 3, arts. 13.3 ,13.4.
131 *Id*. at ch. II, sec. 3, art. 13.3.
132 *Id*. at ch. II, sec. 3, art. 13.4.
133 *Id*. at ch. II, sec. 3, arts. 10.2, 10.8 and 10.9.
134 *Id*. at ch. II, sec. 3, art. 29.1.
135 Id. at ch. II, sec. 3, art. 11 and annex II.
136 European Commission, *Reading Guide*, *supra* note 122.
137 European Commission, *Report of the Twelfth Round of Negotiations for the Transatlantic Trade and Investment Partnership (TTIP)* 19 (Mar. 23, 2016), *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#negotiation-rounds.

rounds of negotiations, and some progress has been made towards consolidating text on standards of treatment.[138] The United States asked detailed questions about the Investment Court system proposed by the European Union, especially the policy rationale behind the proposal and how the proposed system would function.[139]

An interesting - and by no means hypothetical - question is whether the Court of Justice of the European Union would consider the Investment Court System proposed by the European Union to be compatible with EU primary law. The Court of Justice has already been asked on several occasions[140] to consider whether a system of judicial protection established under an international agreement to be concluded by the European Union, would be in conformity with the EU Treaties. The Court of Justice has ruled on this issue most recently in relation to the planned accession of the Union to the European Convention on Human Rights. In its opinion, the Court of Justice acknowledged that the Union's competence to conclude international agreements "necessarily entail[s] the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions."[141] However, the Court of Justice held that there must be "no adverse effect on the autonomy of the EU legal order."[142] and any decision by such a court "must not have the effect of binding the EU and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of EU law."[143] It would seem that these requirements are met as regards the investment dispute settlement system proposed by the European Union, since EU law would not constitute applicable law for purposes of investment dispute resolution proceedings,[144] the Investment Tribunal would not have jurisdiction to determine the legality of a challenged measure under Union law,[145] and the meaning given to Union law by that Tribunal would not be binding on the EU courts or authorities.

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138 European Commission, *Report of the 13th Round of Negotiations*, *supra* note 64, at 18; European Commission, *Report of the 14th Round of Negotiations for the Transatlantic Trade and Investment Partnership* 14 (July 2016, *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/); European Commission, *TTIP Advisory Group*, *supra* note 78, at 5.

139 European Commission, *Report of the 13th Round of Negotiations*, *supra* note 64, at 18.

140 *See* opinion 1/91, EUR-Lex 61991CV0001 (Dec. 14, 1991); opinion 1/09, EUR-Lex 62009CV0001 (Mar. 8, 2011); and opinion 2/13, EUR-Lex 62013CV0002 (Dec. 18, 2014).

141 Opinion 2/13, *supra* note 140, para. 182.

142 *Id*. at para. 183.

143 *Id*. at para. 184.

144 *See also* Christoph Herrmann, *The Role of the Court of Justice of the European Union in the Emerging EU Investment Policy*, 15 J. World Inv. & Trade 570, 582-83 (2014).

145 *But see* Steffen Hindelang, *Repellent Forces: The CJEU and Investor-State Dispute Settlement*, 53 Archiv des Völkerrechts 68 (2015), who argues that "a tribunal's damages award […] might de facto impact interpretations and review for legality of EU measures in the light of superior EU law by the CJEU", *id*. at 79-80.

V. EXCLUSIVE COMPETENCE OF THE EUROPEAN UNION FOR CONCLUDING TTIP?

The question whether TTIP would fall within the exclusive competence of the European Union, or whether the competence for concluding TTIP is shared between the European Union, on the one hand, and its Member States, on the other, is of highly practical relevance. If the latter was the case, then TTIP would have to be ratified by all Member States, which means that each and every EU Member State would have an effective veto power over TTIP's ratification. This is relevant because the mood in some Member States, for instance Belgium, France and Germany, is such that ratification by their national parliaments is all but ensured.

At first, the issue does not seem to be very difficult to determine. The common commercial policy falls within the *exclusive* competence of the Union.[146] But this is not the end of the story. Two caveats apply. The first caveat arises with respect to transport, including transport services; the negotiation *and* conclusion of "international agreements in the field of transport" is not governed by Article 207 TFEU, the relevant provision on the common commercial policy, but is "subject to Title VI of Part Three",[147] which is the title on transport. In that area, the competence is shared between the Union and the Member States.[148] As regards a more or less identical provision to Article 207(5) TFEU, namely Article 133(6), third subparagraph, E.C. Treaty, the Court of Justice held that the latter provision "seeks to maintain, with regard to international trade in transport services, a fundamental parallelism between internal competence […] and external competence […], each competence remaining - as previously - anchored in the title of the Treaty specifically relating to the common transport policy."[149]

However, the European Union also has exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.[150] The last option in particular could be relevant as regards commitments on transport services under TTIP. But the Court of Justice has already held that any distortions in the flow of (transport) services in the internal market which might arise from international commitments on (transport) services do not in themselves affect the common Union rules on (transport) services and are thus not capable of establishing an (exclusive) external Union competence.[151] The same rationale should apply to TTIP.

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146 TFEU art. 3(1)(e).

147 *Id*. art. 207(5).

148 *Id*. art. 4(2)(g).

149 Opinion 1/08, EUR-Lex 62008CV0001 (Nov. 30, 2009), para. 164.

150 TFEU art. 3(2). This provision is also applicable to areas where the competence is, in principle, shared between the Union and its Member States because of its overriding character, Christian Pitschas, *Economic Partnership Agreements and EU Trade Policy: Objectives, Competences and Implementation*, *in* EU BILATERAL TRADE AGREEMENTS AND INTELLECTUAL PROPERTY: FOR BETTER OR WORSE? 209, 221 (Josef Drexl et al. eds., 2014).

151 Case C-476/98, Commission v. Germany, 2002 E.C.R. I-9855. para. 111 (referring to Opinion 1/94, EUR-Lex 61994CV0001 (Nov. 15, 1994), paras. 78 and 79).

In addition, there is a second caveat which relates to the area of administrative cooperation, including the cooperation between Member States' regulatory authorities. In this area, the competence is not even shared between the European Union and its Member States. Rather, the European Union may only "carry out actions to support, coordinate or supplement the actions of Member States."[152] In particular, the European Union is not empowered to adopt measures in the area of administrative cooperation that would lead to a "harmonisation of the laws and regulations of the Member States."[153] This is relevant when it comes to the common commercial policy; although the Union's competence in this area is exclusive, it is explicitly restricted in that it "shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation."[154] Yet TTIP's horizontal chapter on regulatory cooperation and its sector-specific chapters would commit regulatory authorities to pursue a common approach to the process of designing and developing regulatory measures. One might counter that this commitment would not be subject to dispute settlement under TTIP, according to the EU proposal. But this objection would miss the point; the commitment retains a legal nature, nonetheless. Given that international agreements concluded by the European Union are binding on the EU institutions and EU Member States,[155] TTIP would lead to a harmonization of the laws and regulations of Member States regarding the regulatory cooperation to be undertaken by their regulatory authorities.[156] This would not be compatible with Article 207(6) TFEU read in conjunction with Article 197(2) TFEU.

In conclusion, it is argued that the European Union does not have an exclusive competence for TTIP. Consequently, TTIP would have to be ratified as a "mixed agreement" by both the European Union and its Member States.[157] This may complicate the process, possibly to the point where the ratification of TTIP is seriously at risk of being rejected by some Member States.

VI. Impact of TTIP

TTIP would have a severe impact on the multilateral trading system, and this impact would be amplified further if TPP also entered into force. TTIP would certainly not mean that the European Union or the United States would abandon the multilateral trading system, but the latter would be relegated to second place, at least in practical terms. Similar to TPP, where accession is a possibility, albeit a

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152 TFEU art. 6(g).

153 *Id*. at art. 197(2).

154 *Id*. at art. 207(6).

155 *Id*. at art. 216(2).

156 Christian Pitschas, *Transatlantic Trade and Investment Partnership (TTIP) und Regulatorische Konvergenz* in Die WTO nach Bali - Chancen und Risiken 141, 159 (Dirk Ehlers, Christian Pitschas & Hans-Michael Wolffgang eds., 2015).

157 This was acknowledged by Karel De Gucht, *The Transatlantic Trade and Investment Partnership: The Real Debate* 5 (Speech/14/406, May 22, 2014), *available at* http://ec.europa.eu/trade/trade-policy-and-you/publications.

distant one for the moment, for countries that belong to the Trans-Pacific region, TTIP would be open for accession,[158] which may be particularly relevant for Switzerland,[159] thereby making its "plurilateralisation" through enlargement a possibility.[160]

The impact on developing countries would conceivably be even harsher. In contrast to other developed countries, such as Australia, Canada, New Zealand and South Korea, which intend to negotiate or have already negotiated free-trade agreements with the European Union that incorporate obligations similar to TPP or TTIP, developing countries are either not (yet) in a position or not (yet) willing to negotiate such far reaching agreements. The Economic Partnership Agreements concluded or negotiated by the European Union with several ACP regional groups are not a substitute in this respect.[161] This is particularly true for LDCs; while their goods enjoy duty-free, quota-free access to the EU market and, albeit to a more limited extent, the U.S. market, it will prove exceedingly difficult for them to meet the technical regulations and standards that will shape the transatlantic market or engage in the kind of regulatory cooperation envisaged by the two parties.[162] They are likely to be further marginalized as regards trade with the European Union and the United States.

VII. Outlook

At this juncture, it is uncertain whether the TTIP negotiations will be concluded by the end of this year. If not, it could mean that TTIP will never see the light of day; this may depend also on who will become the next U.S. President. But even if the TTIP negotiations will be concluded (one day), it is far from guaranteed that it will get the necessary approval from all Member States. This author takes the view that

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158 The EU Proposal for Institutional, General and Final Provisions provides in article X.17 that TTIP "is open to accession by non-Parties possessing full autonomy in the conduct of their external commercial relations and of the other matters provided for in this Agreement as the Parties may agree", *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1527 (last visited Sept. 29, 2016). The European Commission explained that "there should be a possibility for other countries to join and a geographical limitation on who could join was not deemed necessary", *Transatlantic Trade & Investment Partnership Advisory Group*. Meeting Report, 23 June 2016, at 5, *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#_documents.

159 *Accord Transatlantique: Les négociations avancent lentement*, Entreprise Romande, 29 Jan. 2016, 8.

160 Malmström, *The WTO after Nairobi*, *supra* note 11, at 2 ("… our strong first preference will be for multilateral solutions … However, we must also be realistic. If it's a choice between making progress with a smaller number of partners or no progress at all, then we will choose to move forward - plurilaterally.")

161 *But see* Cecilia Malmström, *TTIP and Developing Countries* 3 (Speech, Jun. 21, 2016), *available at* http://ec.europa.eu/trade/policy/in-focus/ttip/documents-and-events/index_en.htm#_documents.

162 *But see* Malmström, *id*., at 2.

they, too, have to ratify TTIP; the issue of whether TTIP is a "mixed agreement" will almost certainly be referred to the Court of Justice for its - legally binding - opinion.[163]

TTIP would be a watershed for the multilateral trading system, just as TPP. It risks undermining this system and its pre-eminent institution, the WTO, as the European Union and the United States would attempt to create "a more integrated transatlantic marketplace."[164] They would probably spend considerably less time on multilateral trade issues. This is all the more true if TPP enters into force. TPP parties, including the United States, would also try to build a more integrated trans-pacific marketplace. This would put the European Union under more pressure to conclude free-trade agreements with those TPP parties with whom it does not yet have such agreements, especially Australia and New Zealand, thereby even further distracting the European Union from the multilateral trading system.

To answer the question posed by the title of this article: TTIP is a golden opportunity to build a transatlantic marketplace, but this opportunity comes with a hefty price tag. Only the future will tell whether that price is worth paying.

[163] Note that the European Commission has requested an opinion from the Court of Justice on whether the free-trade agreement with Singapore falls within the exclusive competence of the Union, *see* Press Release, *European Commission to Request a Court of Justice Opinion on the Trade Deal with Singapore* (Mar. 4, 2015), *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1269.

[164] HLWG, *Final Report*, *supra* note 22, at 3.

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DE GRUYTER OPEN

The Trans-Pacific Partnership*

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ABSTRACT

This article provides an overview of the recently concluded Trans-Pacific Partnership Agreement (TPP), a treaty the parties have described as comprehensive and ambitious, yet also representing a balance of competing interests. The article focuses on the TPP's chapters relating to investment, services, intellectual property and regulatory coherence, each of which provides insight into the motivations that drove the conclusion of the TPP and the negotiating dynamics that determined its final content. In areas such as investment, the TPP takes a more balanced approach than many earlier agreements, providing greater safeguards for the regulatory autonomy of states while still embodying core protections for foreign investors. In relation to intellectual property and services, the TPP goes beyond earlier agreements in several key respects, such as preventing the imposition of local presence requirements for service providers or requiring longer copyright terms than those demanded by other international treaties. The TPP chapter on regulatory coherence is one of the most novel features of the treaty, as regulatory coherence is not frequently included in earlier trade agreements, demonstrating the increased focus of states on addressing regulatory barriers to trade and investment. While all of these elements of the TPP are interesting in their own right, given the number and size of the parties involved in the agreement, they also provide valuable guidance about the direction of other ongoing and future preferential trade agreement negotiations, such as the proposed Transatlantic Trade and Investment Partnership (TTIP) and Trade in Services Agreement (TiSA).

CONTENTS

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I. INTRODUCTION

The Trans-Pacific Partnership (TPP) is touted as the "biggest global trade deal in twenty years",[1] following on from the creation of the World Trade Organization (WTO) in 1995. Its 12 Pacific Rim countries are unusually diverse as regards geographic location, culture, interests, and level of development: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States (U.S.) and Vietnam. Together, they represent approximately 50% of global gross domestic product and 37% of global trade.[2] However, the number of and variation among TPP countries are not the only unusual aspects of this "new generation"[3] of trade and investment agreement. The agreement is also potentially revolutionary in the depth and breadth of its provisions. TPP countries have proclaimed its significant impact in eliminating "more than 98 per cent of tariffs in the TPP region."[4] But the TPP also focuses on a wide range of governance issues including domestic regulation. Novel aspects of the agreement include innovative disciplines relating to environmental protection and fisheries management, extensive disciplines on state-owned enterprises, and a separate chapter on transparency and anti-corruption.

The size (approximately 6,000 pages),[5] depth and breadth of the agreement, as well as its more intrusive "behind the border" aspects, have led to widespread controversy and concern among the TPP citizenry. This concern has been exacerbated by both the secrecy of TPP negotiations,[6] since their commencement in March 2010,[7] and the occasional leaking of texts during the negotiating process. In the United States, a system of "cleared trade advisors" operating in "trade advisory committees" allowed some individuals (including "representatives from industry, agriculture, services, labor, state and local governments, and public interest groups")[8] access to draft texts and the ability to provide

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1 Andrew Robb, Minister for Trade and Invt., Austl., *Trans-Pacific Partnership (TPP) Pact to Drive Jobs, Growth and Innovation for Australia*, Media Release (Oct. 6, 2015).

2 World Bank Group, GLOBAL ECONOMIC PROSPECTS: SPILLOVERS AMID WEAK GROWTH 221 (Jan. 2016).

3 *See e.g.*, Edward Alden, *The TPP Agreement: Big Things Are Still Possible*, Council on Foreign Relations Blog (Oct. 5, 2015), *available at* http://blogs.cfr.org/renewing-america/2015/10/05/the-tpp-agreement-big-things-are-still-possible.

4 Austl. Gov't., Dep't Foreign Affairs & Trade, *Trans-Pacific Partnership Agreement: Outcomes at a Glance,* 1 (last updated Oct. 6, 2015). *See also* U.S. Trade Representative, *The Trans-Pacific Partnership: Overall US Benefits Fact Sheet*: *TPP eliminates over 18,000 taxes that various countries impose on Made-in-America exports* (last updated Oct. 6, 2015).

5 *See e.g.*, *Free exchange: A Serviceable Deal*, THE ECONOMIST (Nov. 14, 2015), *available at* http://www.economist.com/news/finance-and-economics/21678253-tpp-intended-spark-boom-trade-services-it-will-be-decades.

6 *See* Austl. Gov 't., Dep't. Foreign Affairs & Trade, *Release of Confidentiality Letter* (Feb. 25, 2014).

7 Austl. Gov 't., Dep't Foreign Affairs & Trade, *Update on the first round of Trans-Pacific Partnership (TPP) Negotiations - A Strong Start* (Oct. 19, 2014).

8 USTR, *FACT SHEET: Transparency and the Trans-Pacific Partnership* (June 2012).

feedback.[9] Also, according to the Office of the United States Trade Representative (USTR), "[a]s a matter of longstanding policy and practice, USTR has provided any Member of Congress access to classified negotiating documents and texts on request."[10] In contrast, in Australia, parliamentarians received access to the draft text but only at a very late stage in the negotiations[11] and only on an ad hoc basis rather than pursuant to any consistent policy established systematically for treaty-making.[12] (The treaty was not tabled in the Australian Parliament until 9 February 2016:[13] four months after negotiations concluded in early October 2015).[14] These kinds of mechanisms, along with regular stakeholder meetings,[15] were intended to enhance transparency and participation, but their limited nature highlights the difficulties of balancing the principles of tough, frank negotiation with the need for community input.

The official release of the agreed treaty text on 6 November 2015 (before the "legal scrub" and before the signing of the treaty on 4 February 2016) has not alleviated concerns about the agreement. Instead, debate has continued on matters including the economic impact of the agreement, assuming it is ratified and enters into force for the 12 parties. The World Bank has concluded that, by 2030, the TPP "could … lift member countries' trade by 11 percent" and "will raise member country GDP by 0.4-10 percent", with the "largest gains in GDP … expected in smaller, open member economies, such as Vietnam and Malaysia (10 percent and 8 percent, respectively)."[16] The Peterson Institute has suggested that "the United States will be the largest beneficiary of the TPP in absolute terms",[17] whereas another study has found "negative effects on growth in the United States and in Japan", as well as "the loss of 770,000 jobs, with the largest losses occurring in the United States."[18] While Australia's then Trade Minister Andrew Robb rejected the

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9 *Id*.

10 *Id*.

11 Lenore Taylor, *Australian MPs Allowed to See Top-Secret Trade Deal Text but Can't Reveal Contents for Four Years,* The Guardian (June 2, 2015), *available at* http://www.theguardian.com/business/2015/jun/02/australian-mps-allowed-to-see-top-secret-trade-deal-text-on-condition-of-confidentiality. *See* Acknowledgement of Confidentiality Requirements to Facilitate Viewing of the Draft TPP Negotiating Text by Members of the Australian Parliament (2015), *available at* http://static.guim.co.uk/ni/1433217576506/Trans-Pacific-Partnership-a.pdf (as *noted in* Taylor, *supra* note 11).

12 *See* Hansard, Foreign Affairs, Defence and Trade References Committee, *Government Response to Report "Blind Agreement: Reforming Australia's Treaty-Making process"* (Feb. 2, 2016) 67.

13 Andrew Robb, Minister for Trade and Investment, *Trans Pacific Partnership Agreement Tabling*, Ministerial Statement (Feb. 9, 2016).

14 John Kerry, Secretary of State, *Successful Conclusion of Trans-Pacific Partnership (TPP) Negotiations*, Press Statement (Oct. 5, 2015).

15 *See e.g.*, USTR, *Direct Stakeholder Engagement* (Mar. 6, 2013).

16 World Bank, *supra* note 2 at 226, 227, 229.

17 Peter Petri & Michael Plummer, *The Economic Effects of the Trans-Pacific Partnership: New Estimates* 2 (Peterson Institute for International Economics, Working Paper Series WP16-2, Jan. 2016).

18 Jeronim Capaldo & Alex Izurieta with Jomo Kwame Sundaram, *Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement* 1 (Global Development and Environment Institute, Tufts University, Working Paper No. 16-01, Jan. 2016).

"modest benefits" suggested by the World Bank study,[19] Australia's Department of Foreign Affairs and Trade apparently refrained from conducting any modeling of its own of the impact of the TPP, relying instead on the studies by the World Bank and the Peterson Institute.[20] New Zealand conducted its own modelling to determine that "entering TPP would be in New Zealand's national interest"[21] on the basis that its total benefits after three years would be "ten times larger than costs" and it would increase New Zealand's GDP by 1% by 2030.[22]

Given word constraints, it is not possible to cover in a comprehensive manner the many details of the TPP, particularly in view of the many side letters and annexes that make up the agreement as a whole. Documents associated with the TPP also include, for example, a separate declaration by the TPP countries regarding currency manipulation, including a commitment to "avoid manipulating exchange rates … to gain an unfair competitive advantage" and "refrain from competitive devaluation."[23] In this article, instead, we provide an overview of four key areas of the TPP - investment, services, intellectual property, and regulatory coherence - based on the agreed text released following the legal scrub on 26 January 2016.[24] These areas are selected given their importance to TPP countries and their potential to set a precedent for new approaches in international economic law. In examining each area we take note of the difficulties involved in reaching an agreement of this size among so many parties, while also reflecting on the implications of the TPP for other existing agreements and ongoing negotiations. Throughout all of these provisions the TPP parties attempt to strike a balance between competing interests, driven by the desire to reach an ambitious and innovative agreement, but also constrained by the range of parties involved and public concern regarding the extent of obligations in areas such as investment and intellectual property.

II. Investment

As one leading commentator has noted, the TPP's investment chapter is "relatively balanced", with respect to "the needs of capital exporters desiring to protect the rights of their investors abroad" and "the needs of capital importers which, as

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19 Greg Earl, *Andrew Robb Rejects World Bank Study on TPP Benefits* Australian Financial Rev. (Feb. 3, 2016), *available at* http://www.afr.com/news/economy/trade/andrew-robb-rejects-world-bank-study-on-tpp-benefits-20160202-gmjitb.

20 Office of Trade Negotiations, Dep't Foreign Affairs & Trade, *Trans-Pacific Partnership Agreement: National Interest Analysis [2016] ATNIA 4*, par.10.

21 Min. Foreign Affairs & Trade, N.Z., *Trans-Pacific Partnership: National Interest Analysis* 27 (Jan. 25, 2016). *See also* Murray Griffin, New Zealand Analysis Shows More Limited TPP Benefits, Int'l Trade Daily, (Jan. 28, 2016).

22 Min. Foreign Affairs & Trade, *supra* note 21, at 21-22.

23 *Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries* (released Nov. 6, 2015).

24 Trans-Pacific Partnership text released Jan. 26, 2016 following legal scrub, *available at* https://tpp.mfat.govt.nz/text (last visited 20 July 2016).

host states, still need to be able to regulate to protect the public interest."[25] Thus, the chapter contains the core protections for foreign investors typically found in international investment agreements (IIAs), as well as several clarifications and exceptions appearing more regularly in modern IIAs to ensure sufficient policy space for governments. Similarly, the chapter includes a traditional mechanism for investor-state dispute settlement (ISDS), which is inherently designed to protect foreign investors, while containing some procedural and substantive reforms to address some of the legitimacy problems arising from this form of dispute settlement. For some, these clarifications, exceptions and reforms do not go far enough in protecting sovereign regulatory autonomy of host states.[26] For others, the more novel aspects go too far in carving out particular areas of regulation.[27]

A. Definition of Investment

As is usual in IIAs, the definition of investment in the TPP is broad, encompassing assets taking forms such as enterprises, shares and intellectual property.[28] However, the definition is limited to those assets that have "the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[29] These named characteristics bring within the treaty text two of the elements of an investment identified by the investment treaty tribunal in *Salini v. Morocco*, referring to the meaning of investment in the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention):[30] "contributions … and a participation in the risks of the transaction."[31] The tribunal also included two other criteria, which do not appear in the TPP definition: "a certain duration of performance of the contract" and (more controversially) a "contribution to the economic development of the host State."[32] As an example of the potential significance of this fourth criterion, in recent years Uruguay unsuccessfully argued that the tobacco company Philip Morris had not made an investment in Uruguay because its activities impose "huge costs" on Uruguay.[33]

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25 José Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?* 1, 32 (Inst. Int'l. L. & Justice, N.Y. U. L. Sch., Working Paper 2016/3 (*MegaReg Series*), Mar. 27, 2016).

26 *See e.g.*, Lise Johnson & Lisa Sachs, *The TPP's Investment Chapter: Entrenching, Rather Than Reforming, a Flawed System* (Colum. Center on Sustainable Inv., Policy Paper, Nov. 2015); Lise Johnson, Lisa Sachs & Jeffrey Sachs, *The Real Danger in TPP*, CNN.com (Feb. 19, 2016), *available at* http://edition.cnn.com/2016/02/19/opinions/tpp-threatens-sustainable-development-sachs.

27 *See e.g.*, *TPP Deal Includes Tobacco Carveout, Teeing up Fight with Congress*, Inside US Trade (Oct. 9, 2015), *available at* https://insidetrade.com.

28 TPP, *supra* note 24, art. 9.1(a), (b), (f) (definition of investment).

29 *Id.* art. 9.1.

30 Conv. on the Settlement of Investment Disputes between States and Nationals of other States, concluded Mar. 18, 1965, entered into force Oct. 14, 1966, 575 U.N.T.S. 159.

31 Salini Costruttori SPA & Italstrade SPA v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001).

32 *Id*.

33 Philip Morris Brands Sàrl, Philip Morris Products SA & Abal Hermanos SA v. Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction, paras. 177, 209 (July 2, 2013).

B. CORE OBLIGATIONS AND EXCEPTIONS

In addition to the country-specific exceptions and inclusions contained in side letters and annexes,[34] the investment chapter contains many general clarifications and exceptions to its core obligations, in order to enhance policy space. For example, the non-discrimination obligations of national treatment and most-favored-nation (MFN) treatment are subject to footnote 14, which specifies that whether treatment is accorded in "like circumstances" for the purpose of those provisions "depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." A "Drafters' Note" adds that these provisions "seek to ensure that foreign investors or their investments are not treated less favorably on the basis of their nationality" and "do not prohibit all measures that result in differential treatment."[35] The MFN provision is also explicitly restricted to prevent a state or investor from using it to invoke more favorable dispute settlement provisions from other treaties, such as more favorable ISDS provisions.[36] Specific provisions prevent a successful claim of unlawful expropriation[37] or breach of fair and equitable treatment[38] on the sole basis of a host state's decision to modify or reduce a subsidy or grant.

Nevertheless, some of these provisions designed to preserve TPP countries' policy space have only limited impact. For example, the clarifications applicable to the key obligations concerning fair and equitable treatment (FET) and expropriation, while welcome, do not provide as much protection as some other recent treaties. Significantly, under the TPP a FET breach does not arise merely from a breach of another TPP provision, a breach of another international agreement, or a failure to fulfil an investor's expectations.[39] In addition, the FET standard is restricted to the "customary international law minimum standard of treatment."[40] However, this restriction still allows arbitrators to interpret the customary standard as having evolved to preclude, for example, violations of due process or of domestic law, rather than only egregious or outrageous conduct.[41] In contrast, the Comprehensive Economic and Trade Agreement between Canada and the European Union (CETA)[42] specifies that a breach of domestic law does not establish a breach of the FET standard.[43] CETA also contains an apparently *exhaustive* list of the kinds of conduct

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34 *See e.g.*, TPP, art. 9.12 (non-conforming measures).

35 *Drafters' Note on Interpretation of "In Like Circumstances" Under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment)* (Jan. 26, 2016) [2].

36 TPP, *supra* note 24, art. 9.5.3.

37 *Id*. art. 9.8.6.

38 *Id*. art. 9.6.5.

39 *Id*. arts. 9.6.3, 9.6.4.

40 *Id.* art. 9.6.2. *See also* annex 9-A.

41 *See e.g.*, Clayton & Bilcon of Delaware, Inc. v. Canada, Award on Jurisdiction and Liability, ¶¶ 438-44 (Perm. Ct. Arb. Case No. 2009-04, Mar. 17, 2015). *Cf*. Clayton & Bilcon of Delaware, Inc. v. Canada, (dissenting opinion of Professor Donald McRae) (Perm. Ct. Arb. Case No. 2009-04, Mar. 10, 2015).

42 Consolidated Comprehensive Economic and Trade Agreement between Canada and the European Union Text (released Feb. 2016, not yet signed or entered into force), *available at* http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

43 Comprehensive Economic and Trade Agreement between Canada and the European Union, art. 8.10.7.

that will breach the FET standard (e.g. denial of justice, targeted discrimination, or abusive treatment),[44] whereas the TPP contains an *inclusive* list of such conduct,[45] leaving more scope for other conduct to amount to a breach as well.

The narrowing of the expropriation obligation in the TPP is also significant but limited. The issuance of a compulsory license pursuant to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) and consistent with the intellectual property chapter of the TPP does not constitute expropriation.[46] An action "cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment."[47] In addition:

> Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.[48]

Yet, again, the words "except in rare circumstances" detract from the force of this provision, leaving scope for argument that a particular non-discriminatory regulatory action to promote legitimate public welfare objectives *does* constitute expropriation.

Similarly, Article 9.16 provides:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.[49]

Article 9.16 may be important in interpreting other provisions in the investment chapter, on the basis that it reflects the object and purpose of the treaty or at least the context for interpreting treaty terms, within the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties. However, the words "otherwise consistent with this Chapter" in Article 9.16 mean that this provision cannot operate as a fully-fledged "exception" to the obligations in the investment chapter. Moreover, while limited exceptions to the prohibition on performance requirements in Article 9.10 include references to measures "necessary to protect human, animal or plant life or health" and measures "related to the conservation of living or non-living exhaustible natural resources",[50] no general set of exceptions analogous to that in Article XX of the WTO's General Agreement on Tariffs and Trade (GATT) 1994[51] applies to the TPP investment chapter as a whole.

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44 *Id.* art. 8.10.2.
45 TPP, *supra* note 24, art. 9.6.2(a).
46 *Id.* art. 9.8.5.
47 *Id*. annex 9-B, [1].
48 *Id*. annex 9-B, [3(b)] (footnote omitted).
49 Emphasis added.
50 TPP, *supra* note 24, art. 9.10.3(d)(ii), (iii).
51 GATT, Doc LT/UR/A-1/A/1/GATT/2, signed Oct. 30, 1947, as incorporated in the Marrakesh Agreement Establishing the World Trade Organization, annex 1A, opened for signature Apr. 15, 1994, entered into force Jan. 1, 1995, 1867 U.N.T.S, 3.

These provisions in the TPP investment chapter appear to reflect an attempt by the drafters to clarify and narrow the scope of investment obligations, in view of the incursion on policy space witnessed in some investment treaty awards.[52] The limits to these clarifications may reflect difficulties in agreeing on the requisite language, both among a relatively large number of negotiating parties, and within each country given the varied interests of industry, inward and outward investors, and other stakeholders. Although the results may be seen as an advancement in comparison to the older-style bilateral investment treaties, which tend to lack nuance and have no explicit exceptions, they also leave much to the discretion of arbitrators, which is itself a cause for some concern. That fact lends greater significance to the inclusion of ISDS in the TPP.

C. INVESTOR-STATE DISPUTE SETTLEMENT

ISDS in the TPP was of central concern to many community groups in different TPP countries. For Australia, in particular, a government policy of April 2011 moved away from pursuing ISDS where such a mechanism would provide greater protections to foreign than domestic investors.[53] A footnote in a leaked version of the TPP investment chapter in June 2012 confirmed (in square brackets) that the ISDS mechanism would not apply to Australia or Australian investors.[54] A subsequent leak in 2015 added to that footnote: "*deletion of footnote is subject to certain conditions*."[55] The textual change in those years corresponds with the change of Australian government, leading to a return to an ad hoc approach to ISDS since 2013.[56] Reflecting that case by case approach, in 2014-2015, ISDS was included in Australia's preferential trade agreements (PTAs) with Korea[57] and China[58] but not Japan.[59] The ISDS mechanism in the final TPP text applies to all TPP countries,[60] although Australia and New Zealand have excluded ISDS as

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52 *See e.g.*, *supra* note 41.

53 AUSTL. GOV'T., DEP'T FOREIGN AFFAIRS & TRADE, GILLARD GOVERNMENT TRADE POLICY STATEMENT: TRADING OUR WAY TO MORE JOBS AND PROSPERITY, 14 (Apr. 2011).

54 Investment, § B (Investor-State Dispute Settlement), n. 20, *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf (last visited Apr. 20, 2016) as noted in Citizens Trade Campaign, *Newly Leaked TPP Investment Chapter Contains Special Rights for Corporations* (June 13, 2012).

55 WikiLeaks, *Trans-Pacific Partnership Treaty: Advanced Investment Chapter Working Document for All 12 nations (Jan. 20, 2015 draft)*, Investment (Jan. 20, 2015), § B (Investor-State Dispute Settlement), n. 29 (emphasis in original) (Mar. 25, 2015).

56 *See e.g.*, Julie Bishop, *Free Trade Focus*, ON LINE OPINION (Mar. 28, 2013); *Australia May be More Open to ISDS in TPP with Government Change*, 31 INSIDE US TRADE (Mar. 15, 2013), *available at* https://insidetrade.com (last visited Apr. 20, 2016).

57 Korea-Australia Free Trade Agreement, signed Apr. 8, 2014, entered into force Dec. 12, 2014.

58 Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China, ch. 9, § B, signed June 17, 2015, entered into force Dec. 20, 2015.

59 Agreement between Australia and Japan for an Economic Partnership, signed July 8, 2014, entered into force Jan. 15, 2015.

60 TPP, *supra* note 24, ch. 9, § B.

between themselves pursuant to a side letter.[61] That exclusion is consistent with the approach of the two countries under the investment protocol to their PTA with each other,[62] their PTA with the Association of Southeast Asian Nations in 2009,[63] and their treaty recognizing each other's court proceedings.[64] However, in contrast, ISDS applies between all other TPP countries, including between Australia and the United States, despite the exclusion of ISDS from the PTA between those two countries.[65]

A number of procedural reforms apply to the ISDS mechanism in the TPP. For example, a specific provision provides for the acceptance of submissions from *amicus curiae* (friends of the court),[66] and hearings are to be open to the public, with non-confidential documentation also to be made public.[67] These provisions are relatively unusual in IIAs and should help enhance the transparency and thus legitimacy of the ISDS process under the TPP.

More unusually, the TPP also includes a tobacco-specific "carve-out", allowing TPP countries to elect to deny the benefits of the ISDS mechanism in respect of claims against tobacco control measures.[68] Australia and New Zealand have already indicated their intention to make such an election on an across the board basis.[69] The provision is written in such a way that a TPP country could also elect to deny the benefits of ISDS in respect of a specific claim, even after the proceedings have commenced. In the United States, the carve-out has raised concerns for TPP ratification, for example among members of Congress "from tobacco-producing states."[70] In contrast, the carve-out has also been heralded as an important public health precedent for other treaties.[71] Other commentators have made the point that

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61 Exchange of letters between Andrew Robb, Minister for Trade and Investment, Australia, and Todd McClay, Minister of Trade, N.Z. (Feb. 4, 2016).

62 Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement, signed Feb. 16, 2011, entered into force Mar. 1, 2013 (no ISDS mechanism).

63 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ch. 11, § B, signed Feb. 27, 2009, entered into force Jan. 1, 2010, [2010] ATS 1; letter from Tim Groser, Minister of Trade, New Zealand, to Simon Crean, Minister for Trade, New Zealand (Feb. 27, 2009).

64 Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, signed July 24, 2008, entered into force Nov. 10, 2013, [2013] ATS 32.

65 Australia-United States Free Trade Agreement, signed May 18, 2004, entered into force Jan. 1, 2005, [2005] ATS 1.

66 TPP, *supra* note 24, art. 9.23.3.

67 *Id*. art. 9.24.

68 *Id.* art. 29.5.

69 *Notification by Australia Pursuant to Article 29.5 of the Trans-Pacific Partnership Agreement (15 Feb.2016); National Interest Analysis (Australia) [2016] ATNIA 4*, ¶ 5 (Feb. 4, 2016); Trans-Pacific Partnership National Interest Analysis (New Zealand) 252 (Jan. 25, 2016); *Australia, NZ Intend to Deny Tobacco ISDS Challenges under TPP*, 34.8 Inside US Trade (Feb. 26, 2016), *available at* https://insidetrade.com.

70 *Business, Ag Groups Press TPP Countries to Oppose Tobacco Carveout*, 33 Inside US Trade (Oct. 2, 2015), *available at* https://insidetrade.com.

71 *See e.g.*, Campaign for Tobacco-Free Kids, *In Historic Step for Public Health, Trans-Pacific Partnership Protects Health Measures from Tobacco Industry Attack*, Press Release (Oct. 5, 2015).

the carve-out may help tobacco control but that reforms to ISDS are needed beyond tobacco control.[72]

This brings us to the limits of ISDS reform in the TPP. Beyond the procedural reforms and the tobacco carve-out, the TPP could have included more fundamental reforms to the ISDS system. For example, the European Commission has proposed a new international investment court, including an appellate court, in connection with its negotiation of the Transatlantic Trade and Investment Partnership (TTIP) with the United States.[73] The Commission is also pushing this kind of approach in its agreements with other countries such as Vietnam and Canada.[74] The TPP merely acknowledges that an appellate court might arise in future and should then be considered by TPP parties.[75] The Commission's proposal may not be accepted by the United States, and might not in any case ultimately develop into the multilateral system that the Commission envisages. However, this kind of ambitious reform proposal may be needed to address the underlying legitimacy problems with ISDS,[76] such as conflicts of interest with arbitrators acting as counsel, unpredictability, and excessive awards.

III. SERVICES

A. SCOPE, CORE OBLIGATIONS AND EXCEPTIONS

The TPP contains important disciplines on services, which account for an increasing portion of global GDP (13.2 percent in 2014).[77] As with the WTO's General Agreement on Trade in Services (GATS),[78] the TPP chapter on Cross-Border Trade in Services (Chapter 10) applies to services supplied in GATS terms via modes 1 (cross-border supply), 2 (consumption abroad), or 4 (presence of natural persons):[79]

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72 *See e.g.*, Simon Lester, *The TPP Tobacco Carveout: A Triumph of Politics Over Good Policy*, HUFFINGTON POST (Dec. 1, 2015), *available at* http://www.huffingtonpost.com/simon-lester/the-tpp-tobacco-carveout_b_8683498.html; James Surowiecki, *The Corporate-Friendly World of the TPP*, THE NEW YORKER (Oct. 6, 2015), *available at* http://www.newyorker.com/news/daily-comment/the-corporate-friendly-world-of-the-t-p-p.

73 European Union, *Proposal for Investment Protection and Resolution of Investment Disputes* (Nov. 12, 2015), art. 12.

74 Michael Scaturro, *EU-Canada Investment Court Plan Close to TTIP Version* INT'L TRADE DAILY (Feb. 29, 2016), *available at* http://www.bna.com/international-trade-daily-p6099; *see e.g.* Comprehensive Economic and Trade Agreement between Canada and the European Union, art. 8.29.

75 TPP, art. 9.23.11.

76 *See also e.g.,* UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (2015).

77 World Bank, *Data: Trade in Services (% of GDP)*, *available at* http://data.worldbank.org/indicator/BG.GSR.NFSV.GD.ZS/countries/AU-US?display=graph (last visited Apr. 4, 2016).

78 Marrakesh Agreement Establishing the World Trade Organization, annex 1B , opened for signature Apr. 15, 1994, entered into force Jan. 1, 1995, 1867 U.N.T.S. 3.

79 GATS, art. I:2(a), (b), (d).

> (a) from the territory of a Party into the territory of another Party;
> (b) in the territory of a Party to a person of another Party; or
> (c) by a national of a Party in the territory of another Party …[80]

However, TPP Chapter 10 does not cover GATS mode 3 (commercial presence), because "the supply of a service in the territory of a Party by a covered investment"[81] is instead covered primarily[82] by Chapter 9 (Investment). Chapter 10 is not subject to the ISDS mechanism in Chapter 9.[83]

Like the GATS, Chapter 10 does not apply to "government procurement"[84] or "services supplied in the exercise of governmental authority."[85] Chapter 10 also explicitly excludes "subsidies or grants provided by a Party, including government-supported loans, guarantees and insurance"[86] and (largely) financial services,[87] which are covered by a separate chapter (Chapter 11).

The U.S. Trade Representative explains that Chapter 10 "includes four core obligations … subject to country-specific exceptions that must be negotiated and agreed."[88] Three of these core obligations are familiar from the GATS: market access (precluding restrictions such as numerical limits on the number of service suppliers)[89] and the twin non-discrimination obligations of national treatment[90] and MFN treatment[91] (both subject to a clarification regarding the meaning of "like circumstances" similar to that in footnote 14 of the investment chapter).[92] (Another important obligation common to GATS and Chapter 10 of the TPP relates to domestic regulation: "Each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.")[93] The TPP services chapter is also subject to general exceptions contained in Article XIV(a)-(c) of GATS.[94]

The fourth core obligation is of perhaps greater significance, prohibiting requirements of "local presence" in the following terms (not found in GATS):

> No Party shall require a service supplier of another Party to establish or maintain a representative office or any form of enterprise, or to be resident, in its territory as a condition for the cross-border supply of a service.[95]

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80 TPP, *supra* note 24, art. 10.1 (definition of cross-border trade in services or cross-border supply of services).
81 *Id*.
82 *But see* TPP, *supra* note 24, arts. 10.2.2, 10.2.3(a).
83 *Id.* ch. 10, n. 1.
84 *Id*. art. 10.2.3(b); *cf*. GATS, art. XIII.
85 TPP, *supra* note 24, art. 10.2.3(c); GATS, art. I:3(b).
86 TPP, *supra* note 24, art. 10.2.3(d); *cf*. GATS, art. XV.
87 TPP, *supra* note 24, art. 10.2.3(a).
88 USTR, *TPP Chapter Summary: Cross Border Trade in Services* 2 (Oct. 6, 2015).
89 TPP, *supra* note 24, art. 10.5; GATS, art. XVI.
90 TPP, *supra* note 24, art. 10.3; GATS, art. XVII.
91 TPP, *supra* note 24, art. 10.4; GATS, art. II.
92 TPP, *supra* note 24, ch. 10, n. 2.
93 *Id*. art. 10.8.1; *cf*. GATS, art. VI:1.
94 TPP, *supra* note 24, art. 29.1.3.
95 *Id*. art. 10.6.

The TPP services chapter has the potential for significant liberalization of trade in services because of its overarching framework. Specifically, the TPP follows a "negative list" approach, whereby different service sectors are subject to the core obligations except to the extent that a TPP country has negotiated for the exclusion of a particular sector or measure. In contrast, the GATS follows a largely "positive list" approach, whereby market access and national treatment commitments apply only to sectors that a WTO member has inscribed in its services schedule. Although, in principle, either approach could lead to the same result, in practice, a negative list approach may have a liberalizing effect and may also enhance transparency and the ability for future negotiations to be successfully directed at remaining barriers.[96] These kinds of benefits are enhanced by the inclusion in the services chapter of a "ratchet" mechanism, whereby amendments to non-conforming measures listed in that country's schedule to Annex I cannot "decrease the conformity of the measure."[97] Nevertheless, each TPP country maintains more or less extensive lists of non-conforming measures in relation to services (as with investment).[98]

In the following sections we examine as examples three areas governed by the TPP services chapter: professional services, telecommunications and electronic commerce.

B. Professional Services

A dedicated annex to Chapter 10 (Annex 10-A) covers "Professional Services." The annex includes general provisions regarding recognition of professional qualifications,[99] licensing or registration, as well as specific provisions on (i) engineering and architectural services,[100] (ii) temporary licensing or registration of engineers,[101] and (iii) legal services.[102] The annex also establishes a Professional Services Working Group[103] "to support the Parties"[104] relevant professional and regulatory bodies" in relation to professional recognition activities. The annex recognizes external developments such as the Asia-Pacific Economic Cooperation (APEC) Engineer and APEC Architect frameworks.[105] The provisions on legal services are relatively limited, while "recogniz[ing] that transnational legal services that cover the laws of multiple jurisdictions play an essential role in facilitating trade and investment and in promoting economic growth and business confidence."[106] If regulating foreign lawyers and transnational legal practice, each TPP country

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96 *See* Tomer Broude & Shai Moses, *The Behavioral Dynamics of Positive and Negative Listing in Services Trade Liberalization: A Look at the Trade in Services Agreement (TiSA) Negotiations*, (International Law Forum, Faculty of Law, Hebrew U. of Jerusalem, Research Paper No. 01-15, Apr. 2015) (draft chapter for RESEARCH HANDBOOK ON TRADE IN SERVICES (Martin Roy & Pierre Sauvé eds., Edward Elgar, forthcoming 2016).

97 TPP, *supra* note 24, art. 10.7.1(c).

98 *Id*. art. 10.7; on services *see supra* note 34 and corresponding text.

99 TPP, *supra* note 24, annex 10-A [1]-[4].

100 *Id*. annex 10-A [5]-[7].

101 *Id*. annex 10-A [8].

102 *Id*. annex 10-A [9]-[10].

103 *Id*. annex 10-A [11].

104 *Id*. annex 10-A [12].

105 *Id*. annex 10-A [5]-[7].

106 *Id*. annex 10-A [9].

is merely to "*encourage its relevant bodies to consider*, subject to its laws and regulations," a number of matters such as "whether or in what manner: (a) foreign lawyers may practice foreign law on the basis of their right to practice that law in their home jurisdiction"; and (e) different modes of providing transnational legal services are accommodated, such as "on a temporary fly-in, fly-out basis" and "through the use of web-based or telecommunications technology."[107]

Against these rather limited provisions applicable to all TPP countries, the specific commitments of each country must be examined. In the case of legal services, for example, the commitments made and restrictions maintained do not appear to depart significantly from the degree of liberalization under GATS and existing PTAs.[108] Singapore, for instance, in Annex II (not subject to the ratchet mechanism) "reserves the right to maintain or adopt any measure affecting the supply of legal services in the practice of Singapore law."[109] Malaysia - also in Annex II - "reserves the right to adopt or maintain any measures relating to mediation and Shari'a law",[110] and - under Annex I (subject to the ratchet mechanism) - specifies that foreign law firms and foreign lawyers may practice Malaysian law only to the extent provided under existing Malaysian laws and regulations.[111] Similarly, under the GATS, Malaysia makes market access and national treatment commitments regarding legal services "relating only to home country laws, international law and offshore corporation laws of Malaysia."[112] In other words, Malaysia does not commit to allow foreign lawyers to practice general local law in Malaysia.

A separate TPP chapter also applies to "Temporary entry for business persons", highlighting the importance placed by TPP parties on the ability of suppliers to provide services on a "fly-in, fly-out" basis. That short chapter (Chapter 12) also applies to business people engaged in trade in goods or the conduct of investment activities.[113] Like the GATS, TPP Chapter 12 does not "apply to measures regarding citizenship, nationality, residence or employment on a permanent basis."[114] Chapter 12 contains provisions regarding the procedures for application for a visa[115] and transparency[116] and establishes a Committee on Temporary Entry for Business Persons.[117] The chapter also requires TPP countries to set out in Annex 12-A (on a positive list basis) the commitments made with respect to temporary entry of business persons.[118] A refusal to grant temporary entry can provide the basis for state-state dispute settlement under the TPP in particular circumstances.[119]

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107 *Id*. annex 10-A [10] (emphasis added).

108 Andrew Godwin, *Legal Services and the TPP*, 90 L. Inst. J. (Mar. 2016) at 30 (focusing on Australia and Asia).

109 TPP, *supra* note 24, annex II: Singapore's Reservations to ch. 9 (Investment) & ch. 10 (Cross-Border Trade in Services), II-SG-14 (released Nov. 5, 2015).

110 *Id*. annex II: Schedule of Malaysia 15 (released Nov. 5, 2015).

111 *Id*. annex I: Schedule of Malaysia 8 (released Nov. 5, 2015).

112 World Trade Organization, Malaysia: Schedule of Specific Commitments, 5, WTO Doc GATS/SC/52 (Apr. 15, 1994).

113 TPP, *supra* note 24, art. 12.1 (definition of business person).

114 *Id.* art. 12.2.2 *(see also* arts. 12.2.3, 12.2.4); *cf.* GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement, para. 2.

115 TPP, *supra* note 24, art. 12.3.

116 *Id.* art. 12.6.

117 *Id.* art. 12.7.

118 *Id.* art. 12.4.1.

119 *Id.* art. 12.10.

C. TELECOMMUNICATIONS AND ELECTRONIC COMMERCE

Dedicated TPP chapters apply to telecommunications (Chapter 13) and Electronic Commerce (Chapter 14). The telecommunications-specific provisions go beyond the general obligations regarding telecommunications services under GATS[120] and also contain some improvements on the more detailed commitments regarding telecommunications services that some WTO members included in their GATS schedules pursuant to the "Reference Paper."[121] Many of the provisions are familiar from more modern PTAs, but their inclusion will also harmonize and enhance the patchwork obligations applicable under TPP countries' various PTAs. The obligations include, for example: ensuring the availability of interconnection[122] and number portability;[123] maintaining measures to prevent major suppliers from engaging in anti-competitive practices;[124] not prohibiting resale of any public telecommunications service;[125] separating the telecommunications regulatory body from suppliers of public telecommunications services;[126] and not according more favorable treatment to telecommunications suppliers owned by the national government.[127]

The TPP telecommunications chapter also includes some rather unusual provisions reflecting the United States' approach to regulation (or non-regulation) of telecommunications services. Article 13.3 recognizes the "value of competitive markets"[128] and the "role of market forces"[129] in telecommunications, allowing parties to "forbear" from applying particular regulations where not necessary "to prevent unreasonable or discriminatory practices" or "for the protection of consumers" and where "consistent with the public interest."[130] Footnote 2 to the telecommunications chapter is also explicitly directed to the mobile telecommunications market in the United States:

> [T]he United States, based on its evaluation of the state of competition in the U.S. commercial mobile market, has not applied major supplier-related measures … to the commercial mobile market.

Another part of the telecommunications chapter that seems directed specifically at the concerns of particular TPP countries (including Australia and New Zealand,[131] as well as other ASEAN countries such as Malaysia, Singapore and

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120 GATS, Annex on Telecommunications.

121 WTO Negotiating Group on Basic Telecommunications*, Reference Paper* (Apr. 24, 1996).

122 TPP, *supra* note 24, art. 13.5.1.

123 *Id.* art. 13.5.4.

124 *Id.* art. 13.8.1.

125 *Id.* art. 13.9.1.

126 *Id.* art. 13.16.1.

127 *Id.* art. 13.16.3.

128 *Id.* art. 13.3.1.

129 *Id.* art. 13.3.2.

130 *Id.* art. 13.3.3.

131 *See* generally Tania Voon, *Discrimination in International Mobile Roaming Regulation: Implications of WTO Law*, 16 J. INT'L ECON. L. 91 (2013).

Brunei Darussalam)[132] addresses international mobile roaming rates. Proclaimed in Australia in particular as a major success of the negotiations,[133] the TPP contains provisions regarding transparency of such rates[134] and the potential for TPP governments to agree on reciprocal regulation to lower such rates.[135] Reciprocity of this kind could not provide the basis for a claim of MFN violation under the TPP,[136] but the implications of MFN rules under GATS and other PTAs remain uncertain.

As might be expected, TPP countries tend to list significant non-conforming measures in relation to the sensitive sector of telecommunications. In Malaysia, foreign companies are not eligible for individual or class licenses to supply telecommunications services in the absence of ministerial permission.[137] For Vietnam, while no foreign equity limitation or joint venture requirement can be maintained after the TPP has been in force for five years in connection with non-facilities-based telecommunications services (i.e. services supplied without network infrastructure, e.g. on the basis of resale), after that period foreign equity will be permitted for basic facilities-based services only up to 49 percent and through a joint venture or the purchase of shares in a Vietnamese enterprise.[138] For Australia, foreign investments in Australian businesses with assets exceeding AUD252 million in the telecommunications sector will be subject to notification and approval from the Australian government.[139] Australia also reserves the right to adopt or maintain any measure with respect to local content quotas for television and radio broadcasting and preferential co-production arrangements for film and television productions.[140]

The dedicated electronic commerce chapter (Chapter 14) contains important disciplines such as: prohibitions on customs duties on electronic transmissions[141] and on requirements to use or locate computing facilities in the territory as a condition for conducting business[142] or to transfer software source code as a condition for import, distribution or sale of that software in the territory;[143] and obligations of non-discriminatory treatment of digital products[144] and the allowance of cross-

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132 *See* 11th ASEAN Telecommunications and IT Ministers Meeting and its Related Meeting with External Parties, *Joint Media Statement* (Dec. 9, 2011) [9]; 14th ASEAN Telecommunications and Information Technology Ministers Meeting and Related Meetings, *Joint Media Statement* (Jan. 23, 2015) [3]; Infocomm Development Authority of Singapore, *Singapore and Malaysia to Reduce Mobile Roaming Rates*, Media Release (Apr. 20, 2011); Infocomm Development Authority of Singapore and Authority for Info-Communications Technology Industry of Brunei Darussalam, *Brunei Darussalam and Singapore Agree to Reduce Mobile Roaming Rates for Voice Calls, SMS, Video Calls and Data*, Media Release (Sept. 10, 2014).

133 Hansard (Senate), Senator Mitch Fifield, Minister for Communications 29 (Oct. 13, 2015).

134 TPP, *supra* note 24, arts. 13.6.1, 13.6.2, 13.6.6.

135 *Id.* arts. 13.6.3-13.6.4.

136 *Id*. art. 13.6.5.

137 *Id.* annex I: Schedule of Malaysia, 11 (released Nov. 5, 2015).

138 *Id.* annex I: Schedule of Viet Nam, 7-8 (released Nov. 6, 2015).

139 *Id.* annex I: Schedule of Australia, 3 (released Nov. 6, 2015).

140 *Id.* annex II: Schedule of Australia, 8, 10 (released Nov. 6, 2015).

141 *Id.* art. 14.3.

142 *Id.* art. 14.13.2.

143 *Id.* art. 14.17.1.

144 *Id.* art. 14.4.

border transfer of information by electronic means for business purposes.[145] Some exceptions apply to some of these requirements, for example to achieve a legitimate public policy objective.[146] Their interpretation and application, for example in a state-state TPP dispute, may be significant in determining the practical force of some of these provisions.

As with the investment chapter, the services-related chapters of the TPP demonstrate the limited advances that may be made in an agreement of this kind, bringing together like-minded countries in a less expansive setting than the WTO, yet still subject to a whole range of country-specific interests and imperatives that lead inevitably to different non-conforming measures and textual compromises. The outcomes and techniques used in the TPP may have significant implications for a more ambitious ongoing project: the negotiations towards a Trade in Services Agreement (TiSA) among (at the time of writing) 23 WTO members, including the European Union (representing its 28 member states), being jointly led by Australia, the European Union, and the United States.[147] Those negotiations are already demonstrating innovation in the architecture of commitments (with market access commitments subject to a positive list approach as under GATS and national treatment commitments subject to a negative list approach as under the TPP).[148] Making up 71 per cent of world services trade,[149] these parties face a challenge in achieving greater levels of services liberalization than have already been achieved in the WTO, TPP and existing PTAs.

IV. Intellectual Property

One of the most controversial aspects of the TPP is the chapter on intellectual property. During the negotiation of the agreement, the scope and impact of provisions in this chapter were a major source of concern for civil society in many TPP parties.[150] The extent of novel provisions relating to "biologics" - a type of highly complex

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145 *Id.* art. 14.11.

146 *Id.* arts. 14.11.3, 14.13.3.

147 Austl. Gov't., Dep't Foreign Affairs & Trade, *Trade in Services Agreement*, *available at* http://dfat.gov.au/trade/agreements/trade-in-services-agreement/pages/trade-in-services-agreement.aspx (last visited Apr. 4, 2016).

148 Austl. Gov't., Dep't Foreign Affairs & Trade, *TiSA Scheduling Approach: How to Read a Trade in Services Agreement Schedule*, *available at* http://dfat.gov.au/trade/agreements/trade-in-services-agreement/Pages/tisa-scheduling-approach.aspx (last visited Apr. 4, 2016).

149 Austl. Gov't., Dep't Foreign Affairs & Trade, *Trade in Services Agreement*, *available at* http://dfat.gov.au/trade/agreements/trade-in-services-agreement/pages/trade-in-services-agreement.aspx (last visited Apr. 4, 2016).

150 *See e.g.*, Letter from Australian Fair Trade and Investment Network Ltd to the Hon Andrew Robb (Minister for Trade and Investment), May 19, 2014; Electronic Frontier Foundation, *Trans-Pacific Partnership Agreement*, *available at* https://www.eff.org/issues/tpp (last visited Apr. 20, 2016); Public Citizen, *Trans-Pacific Partnership (TPP): More Job Offshoring, Lower Wages, Unsafe Food Imports*, *available at* http://www.citizen.org/TPP (last visited Apr. 20, 2016).

medicine created by biotechnology processes - was one of the last issues to be resolved in the negotiation of the agreement.[151] Even now that the agreement has been signed and countries have begun their domestic ratification processes, debate continues about these provisions.[152] The challenges faced in reaching agreement on intellectual property obligations reflect U.S. ambitions for a high standard of protection, the complexity of negotiating among such a diverse range of actors, and the aspiration for the TPP to become the basis of a future regional trading bloc.

The TPP's intellectual property chapter builds on the obligations contained in the WTO's TRIPS Agreement,[153] as well as other major agreements overseen by the World Intellectual Property Organization (WIPO) and other relevant bodies.[154] But the TPP also goes beyond TRIPS and other intellectual property treaties in several key respects (often referred to as "TRIPS-Plus" provisions), as has become common in PTAs negotiated by the United States or the European Union.[155] For example, the TPP requires a copyright term of life of the author plus seventy years:[156] a twenty year extension over the comparable requirement in TRIPS.[157] In relation to patents, the TPP does not generally require a longer term of protection than that mandated by the TRIPS Agreement (twenty years from the filing date of the patent application).[158] However, the TPP obliges the parties to provide an extension to the term of a patent in circumstances of unreasonable delay in processing the patent application.[159]

Due to the breadth of the obligations in the intellectual property chapter - which cover copyright, trademarks, geographical indications, patents, industrial designs, and trade secrets - a comprehensive review of its content is beyond the scope of this article. Instead, the following sections examine the interests and negotiating positions of different parties to the TPP, beginning with a general overview of how the ambitions of the United States drove the negotiation of the chapter but were tempered by the interests of other parties. We then examine two of the most controversial aspects of the TPP: first, the issue of access to medicines and protection for biologics; and, second, provisions relating to the enforcement of intellectual property rights, particularly in the context of copyright and digital media.

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151 John Garnaut, *The Arm Wrestle Over Drugs: Inside the TPP Deal*, Sydney Morning Herald (Oct. 7, 2015), *available at* http://www.smh.com.au/national/the-arm-wrestle-over-drugs-inside-the-tpp-deal-20151006-gk2dnt.html; Ruth Lopert, *Why Biologics Were Such a Big Deal in the Trans-Pacific Partnership*, The Conversation (Oct. 6, 2015), *available at* https://theconversation.com/why-biologics-were-such-a-big-deal-in-the-trans-pacific-partnership-48595.

152 *See* Len Bracken, *Australia May Deal on TPP Drug Concern, Hatch Says,* Int'l Trade Daily (Feb. 24, 2016), *available at* http://www.bna.com/international-trade-daily-p6099.

153 *See e.g.*, TPP, *supra* note 24, arts. 18.41, 18.64, 18.72.

154 *See e.g.*, TPP, *supra* note 24, art. 18.7.2 (referring, *inter alia*, to the WIPO Performances and Phonograms Treaty, the WIPO Copyright Treaty, and the International Convention for the Protection of New Varieties of Plants).

155 For a general overview *see* Michael Handler & Bryan Mercurio, *Intellectual Property*, *in* Bilateral and Regional Trade Agreements: Commentary and Analysis 324 (Simon Lester, Bryan Mercurio & Lorand Bartels eds., 2016).

156 TPP, *supra* note 24, art. 18.63.

157 Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 12.

158 *Id*. art. 33.

159 TPP, *supra* note 24, art. 18.46.

A. UNITED STATES' AMBITION AND THE DIVERSE INTERESTS OF THE TPP PARTIES

The United States has long been a strong proponent of TRIPS-Plus standards in PTAs.[160] This negotiating stance is mandated by the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (Trade Promotion Authority)[161] - the law that provided the executive branch of government with the authority to negotiate the TPP and then present it for Congressional approval using a special "fast-track" procedure.[162] The Trade Promotion Authority sets out the objectives that must guide U.S. negotiators, which include, *inter alia*,

- ensuring that the provisions of any trade agreement governing intellectual property rights that is entered into by the United States reflect a standard of protection similar to that found in United States law;[163]
- providing strong protection for new and emerging technologies;[164]
- ensuring that standards of protection and enforcement keep pace with technological developments and in particular ensuring that rightholders have the legal and technological means to control the use of their works through the Internet and other global communication media;[165] and
- providing strong enforcement of intellectual property rights.[166]

In addition to these objectives that favor strong intellectual property protections, the Trade Promotion Authority mandates that trade agreements "foster innovation and promote access to medicines" and respect the WTO Declaration on TRIPS and Public Health.[167] Based on these negotiating objectives, the United States approached the intellectual property chapter with a draft text "based closely on [United States] law and developed through past bilateral negotiations."[168]

The United States' strongly pro-intellectual property stance left it relatively isolated among the TPP parties.[169] Although some other TPP parties already had

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160 Kimberlee Weatherall, *The TPP as a Case Study of Changing Dynamics for International Intellectual Property Negotiations*, *in* TRADE LIBERALISATION AND INTERNATIONAL CO-OPERATION: A LEGAL ANALYSIS OF THE TRANS-PACIFIC PARTNERSHIP 50, 53-54 (Tania Voon ed., 2013).

161 Pub L No. 114-26, § 101, 129 Stat 319 (2015) (Bipartisan Congressional Trade Priorities and Accountability Act of 2015).

162 For a detailed explanation of the role and scope of Trade Promotion Authority *see* Ian F. Fergusson & Richard S. Beth, *Trade Promotion Authority (TPA): Frequently Asked Questions* (Congressional Research Service Report No. R43491, July 2, 2015).

163 Bipartisan Congressional Trade Priorities and Accountability Act of 2015 § 102(b)(5)(A)(i)(II), 19 U.S.C. § 4201 (2015).

164 *Id*. § 102(b)(5)(A)(ii).

165 *Id*. § 102(b)(5)(A)(iv).

166 *Id*. § 102(b)(5)(A)(v).

167 *Id*. § 102(b)(5)(C).

168 Weatherall, *supra* note 160, at 54; *See also* Susy Frankel, *The Intellectual Property Chapter in the TPP*, *in* THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST CENTURY TRADE AGREEMENT 157, 158-69 (Chin L. Lim, Deborah K. Elms & Patrick Low eds., 2012).

169 Inu Barbee & Simon Lester, *The TPP and the Future of Trade Agreements*, 2 LATIN AMERICAN J. INT'L TRADE L. 207, 216-17 (2014); Henry Farrell, *The United States Is Isolated in the Trans-Pacific Partnership Negotiations*, THE WASHINGTON POST (Nov. 18, 2013),

domestic systems reflecting the most protective international standards,[170] these countries were generally not supportive of enshrining even higher standards in the TPP, with the exception of Japan.[171] Other TPP parties came to the negotiating table with comparatively weak domestic intellectual property regimes. In fact, five of the eleven other TPP parties featured on the United States' intellectual property "Watch List" or "Priority Watch List" in 2015.[172] In Australia - whose intellectual property regime had already been heavily influenced by its bilateral PTA with the United States[173] - the government expressed strong resistance to any provisions that would require a change in domestic laws.[174] Based on leaked negotiating documents, New Zealand and Chile both proposed versions of an intellectual property chapter simply affirming the TRIPS Agreement standards with few additions.[175] Interestingly, several parties who otherwise opposed high intellectual property standards in the TPP wanted to see stronger levels of protection in relation to traditional knowledge and genetic resources.[176] The provisions on traditional knowledge and genetic resources included in the final TPP text are only aspirational, stating that the parties will "endeavor" to foster cooperation to "enhance the understanding of the issues"[177] and that "quality patent examination" may include the inclusion of relevant traditional knowledge in the prior art.[178]

This snapshot of the parties' different starting points for the negotiations demonstrates the extent of compromise that was necessary in order to conclude the intellectual property chapter. Although the final agreement contains a range of significant TRIPS-Plus provisions, the United States was unable to obtain several items on its wish-list.[179] For example, the United States had initially sought the inclusion in the TPP of limits on parallel importation, and an extension of the copyright term for films and sound recordings to 95 years.[180] In addition to compromise on these substantive points, the TPP provides transitional periods to facilitate some parties' compliance with new obligations.[181] Such periods are commonly included in intellectual property agreements for the benefit of developing

available at https://www.washingtonpost.com/news/monkey-cage/wp/2013/11/18/the-united-states-is-isolated-in-the-trans-pacific-partnership-negotiations.

170 Weatherall, *supra* note 160, at 51.

171 For an indication of the countries" negotiating positions on intellectual property, *see* Wikileaks, *Secret TPP Treaty: Advanced Intellectual Property Chapter for All 12 Nations with Negotiating Positions* (Aug. 30, 2013 draft) (released Nov. 13, 2015).

172 Ambassador Michael G. Froman, U.S. Trade Representative, *2015 Special 301 Report* (Office of the United States Trade Representative, Apr. 2015).

173 Australia-United States Free Trade Agreement, ch. 17, signed May 18, 2004, entered into force Jan. 1, 2005 [2005] ATS 1.

174 Andrew Robb, Min. Trade & Investment, Austl., *Trans-Pacific Partnership (TPP) Pact to Drive Jobs, Growth and Innovation for Australia*, Media Release (Oct. 6, 2015).

175 Chile TPP Submission, *Preliminary Considerations for TPP IP Chapter* (Feb. 2011); *TPP Text Submitted by New Zealand - Intellectual Property* (Feb. 2011).

176 Frankel, *supra* note 168, at 158.

177 TPP, *supra* note 24, art. 18.16.2.

178 *Id*. art. 18.16.3(a).

179 For a more detailed overview of early U.S. proposals for the TPP intellectual property chapter, *see* Weatherall, *supra* note 160, at 54-55.

180 United States Proposal, *Trans-Pacific Partnership - Intellectual Property Rights Chapter*, arts. 4.2, 4.5(b)(i) (Feb. 10, 2011).

181 *See* TPP, *supra* note 24, art. 18.83.

nations, but the TPP also provides grace periods for some of its developed country parties. For instance, New Zealand has eight years to increase its term of copyright protection.[182]

B. ACCESS TO MEDICINES AND PROTECTION FOR BIOLOGICS

As noted above, the United States' negotiating objectives for the TPP included ensuring both strong protection for intellectual property (including for new and emerging technologies)[183] and that trade agreements provide access to medicines.[184] These competing goals reflect pressure from two different advocacy groups: on the one hand, the pharmaceutical companies that produce innovative drugs, and on the other hand, public health advocates seeking quick and affordable access to new medicines for all countries.[185] The final outcomes reached in the TPP reflect a compromise between these two positions, but arguably "satisfied neither side."[186] One of the most controversial aspects of the negotiation of the TPP in relation to access to medicines was the protection of biologics.[187] The term "biologics" is not exhaustively defined in the TPP, but countries must extend the protection to any:

> product that is, or, alternatively, contains, a protein produced using biotechnology processes, for use in human beings for the prevention, treatment or cure of a disease or condition.[188]

Examples of biologics include many cancer treatments and some medicines for the management of chronic conditions, such as rheumatoid arthritis.[189] If a biologic is new and inventive it may be eligible for a patent in accordance with the general provisions of the TPP,[190] like any other product.[191] Many PTAs recently negotiated by the United States include a separate and additional form of monopoly right for the developer's branded pharmaceuticals, known as data protection or data exclusivity.[192] For a certain period of time, data protection precludes the regulator from using data submitted by the developer of an innovative pharmaceutical in order to receive marketing approval, such as clinical trial results, to grant approval

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182 *Id*. art. 18.83.4(d).

183 Bipartisan Congressional Trade Priorities and Accountability Act of 2015 § 102(b)(5)(A), 19 U.S.C. § 4201 (2015).

184 *Id*. § 102(b)(5)(C).

185 Lee Branstetter, *TPP and the Conflict Over Drugs: Incentives for Innovation Versus Access to Medicines*, *in* ASSESSING THE TRANS-PACIFIC PARTNERSHIP, VOL. 2: INNOVATIONS IN TRADING RULES 20 (Jeffrey J. Schott & Cathleen Cimino-Isaacs eds., 2016).

186 *Id*.

187 *See* sources cited *supra* note 150.

188 TPP, *supra* note 24, art. 18.51.2.

189 Austl. Gov't., Dep't Foreign Affairs & Trade, *Outcomes: Biologics* (Oct. 6, 2015), *available at* http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-biologics.aspx.

190 TPP, *supra* note 24, art. 18.37.

191 Austl. Gov't. Dep't Foreign Affairs & Trade, *Outcomes: Biologics* (Oct. 6, 2015), *available at* http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-biologics.aspx.

192 On the distinction between these two concepts *see* Branstetter, *supra* note 185, at 22 n. 7.

to a generic form of the same medicine.[193] Once the data protection period expires, the regulator may use the information provided by the innovator to allow for faster approval of generic or biosimilar versions, avoiding the unnecessary duplication of some human or animal drug testing.[194] Under the TPP, as in previous United States' PTAs, parties are required to provide five years of data protection for pharmaceutical products.[195]

In comparison to traditional pharmaceuticals, which are typically small molecule medicines produced through chemical synthesis, biologics are expensive to develop.[196] For this reason, producers of biologics successfully sought a longer period of data protection for their products in the United States, and a twelve year data protection period was introduced in 2010 as part of the legislative package negotiated to pass the "Obamacare" reform of the domestic health system.[197] Industry lobbied the United States to push for a similarly long data protection period for biologics to be included in the TPP,[198] but other negotiating parties - particularly Australia - refused to agree.[199] During the last days of the negotiation, a compromise was reached,[200] which requires TPP parties to provide either: (a) eight years of data protection;[201] or (b) five years of formal data protection, as long "other measures" provide "effective market protection" that delivers a "comparable outcome in the market."[202]

The language of this provision appears deliberately vague, with no further definition of these "other measures" or what they might include, aside from a recognition that "market circumstances also contribute to effective market protection."[203] In Australia's view, its current system of protection for biologics fulfils these requirements because, even though it offers only five years of data protection, other features of its patent system and regulatory environment for pharmaceuticals effectively extend the monopoly period granted to the originators of biologics.[204] The ambiguous drafting of the provision on biologics, and ongoing debate regarding its interpretation,[205] demonstrate the difficulties that can arise as a result of having to compromise between staunchly divided countries.

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193 *See e.g.*, TPP, *supra* note 24, art. 18.50.

194 Lawrence A. Kogan, *The U.S. Biologics Price Competition and Innovation Act of 2009 Triggers Public Debates, Regulatory/Policy Risks, and International Trade Concerns*, 6 Global Trade & Customs J. 513, 515 (2011).

195 TPP, *supra* note 24, art. 18.50.1.

196 Austl. Gov't., Dep't Foreign Affairs & Trade, *Outcomes: Biologics* (Oct. 6, 2015), *available at* http://dfat.gov.au/trade/agreements/tpp/outcomes-documents/Pages/outcomes-biologics.aspx (last visited Apr. 20, 2016).

197 *See* Biologics Price Competition and Innovation Act (2009), Title VII Patient Protection and Affordable Care Act (2010), 42 U.S.C. § 18001 (2010). *See also* Kogan, *supra* note 194.

198 Branstetter, *supra* note 185, at 25.

199 *See* sources cited *supra* note 150.

200 *Id.*

201 TPP, *supra* note 24, art. 18.51.1(a).

202 *Id*. art. 18.51.1(b).

203 *Id*. art. 18.51.1(b)(iii).

204 Australian Parliament, Evidence to the Joint Standing Committee on Treaties, Canberra, Feb. 22, 2016, 7-8 (Elizabeth Ward, First Assistant Secretary; TPP Chief Negotiator, Office of Trade Negotiations, Dep't Foreign Affairs & Trade).

205 *Id.*; *cf*. Len Bracken, *Australia May Deal on TPP Drug Concern, Hatch Says,* Int'l Trade Daily, (Feb. 24, 2016), *available at* http://www.bna.com/international-trade-daily-p6099.

The longer period of data protection offered for biologics was a novel inclusion in the TPP, but it is not the only provision that may impact on access to medicines.[206] Other relevant provisions include obligations to allow for extension of patents in the face of unreasonable regulatory delay,[207] and requirements to link marketing approval for generic drugs with notification to the holder of the patent for the relevant originator drug, to allow them an opportunity to seek remedies for patent infringement (known as "patent linkage").[208] Beyond the intellectual property chapter, other elements of the TPP may also impact upon access to medicines, including an annex to the transparency chapter relating to the marketing and regulatory review of pharmaceutical products and medical devices.[209] Although the combined impact of these provisions has given rise to considerable concern among public health advocates,[210] the TPP also provides some limited flexibilities that allow parties to derogate from their obligations to promote access to medicines.[211] In particular, nothing in the intellectual property chapter should prevent a party from taking measures consistent with the WTO's Declaration on TRIPS and Public Health.[212] That Declaration affirms the right of WTO Members to grant compulsory licenses of patents for the production of generic medicines,[213] and to determine what constitutes a national emergency for the purposes of exceptions provisions in the TRIPS Agreement.[214]

C. Copyright Enforcement

Another aspect of the TPP intellectual property chapter that has been highly controversial is its provisions relating to the enforcement of intellectual property rights, particularly copyright. Two major efforts made prior to the TPP to strengthen mechanisms of enforcement for intellectual property rights faced significant public resistance, beyond anything seen in previous controversies related to intellectual property.[215] The first of these was the Stop Online Piracy Act (SOPA),[216] a bill introduced in the United States Congress to target websites that engage in, enable or facilitate copyright infringement.[217] It would also have imposed obligations

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206 *See* generally Branstetter, *supra* note 185; Brook K. Baker, *Trans-Pacific Partnership Provisions in Intellectual Property, Transparency, and Investment Chapters Threaten Access to Medicines in the US and Elsewhere*, 13 PLoS Medicine 1 (2016).

207 TPP, *supra* note 24, arts. 18.46, 18.48.

208 *Id*. art. 18.53.

209 *Id*. annex 26-A: Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices.

210 *See e.g.*, Medecins Sans Frontieres Access Campaign, *Spotlight on Trans-Pacific Partnership Agreement* (Jan. 2016), *available at* http://www.msfaccess.org/spotlight-on/trans-pacific-partnership-agreement.

211 TPP, *supra* note 24, arts. 18.6, 18.50.3.

212 *Id*. art. 18.6.

213 World Trade Organization, Declaration on the TRIPS Agreement and Public Health, (Ministerial Declaration), ¶ 5(b), WTO Doc WT/MIN (01)/DEC/2 (Nov. 14, 2001).

214 *Id*. ¶ 5(c).

215 Weatherall, *supra* note 160, at 65.

216 Stop Online Piracy Act, H.R. 3261, 112th Congress (2011).

217 *Id.* § 103(a) (1)(B). *See also* Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 Nw J. Technology & Intell. Property 21, 21-22 (2013).

on internet intermediaries, including internet service providers (ISPs), payment networks and search engines, to block access to foreign websites that facilitate online piracy.[218] This bill was met with massive protests from technology companies, including Google and Wikipedia, which included thousands of websites participating in a shut down on 18 January 2012.[219]

Shortly after the SOPA controversy, another flashpoint for opposition to increased copyright enforcement emerged: the Anti-Counterfeiting Trade Agreement (ACTA).[220] ACTA is an international treaty requiring parties to provide criminal penalties for a range of activities related to copyright infringement, including aiding and abetting (terms that are undefined in the treaty).[221] ACTA was negotiated in 2010 and opened for signature in 2011, but consideration of its ratification in Europe in early 2012 led to significant public opposition and protest.[222] Five of the eight original signatories of ACTA are TPP parties: Australia, Canada, Japan, Singapore, and the United States.[223] In spite of these countries demonstrating an appetite for higher international standards for copyright enforcement, the public reaction to SOPA and ACTA influenced and shaped debate regarding the TPP's intellectual property provisions.[224]

The TPP intellectual property chapter includes several important obligations relating to the enforcement of intellectual property rights. One provision found in some previous United States PTAs[225] is a requirement to provide both civil and administrative penalties for circumventing technological protection measures (TPMs) employed by copyright holders to control access to their work.[226] Criminal penalties must be provided for any person "found to have engaged willfully and for the purposes of commercial advantage or financial gain" in the circumvention of TPMs.[227] To address online piracy and copyright violations, each TPP party must establish a "framework of legal remedies and safe harbors" that includes "legal incentives" for ISPs to cooperate with copyright owners to deter the unauthorized storage and transmission of copyrighted works.[228] Upon obtaining knowledge of the copyright infringement, ISPs must "expeditiously remove or disable access" to the material.[229] To counterbalance this obligation, ISPs are provided with a safe harbor from monetary damages for copyright infringement on their network that they do not "control, initiate or direct."[230]

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218 Stop Online Piracy Act, H.R. 3261, 112th Congress (2011), § 102(c)(2).
219 Carrier, *supra* note 217, at 23; Weatherall, *supra* note 160, at 65-66.
220 Anti-Counterfeiting Trade Agreement, [2011] ATNIF 22, opened for signature Oct. 1, 2011, not yet entered into force.
221 *Id.* art. 23.4.
222 Weatherall, *supra* note 160, at 66.
223 Ministry of Foreign Affairs, Government of Japan, *Joint Press Statement of the Anti-Counterfeiting Trade Agreement Negotiating Parties* (Oct. 1, 2011).
224 Weatherall, *supra* note 160, at 66-67.
225 *See e.g.*, Australia-United States Free Trade Agreement, signed May 18, 2004, entered into force Jan. 1, 2005, art. 17.4.7. [2005] ATS 1.
226 TPP, *supra* note 24, arts. 18.68.1 and 18.74.
227 *Id.* art. 18.68.1.
228 *Id.* art. 18.82.1.
229 *Id.* art. 18.82.3(a).
230 *Id.* art. 18.82.1(b).

While these provisions are certainly significant, the United States had proposed more extensive enforcement obligations that did not make it into the final agreement. These included criminal penalties for "significant willful" copyright violation, even with "no direct or indirect motivation of financial gain."[231] Further demonstrating the effort to balance increased enforcement with the public interest in accessing copyright material, the TPP includes an article requiring each party to "endeavor to achieve an appropriate balance in its copyright and related rights system", including by allowing the use of copyrighted material for legitimate purposes such as criticism or teaching.[232] Many previous international treaties, such as the TRIPS Agreement, allow the parties to grant exceptions to intellectual property rights.[233] However, the TPP is novel in actively suggesting that parties employ such exceptions.

The issues of access to medicines and the protection of biologics, as well as enforcement of copyright, demonstrate the negotiating dynamic that drove the intellectual property chapter of the TPP. Although the United States pushed for some of the highest standards ever seen in a PTA, in a number of important areas other TPP parties resisted, forcing compromise. Overall, however, the TPP provides for a relatively high standard of intellectual property protection. This may be an important factor in the future of the agreement, and whether or not it becomes the basis for a more comprehensive Asia-Pacific regional trade agreement.[234] In particular, it remains to be seen how the presence of these stringent disciplines on intellectual property will impact the likelihood of major players in the region that are not yet in the TPP - particularly China - seeking to join the agreement in the future.[235] The extent of intellectual property protection required by the TPP is likely to be one of the points that clearly distinguishes it from the other major plurilateral trade agreement currently being negotiated in the region: the Regional Comprehensive Economic Partnership (RCEP).[236] RCEP is likely to cover intellectual property,[237] but its provisions are unlikely to go far beyond the requirements of the TRIPS Agreement.[238]

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231 United States Proposal, *Trans-Pacific Partnership - Intellectual Property Rights Chapter*, art. 15.1(a) (Feb. 10, 2011).

232 TPP, *supra* note 24, art. 18.66.

233 *See e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13.

234 *See generally*, Meredith Kolsky Lewis, *The TPP and the RCEP (ASEAN+6) as Potential Paths Toward Deeper Asian Economic Integration*, 8 Asian J. WTO & Int'l Health L. & Pol'y 359 (2013).

235 Weatherall, *supra* note 160, at 62-63; Larry Backer, *The Trans-Pacific Partnership: Japan, China, the U.S., and the Emerging Shape of a New World Trade Regulatory Order*, 13 Wash. U. Global Stud. L. Rev. 49 (2014); Barbee & Lester, *supra* note 169, at 216.

236 *See* Austl. Gov't. Dep't Foreign Affairs & Trade, *Regional Comprehensive Economic Partnership*, *available at* http://dfat.gov.au/trade/agreements/rcep/pages/regional-comprehensive-economic-partnership.aspx.

237 Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership, *available at* http://www.asean.org/images/2012/documents/Guiding%20Principles%20and%20Objectives%20for%20Negotiating%20the%20Regional%20Comprehensive%20Economic%20Partnership.pdf (last visited Apr. 20, 2016).

238 Kolsky Lewis, *supra* note 234, at 368.

V. Regulatory Coherence

In stark contrast to its intellectual property disciplines, the regulatory coherence chapter of the TPP is one of the shortest in the agreement, at just seven pages. Yet its textual simplicity should not undermine the importance of this chapter, which is one of the first on this topic to be included in any PTA.[239] Regulatory coherence in the context of the TPP is defined as:

> the use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of domestic policy objectives, and in efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment.[240]

The inclusion of regulatory coherence in the TPP reflects a shift in international trade policy toward focus on regulatory barriers to trade.[241] It builds on work done on "regulatory reform" in the context of the Organization for Economic Co-operation and Development (OECD) and the APEC forum.[242] In addition to its chapters targeting specific categories of regulatory barrier to trade - such as sanitary and phytosanitary measures, and technical barriers to trade - the TPP sets standards for regulatory processes across the whole range of government activity through the regulatory coherence chapter. While its breadth has led some to be wary of the concept of regulatory coherence,[243] it is important to note from the outset that this chapter of the TPP is not subject to dispute settlement,[244] and that many of its provisions are about institutional frameworks and international cooperation.[245] Furthermore, each party to the TPP is able to decide the scope of its measures that are covered by the regulatory coherence obligations, subject to the aspiration that "each Party should aim to achieve significant coverage."[246] In this section we examine the "good regulatory practices" required by the TPP, particularly regulatory impact assessment (RIA), as well as the institutional

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239 The only other PTA with a chapter on regulatory coherence or cooperation is CETA, which is currently being finalised.

240 TPP, *supra* note 24, art. 25.2.1.

241 *See* Gary Winslett, *How Regulations Became the Crux of Trade Politics*, 50 J. World Trade 47 (2016); Andrew Lang, World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order 169-70 (2013); Robert Howse, *From Politics to Technocracy - and Back Again: The Fate of the Multilateral Trading Regime*, 96 Am. J. Int'l L. 94, 101 (2002).

242 *See e.g.*, OECD, *APEC-OECD Integrated Checklist on Regulatory Reform* (2008), *available at* http://www.oecd-ilibrary.org/governance/apec-oecd-integrated-checklist-on-regulatory-reform_9789264051652-en; APEC, *Information Notes on Good Practice for Technical Regulation* (APEC, Sept. 2000).

243 *See e.g.*, Jane Kelsey, *Preliminary Analysis of the Draft TPP Chapter on Domestic Coherence* 2 (Oct. 23, 2011), *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherenceMemo.pdf.

244 TPP, *supra* note 24, art. 25.11.

245 *See e.g.,* TPP, *supra* note 24, arts. 25.4, 25.6 and 25.7.

246 TPP, *supra* note 24, art. 25.3.

framework established for future deepening of integration with regard to regulatory barriers to trade.

A. GOOD REGULATORY PRACTICES

Under the TPP, each party must "endeavor to ensure that it has processes or mechanisms to facilitate the effective interagency coordination and review of proposed covered regulatory measures", and "shall consider" establishing and maintaining a national coordinating body.[247] Although this provision does not prescribe the form that this body should take, the United States' proposal to include this provision was based on its desire that other parties create an agency or mechanism with a function similar to its Office of Information and Regulatory Affairs (OIRA).[248] The purpose of this coordination mechanism is to ensure that the development of measures adheres to "good regulatory practices", while minimizing overlap or duplication between agencies and advising on systemic regulatory improvements.[249]

The good regulatory practices encouraged by the TPP centre around the conduct of RIA, "to assist in designing a measure to best achieve the Party's [regulatory] objective."[250] The TPP allows some flexibility by acknowledging "differences in the Parties' institutional, social, cultural, legal and developmental circumstances."[251] Nevertheless, it states that RIA should "rely on the best reasonably obtainable existing information"[252] and include the following elements: (a) an assessment of the need for a regulatory proposal;[253] (b) an examination of the costs, benefits and risks of feasible alternatives;[254] and (c) an explanation of why the selected regulatory approach was chosen.[255]

These provisions of the TPP go further in prescribing general standards for the development of regulatory measures than any previous PTA. The good regulatory practices it requires are focused on improving domestic governance, and nothing in their text is explicitly linked to international trade or investment. In contrast, the European Union's proposal for the regulatory coherence chapter of its TTIP with the United States contains far narrower obligations relating to impact assessment.[256] Under the proposal, the European Union and United States would affirm their intention to carry out RIA in accordance with their respective domestic rules and procedures, but with the added requirement that the parties examine "relevant international

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247 *Id.* art. 25.4.1.

248 Thomas J. Bollyky, *Regulatory Coherence in the TPP Talks*, in THE TRANS-PACIFIC PARTNERSHIP: A QUEST FOR A TWENTY-FIRST-CENTURY TRADE AGREEMENT 171, 181 (Chin L. Lim, Deborah K. Elms & Patrick Low eds., 2012).

249 TPP, *supra* note 24, art. 25.4.2.

250 *Id.* art. 25.5.1.

251 *Id.* art. 25.5.2.

252 *Id.* art. 25.5.2(d).

253 *Id.* art. 25.5.2(a).

254 *Id.* art. 25.5.2(b).

255 *Id.* art. 25.5.2(c).

256 EU Textual Proposal for TTIP Regulatory Cooperation Chapter, Apr. 2015 (publicly released May 4, 2015), *available at* http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153403.pdf.

instruments", the "regulatory approaches of the other Party", and the "impact on international trade and investment" when evaluating options under consideration.[257]

Given the diverse economic and political systems of the TPP parties, it may seem surprising that they were able to reach common ground on how regulatory measures should be developed. All TPP parties are members of APEC and, in that context, had already expressed their support for regulatory reform along these lines. In their 2011 Leaders' Declaration, the APEC nations committed to ensuring transparency, implementing internal coordination mechanisms, and developing or strengthening domestic RIA procedures.[258] Thus, while the TPP sets an important new precedent for the treatment of regulatory measures in PTAs, the mechanisms and processes it endorses have been the subject of considerable discussion and agreement in other fora.

B. Cooperation, Harmonisation and Institutional Provisions

The literature on the inclusion of regulatory coherence or cooperation requirements in PTAs has generally focused on the integration of parties' domestic regulatory systems through institutional cooperation, harmonization of standards, or mutual recognition arrangements.[259] Although these aspects of regulatory coherence are the key elements of other mega-regional PTAs - such as CETA and the TTIP[260] - the extent of the cooperation provisions that would be included in the TPP was always somewhat doubtful.[261] While harmonization of regulatory standards would be the most effective means of eliminating the harm of regulatory barriers to trade, this goal is politically unrealistic in most circumstances.[262] Substantive harmonization or mutual recognition of each party's domestic standards is rare, and generally limited to situations involving a high degree of political, economic and/or cultural similarity between the parties. For example, within the cooperative framework established by the 1983 Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA),[263] Australia and New Zealand have achieved mutual

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257 Transatlantic Trade and Investment Partnership, art. 7.

258 APEC Leaders Declaration, Annex D, Strengthening Implementation of Good Regulatory Practices, (Nov. 12-13, 2011), *available at* http://www.apec.org/Meeting-Papers/Leaders-Declarations/2011/2011_aelm/2011_aelm_annexD.aspx.

259 *See e.g.,* Bollyky, *supra* note 248; Alberto Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences* 18 J. Int'l Econ. L. 625 (2015).

260 Elizabeth Sheargold & Andrew D. Mitchell, *The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?* World Trade Rev. (FirstView Articles) 1, 9-11 (2016).

261 Bollyky, *supra* note 248; Rodrigo Polanco, *The Trans-Pacific Partnership Agreement and Regulatory Coherence*, *in* Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership 231 (Tania Voon ed., 2013).

262 Alberto Alemanno, *Is There a Role for Cost-Benefit Analysis Beyond the Nation-State?: Lessons from International Regulatory Co-Operation*, *in* The Globalization of Cost-Benefit Analysis in Environmental Policy 104, 105 (Michael A. Livermore & Richard L. Revesz eds., 2013).

263 *Australia-New Zealand Closer Economic Relations Trade Agreement*, signed Mar. 28, 1983, 1329 UNTS 176 (entered into force Jan. 1, 1983).

recognition of certain product standards and professional qualifications,[264] as well as a joint food standards code.[265] Given the range of parties involved in the TPP, deep integration or harmonization provisions were never likely to have been included in the regulatory coherence chapter.

The institutional mechanisms created in the TPP do have the potential to provide significant avenues for integration of the parties in the future, although the depth of integration or harmonization that they will achieve is uncertain. Article 25.6 of the TPP establishes a Committee on Regulatory Coherence[266] to consider the implementation and operation of the chapter, as well as "identifying future priorities, including potential sectoral initiatives and cooperative activities."[267] Apart from a direction that it coordinate with other TPP bodies and relevant forums to avoid duplication of work,[268] the text provides no guidance about the sectoral activities or other cooperation initiatives that the Committee might pursue. At least once every five years, the Committee must review the good regulatory practices espoused by the TPP and consider whether the chapter could be improved.[269] Another clear directive to the Committee is that it "establish appropriate mechanisms to provide continuing opportunities for interested persons of the Parties to provide input on matters relevant to enhancing regulatory coherence."[270]

In addition to work through the formal committee process, the TPP encourages parties to cooperate through mechanisms such as information exchanges and dialogues.[271] The language of this requirement provides a non-exhaustive list of examples of regulatory cooperation, suggesting that the choice of cooperation activities "take into consideration each Party's needs."[272] The use of these sorts of cooperation mechanisms, while not usually required by PTAs, is often already occurring.[273] The TPP has formalized these processes to some extent by including them in treaty text. However, the flexible and open-ended nature of these obligations means that, in practice, the efficacy of these mechanisms is not guaranteed and will be determined by the political will of the parties. Despite their limitations, including these provisions in a plurilateral treaty with a diverse range of members sets an important precedent that is likely to influence many future PTAs.

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264 Debra P. Steger, *Institutions for Regulatory Cooperation in "New Generation" Economic and Trade Agreements*, 39 Leg. Issues Econ. Integration 109, 115 (2012); Council of Austl. Gov'ts., *The Trans-Tasman Mutual Recognition Arrangement*, *available at* https://www.coag.gov.au/the_trans-tasman_mutual_recognition_arrangement (last visited Apr. 20, 2016).

265 Food Standards Australia and New Zealand, *About FSANZ*, *available at* http://www.foodstandards.gov.au/Pages/default.aspx (last visited Apr. 20, 2016).

266 TPP, *supra* note 24, art. 25.6.1.

267 *Id.* art. 25.6.2.

268 *Id.* arts. 25.6.3 and 25.6.4.

269 *Id.* art. 25.6.7.

270 *Id.* art. 25.8.

271 *Id.* art. 25.7.

272 *Id.* art. 25.7.

273 Alemanno, *supra* note 262, at 106-08.

VI. Conclusion

In this article we have examined four key areas of the TPP, each of which helps to demonstrate the negotiating dynamics and policy tensions that shaped the formation of this significant mega-regional PTA. From its inception, the TPP was intended to be "ambitious, comprehensive, high standard", yet also "balanced."[274] Achieving both these goals required the TPP to go beyond previous PTAs in some areas, such as its new disciplines on regulatory coherence, while creating new flexibilities in other areas, such as investment. The negotiating dynamics that drove the agreement are clearly reflected in its outcomes, with the United States pushing for high standards in key areas such as intellectual property, but having to compromise in order to reach consensus with such a diverse range of parties. The significance of the TPP and the ways in which it has balanced competing interests is not limited to the twelve current parties, as the agreement is likely to influence many current and future PTA negotiations, such as the ongoing negotiations for the TiSA and the TTIP.

Although the TPP text has been finalized and signed, the treaty still faces a long process to achieve ratification in many parties, particularly the United States. Even once (or if) the treaty comes into force for the current parties, the ambition of the TPP will not end. The final paragraph of the preamble to the pact states that one of the objectives of the parties is to "expand their partnership by encouraging the accession of other States or separate customs territories in order to further enhance regional economic integration."[275] The TPP sets out a detailed process governing accession of new members, which requires the agreement of all parties and the establishment of a working group to negotiate the terms and conditions of accession.[276] Yet for this process to become relevant, other states or customs territories must seek membership of the TPP. Whether or not major economies in the Asia-Pacific region, such as China, South Korea and Indonesia, will pursue membership of the TPP is still highly uncertain. The high standards pursued by the treaty, such as its TRIPS-Plus intellectual property provisions and negative list approach to services liberalization, may deter some from seeking membership. Again, the TPP can be understood as representing a difficult balancing act between the push for greater trade liberalization and innovative disciplines, and the desire to create an attractive basis for a future "Free Trade Area of the Asia Pacific."[277]

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[274] Ambassador Michael Froman, U.S. Trade Representative, *Transcript of the Trans-Pacific Partnership Atlanta Ministerial Closing Press Conference* (Oct. 5, 2015).

[275] TPP, *supra* note 24, preamble.

[276] *Id.* art. 30.4.

[277] *Id.* preamble.

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Challenges For Countries In Trade In Services' Negotiations With The Nafta Approach: The Experience Of Chile In The Free Trade Agreement With The United States

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ABSTRACT

The negotiation of trade in services in the context of a free trade agreement is particularly challenging for developing countries in view of the diverse nature of the services sector, the broad regulation applicable to the supply of services, the different modes of supply and the different approaches available for the adoption of the rules governing bilateral trade in services. Two main approaches are available for these negotiations, the General Agreement on Trade in Services (GATS) model or positive list approach, and the North American Free Trade Agreement (NAFTA) model or negative list approach. Even though these two models are similar with respect to the substantive obligations covering the conditions for supplying services, they differ significantly with respect to the manner and the structure of commitments.

Chile faced significant challenges in concluding a free trade agreement with the United States. The importance of the trading partner and its market for Chilean exports meant that Chile had to adopt a number of unfamiliar features, particularly in relation to financial services and e-commerce, in order to facilitate and consolidate the process of opening its market. This article focuses on the chapters of the United States-Chile Free Trade Agreement addressing trade in services, i.e. cross-border trade in services, financial services, telecommunications, temporary entry of business persons and some provisions on e-commerce. Some investment issues will also be address, particularly those interacting with cross-border trade in services. Finally, the article explains the relevance of this approach as a model or basis for bilateral and plurilateral negotiations on trade in services for the Pacific Rim countries and as the preferred model for services trade liberalization for the Latin American countries.

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I. Introduction

Chile currently has 25 Free Trade Agreements (FTAs) in force. In economic terms, these agreements represent an 86.3% of Chile's gross domestic product, cover more than 60 countries[1] and encompass the quasi-totality of Chilean exports and products. For a small economy like Chile, international trade is an essential tool for economic growth. In this context, the negotiation of a free trade agreement with the United States (U.S.) in 2001 represented a major challenge for Chile and established new standards for future trade negotiations, not only because of the broad scope of the agreement, but also because of the high standards introduced in different provisions across its chapters.

Negotiations on trade in services involve several challenges arising from the particular nature of the sector and the range of activities that services cover - from social services, professional services, transport, and distribution to banking services - as well as from the multiple modes of services provision. Indeed, frequently a service is provided on a cross-border basis (mode 1), or through the establishment of commercial presence (mode 3) or by the movement of either the consumer or the supplier of the service (modes 2 and 4 respectively), or even all modes simultaneously. According to Sáez, another characteristic of trade in services is that for many services the final stage of "production" takes place simultaneously with the consumption of the service. In such cases, the exports of a country's services rely on the infrastructure and factors of production available in the host/destination country where consumption of the service will also take place.[2]

During the 1990s, the negotiating experience in international free trade agreements, including trade in services' commitments in the Latin American region was limited to the General Agreement on Trade in Services (GATS),[3] adopted in the context of the Uruguay Round. This was also the case for Chile until the negotiations of free trade agreements with Canada and Mexico. Originally, Chile was invited to participate in the North American Free Trade Agreement (NAFTA).[4] However, the failure of the United States President to obtain congressional approval blocked the negotiations. Chile was then compelled to adopt a new strategy with the North American countries, namely, to negotiate separate free trade agreements with each NAFTA member. The interest of the Canadian government in concluding a free trade agreement allowed Chile to initiate the negotiations with Canada, followed by negotiations with Mexico.

The text of NAFTA was used as the basis for the negotiations of the free trade agreement with Canada, albeit with some improvements and modifications

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1 Information *available at* https://www.direcon.gob.cl/acuerdos-comerciales (last visited Jun. 18, 2016).

2 Sebastian Saéz, Trade in Services Negotiations: a review of the experience of the United States and the European Union in Latin America, 15 (N.U., ECLAC, Division of international Trade and Integration, Dec. 2005).

3 General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Texts: The Results Of The Uruguay Round Of Multilateral Trade Negotiations 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

4 North American Free Trade Agreement, US-Can.-Mex., Dec.17, 1992, 32 I.L.M 289 (1993)

accounting for specific issues and sensitivities of both countries. The Chile-Canada Free Trade Agreement constituted a milestone in Chile's foreign trade negotiations, not only because it was the first concluded with a developed country, but also due to the high level of ambition and the depth of issues covered, such as tariffs, non-tariff barriers and customs procedures. In addition, the agreement included a non-discrimination provision for the supply of services and adequate protection of foreign investments. This was also the first time that Chile introduced chapters on cross-border trade in services, investment and temporary entry of business persons in a free trade agreement.[5]

The major challenge for Chile in negotiating with North American countries on trade in services, investment and related matters was to adapt to their approach, commonly known as the NAFTA approach, which differs from GATS in many respects. In a NAFTA-type model, matters relating to trade in services are regulated in separate chapters: cross-border trade in services, investment, financial services, telecommunications and temporary entry of business persons. In contrast, GATS incudes all services provisions while its annexes on specific issues are part of the same structure and disciplines included in the main text. It is therefore essential to fully comprehend the scope of each chapter and the manner in which the different chapters interrelate, in order to accurately understand the implications of the specific commitments.

In terms of scheduling techniques, NAFTA adopts the so-called negative list approach, whereas GATS adopts the positive list approach. Under the negative list approach, parties make no specific commitments; all sectors are included. As a result, all provisions of the trade in services chapter, apply to all services, except for those specifically exempted in the annexes under specific terms, conditions and limitations. The annexes contain a full list of reservations describing measures in specific sectors which are not required to conform to the obligations contained in the specific chapter. Reservations for the chapters on trade in services apply also to commitments in the investment chapter. Furthermore, unlike GATS which includes all four modes of supply, the NAFTA approach to cross-border trade in services chapters includes only modes 1, 2 and 4 and therefore omits the supply of a service through commercial presence established in the territory of the other party (mode 3). Mode 3 is dealt instead within the investment chapter, regulating investment in all sectors of the economy, including services provided by a company established in the territory of the other party. Finally, GATS includes annexes on specific service sectors, addressing particular issues of those sectors, such as the Annex on Financial Services, mode 4, Telecommunications and Air Transport Services. Those sectors are regulated by both the core text of the GATS and the specific provisions included in its Annexes. NAFTA-inspired free trade agreements, in contrast, include separate chapters covering specific sectors, namely financial services, telecommunications and entry of business persons.

Investment chapters in NAFTA-type agreements regulate services supplied through commercial presence. Cross-border trade in services chapters govern cross-border supply, consumption abroad and temporary movement of natural persons.

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[5] Chile: 20 años de negociaciones comerciales 127-129 (Dirección General de Relaciones Económicas Internacionales, 2009), *available at* https://www.direcon.gob.cl/wp-content/uploads/2013/09/Chile-20-a%C3%B1os-de-negociaciones-comerciales1.pdf (last visited Jun. 13, 2016).

The rules on temporary movement of business persons deal with procedural terms and conditions, as well as with general formalities to be complied with by a natural person falling within one of the four categories of business persons.[6] In addition, the NAFTA approach contains two chapters relating to trade in services: i) a telecommunications chapter, dealing with regulatory issues of the sector, amongst others, related to access and use of public telecommunication networks and the treatment of major suppliers; and ii) a chapter on financial services, dealing in a self-contained manner with disciplines for the supply of financial services and the establishment of a commercial presence of financial institutions in the territory of the other party. Finally, an e-commerce chapter includes provisions on the supply of services regarding specific issues such as non-discrimination of digital products and electronic supply of services. GATS, on the other hand, is a self-contained agreement which includes rules applicable to all service sectors and additional specific rules applicable only to sectors on which the parties have made specific commitments. In this second category fall the Schedule of Specific Commitments, mainly related to market access and national treatment, as well as the Annexes on certain services, in particular, on most-favored-nation exemptions, movement of natural persons, air transport services, financial services and telecommunications.

The approach chosen for services in the negotiations between Chile and the United States was to incorporate a cross-border trade provision in the Services Chapter including modes 1, 2 and 4 of the GATS, thus regulating only the cross-border dimension of services supply, irrespective of whether the service is provided on a cross-border basis (mode 1), or by the movement of the supplier (mode 4), or the consumer (consumption abroad or mode 2). Mode 3 or the establishment of a commercial presence was not regulated in this chapter but falls within the scope of the Investment Chapter. This latter covers all types of investment in all sectors of the economy, except for investment in financial institutions, regulated in a special chapter. The United States-Chile Free Trade Agreement includes also a specific Chapter on Telecommunications, addressing sectorial domestic regulation issues, especially with regards to non-discriminatory access, the use of public telecommunications networks and services as well as in relation to major suppliers. Financial Services are regulated also in a specific self-contained chapter that includes both the supply of financial services in a cross-border manner (modes 1, 2 and 4) and the investment (mode 3) in financial institutions. Finally, the Agreement includes a Chapter on Temporary Entry of Business Persons, designed to facilitate the entry and stay of business persons in the territory of the other party and a Chapter on E-Commerce, regulating mainly the treatment of digital products.

II. Cross-Border Trade in Services in the United States-Chile Free Trade Agreement

The United States-Chile Free Trade Agreement entered into force on January 1, 2004. It contains 24 chapters covering the full range of trade-related matters,

6 *See* Saéz *supra* note 2, at 20.

including provisions on Market Access for Goods, Sanitary and Phyto-Sanitary Measures, Technical Barriers to Trade, Rules of Origin, Trade Remedies and Competition, Investment, Cross-Border Trade in Services (CBTS) and Financial Services, E-Commerce, Telecommunications, Intellectual Property Rights, Institutional Arrangements and Dispute Settlement provisions. The Agreement eliminates tariffs and opens markets, reduces barriers for trade in services, provides protection for intellectual property, ensures regulatory transparency, guarantees non-discrimination in the trade of digital products, commits parties to maintain competition laws prohibiting anticompetitive business conduct, and requires effective labor and environmental enforcement.[7]

The United States-Chile Free Trade Agreement was the outcome of the most comprehensive and challenging negotiation Chile had ever been involved in, covering a new range of issues, for the first time in Chile's bilateral trade policy history. In spite of the experience that Chile had acquired on the NAFTA model during its negotiations with Canada and Mexico, the negotiations with the United States were particularly challenging at that the time, not only because of the new provisions, such as on financial services and e-commerce and their legal implications for the domestic regulation, but also because of the level of ambition and the depth of other "old" provisions, such as Telecommunications and CBTS.

Although the structure of the free trade agreements between Chile and Canada, Mexico and the United States has many similarities, these agreements differ in numerous key provisions, in terms of content and extent alike. For example, the legal effects of the Market Access Article of the United States-Chile Free Trade Agreement are completely different from those of the Quantitative Non-Discriminatory Restrictions included in the agreements with Canada and Mexico. The latter were adopted solely for transparency purposes and the obligations introduced therein were limited to the listing of quantitative restrictions. In contrast, in the case of the United States-Chile Free Trade Agreement, the Market Access obligation is subject to standstill and ratchet obligations while commitments for the sectors listed are binding. Even though Chile had already made specific commitments in the respective GATS Schedules, the extent and coverage of those commitments in terms of the number of sectors included was very low compared to the commitments made under the Annexes on reservations in the United States-Chile Free Trade Agreement. Furthermore, Chile's specific commitments in its agreements with Canada and Mexico were much more flexible. For example, Chile was given more policy space to introduce specific sectorial carve-out, such as the exclusion of cultural industries in its agreement with Canada.

III. The structure of the Agreement

The United States-Chile Free Trade Agreement contains provisions and obligations affecting trade in services in several different chapters. Even though the CBTS

[7] United States-Chile Free Trade Agreement, Jan. 1, 2004, Office of The United States Trade Representative, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta (last visited Aug. 8, 2016).

Chapter contains the most important provisions in relation to market access and non-discrimination of foreign suppliers, the Investment and Financial Services Chapters contain also key provisions, intertwined with the CBTS Chapter. By way of illustration, the Investment Chapter includes commitments on the establishment of commercial presence (mode 3) while the Financial Services Chapter specifically regulates all 4 modes of supply of financial services, whether provided in a cross-border manner (modes 1, 2 and 4) or through the establishment of a commercial presence (mode 3). Specific provisions linked to trade in services are found also in the Chapters on Telecommunications, E-Commerce, and Temporary Entry for Business Persons.[8]

A. Cross-Border Trade in Services

The CBTS Chapter applies to measures adopted or maintained by a party affecting cross-border trade in services by service suppliers of the other party.[9] Cross-border trade in services or cross-border supply of services, as defined in Article 11.1.2. of the CBTS Chapter, includes the supply of a service "from the territory of one Party into the territory of the other Party" (mode 1); "in the territory of one Party by a person of that Party to a Person of the other Party" (mode 2); and "by a national of a Party in the territory of the other Party" (mode 4). In contrast, the scope of application of the Chapter does not include the supply of a service in the territory of a party through commercial presence of the other party (mode 3). This latter mode is regulated in the Investment Chapter. Moreover, Article 11.1.4 stipulates that the Chapter does not apply to financial services, procurement, subsidies and air transport services. Finally, the Chapter contains a general carve-out for services supplied in the exercise of governmental authority.

The main obligations introduced in relation to services covered by the CBTS Chapter include the National Treatment, Most-Favored-Nation Treatment, Local Presence and Market Access. The parties were allowed to introduce exceptions to those obligations in the Annexes on reservations. In principle, under the NAFTA approach, all services sectors are included in the scope of application of the relevant chapter, except for those specific sectors mentioned in the annexes on reservations. All other sectors are therefore liberalized and there is no possibility to introduce new restrictions. The Annexes on reservations of the CBTS Chapter include Annex I (Existing Non-conforming Measures) and Annex II (Future Measures). The first contains a list of current measures non-conforming with the obligations of the

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8 This article focusses only on the main provisions affecting the supply of trade in services and not necessarily in all obligations potentially having an implication on services trade. Thus some Intellectual Property and Government Procurement provisions are not included in the analysis.

9 United States-Chile Free Trade Agreement, *supra*, note 7, art. 11.1 ("Such measures include measures affecting: (a) the production, distribution, marketing, sale, and delivery of a service; (b) the purchase or use of, or payment for, a service; (c) the access to and use of distribution, transport, or telecommunications networks and services in connection with the supply of a service; (d) the presence in its territory of a service supplier of the other Party; and (e) the provision of a bond or other form of financial security as a condition for the supply of a service").

Chapter. This Annex is subject to the obligation of consolidation of the level of liberalization, parties are obliged not to increase the restrictiveness of the measures (standstill effect) while any further future liberalization will be automatically incorporated in the commitments of the Chapter (ratchet effect). These two effects combined allow for the locking-in or freezing of the existing regime and the level of market openness to foreign suppliers of services. The second contains a list of specific services sectors that are not necessarily currently restricted, but were included for policy reasons, because of their sensitivity to market openness and in order to offer the parties regulatory space for the introduction of new non-conforming measures in the future. This exclusion aims to carve-out specific sensitive sub-sectors like, for example, social services, educational services and some of the environmental services, typically listed under Annex II, from the scope of all or some of the obligations of the Chapter.

The Articles on National Treatment[10] and Most-Favored-Nation Treatment[11] provide for service suppliers of one party treatment which is no less favorable than that accorded, in the same circumstances, to national service providers of the other party or to service providers of a third country which is not a party to the free trade agreement. This non-discrimination principle is one of the key obligations of the Chapter and, along with the Market Access obligation is at the center of the liberalization commitments of the CBTS Chapter.

The Local Presence obligation forbids the introduction of residence requirements for the supply of services in the territory of the other party,[12] thus allowing cross-border supply of services. The measures related to this obligation however are also subject to the Annexes on reservations for services and investment commitments. As a result, any type of existing residence requirement may be maintained. Arguably, local presence restrictions required for foreign suppliers fall within the scope of the National Treatment rather than within that of the Local Presence. Chile has consistently listed restrictions affecting the Local Presence obligation also against the National Treatment obligation.[13]

Chile's free trade agreements with Canada[14] and Mexico,[15] introduced the Market Access discipline, under the heading Quantitative Restrictions, only for transparency purposes. In the case of the United States-Chile Free Trade Agreement, it was agreed - for first time in a bilateral context - to introduce a relevant binding obligation. In addition, the Market Access discipline is subject to specific commitments under the Annexes on reservations. However, the manner in which Chile adopted the commitments under the negative list approach was

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10 United States-Chile Free Trade Agreement, *supra*, note 7, art. 11.2.

11 *Id*. art. 11.3.

12 *Id*. art. 11.5.

13 In the case of the TPP, this issue was solved through the introduction of interpretative notes to the Annexes on non-confirming measures, requiring parties to list such measures only against the Local Presence obligation and not against the National Treatment obligation.

14 Canada-Chile Free Trade Agreement, Can.-Chi, Dec., 5, 1996, art. H-07, Global Affairs Canada, http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/menu.aspx?lang=en (last visited Oct. 4, 2016).

15 Chile-Mexico Free Trade Agreement, Chi.-Mex., Apr., 17, 1998, art. 10-08, OAS Information System on Foreign Trade, http://www.sice.oas.org/Trade/chmefta/indice.asp (last visited Oct. 4, 2016).

slightly different from the one adopted in its free trade agreements with the other North American countries. Inspired by the approach of the United States consisting of the reference to the commitments of GATS, Chile included a Market Access general carve-out in its reservations of Annex II. This entry led to the conversion of the negative into a positive list - in the same way the United States did with GATS - because it excludes all services sectors from the scope of the Market Access obligation, except for those specifically listed in the entry. As a result, any specific sector that was not mentioned, was excluded from the scope of the obligation and the relevant commitments.

Generally speaking, the content of the Market Access obligation in Chile's free trade agreements is similar to that of GATS Article XVI which prohibits the imposition of any type of quantitative restrictions on sectors where commitments have been made (with the exception of Article XVI (f) referring to mode 3 restrictions falling within the scope of the National Treatment obligation of the Investment Chapter). Article 11.4 of the CBTS Chapter stipulates that no party may adopt or maintain measures that

a) impose limitations on:
i. The number of service suppliers, the total value of service transactions or assets, the total number of service operations or on the total quantity of services output, the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ, or the requirement of an economic needs test; and …
b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

Letter f) of GATS Article XVI refers to the possibility of introduction of restrictions or limitations in the participation of foreign capital, such as maximum percentages of foreign shareholding or total value of individual or aggregate foreign investment. In the United States-Chile Free Trade Agreement, there was no need to include this specific provision in the Market Access obligation since mode 3 is regulated in the Investment Chapter and not in the CBTS Chapter. However, the Agreement restricts the introduction of such types of limitations to the extent of their specific commitments, by the inclusion of the National Treatment obligation under the Investment Chapter.

As stated before, regarding the Market Access obligation, the final outcome for Chile was the introduction of a positive list of services sectors under the Annex II on reservations. This was due to the complexity of identifying *a priori* sectors in which policy space was necessary for Chile to be able to regulate in the future without breaching the Market Access obligation. The most straightforward approach was to include those sectors that had already been identified as sectors that Chile could made Market Access commitments. It is also relevant to stress that the level of commitments made under the United States-Chile Free Trade Agreement was much more ambitious than what Chile had accepted in other bilateral free trade agreements,[16] and even in the GATS Schedules on Specific Commitments.

[16] In the free trade agreements with Canada and Mexico already in force at the time of the negotiation of the United States-Chile Free Trade Agreement, the Market Access obligation was introduced only for transparency purposes. The relevant articles stipulate

Following the results achieved in relation to Market Access and National Treatment, Chile was keen on introducing enhanced commitments for the Domestic Regulation obligation.[17] At the time, Chile's increasing exports of services were being affected by behind-the-border restrictions or measures impeding Chile from reaping the benefits of access liberalization. Domestic measures play an important role in facilitating and enhancing cross-border trade in services but more needs to be done in order to establish a clear set of relevant rules. The Domestic Regulation provision ensures that the parties will develop and administer measures of general application, including licensing processes, in a fair and reasonable manner as well as that they will be transparent and impartial in the adoption and administration of such measures, while, on the other hand, fully recognizing their right to regulate and introduce new regulations to assure the quality of the services suppliers in order to meet legitimate policy objectives, but in a trade-enhancing manner.

The provision applies also to the Investment Chapter and establishes a common ground for the application of regulation affecting trade in services, and is further developed in the Telecommunications Chapter in relation to the supply of telecommunication services. The provision is also related to some extent to the provisions contained in the Temporary Entry Chapter. Guidelines for the regulation of the trade in services are necessary for the supply of any service, if parties are to profit from the market openness granted under the CBTS and Investment Chapters. Otherwise, market access would be meaningless.

Apart from the references to licensing and certification of the CBTS Chapter, the parties introduced a specific Annex on Professional Services establishing the basic principles or elements for licensing procedures and transparency for the supply of services. This Annex contains three sections: the first covers general provisions of the application processes for licensing and certification, principles for developing mutually acceptable standards and criteria for certification and granting of licenses; the second includes specific commitments for foreign legal consultant services and the third introduces specific obligations for the issuance of temporary licenses for engineers.[18]

The parties also agreed to introduce stronger commitments in order to facilitate the supply of professional services. In particular, they included an Annex setting out the criteria for granting licenses for legal consultants and engineers. However, the implementation of the relevant provisions requires the participation of the relevant professional bodies of each country. To date no such commitment has been implemented, *inter alia*, because of the lack of interest of some professional bodies and the difficulties to meet all the criteria established in the different states of the United States, since it is the individual states, and not the Federal Government that have the authority to regulate these types of professional services.[19]

Finally, the Chapter includes specific provisions on the development and implementation of regulations related to services trade, on mutual recognition

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that restrictions on Market Access are allowed and that the parties are obliged to list them for transparency reasons. No standstill or ratchet effect applied to those measures.

17 United States-Chile Free Trade Agreement, *supra*, note 7, art. 11.8.

18 *Id.* annex 11.9.

19 Ricardo Lagos Weber & Juan Araya Allende, Una Guia sobre los Tratados de Libre Comercio: a 10 Años del TLC con Estados Unidos 108 (Universidad de Valparaíso, 2015).

of titles and degrees as well as a denial of benefits clause. An Annex on Express Delivery Services was also included because of the strong U.S. interest in this sector.[20]

B. Investment

The Investment Chapter covers any type of measure adopted or maintained by a party relating to investors of the other party regarding all types of investments.[21] The Chapter provides for the protection of investors and their covered investments. Investors are entitled to be treated as favorably as the host party treats its own investors and their investments or investors and investments from any third country, in other words, the chapter guarantees non-discrimination, namely National Treatment plus Most-Favored-Nation Treatment. The non-discrimination treatment applies in the full life cycle of investment, i.e. from the establishment, through the management, operation and expansion, up to the disposition of the investment, in other words both the pre-establishment and the post-establishment phases.[22]

Although no provision in the Investment Chapter refers explicitly to mode 3 or investments in the services sector, the broad scope of the Chapter implicitly includes them as well. The explicit exclusion of mode 3 from the scope of the CBTS Chapter, aiming to avoid the spillover effects between the Investment and the CBTS Chapters, confirms that mode 3 is indeed included in the scope of application of the Investment Chapter.

Paragraph 3 of Article 10.1 of the Chapter stipulates that the mere requirement of a form of financial security by a party as a condition for the provision of a specific service in its territory does not make the Investment Chapter applicable to the supply of that cross-border service.[23] This paragraph is another example of this attempt to clearly distinguish the scope and coverage of the CBTS and Investment Chapters for fear of their potential overlaps and interactions.

Furthermore, the Scope and Coverage Article establishes that the Investment Chapter "does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Twelve (Financial Services)."[24] The scope of this exclusion is determined by the scope of the Financial Services Chapter, a self-contained chapter which includes not only measures related to cross-border trade in financial services, but also investment in financial institutions.[25] Furthermore,

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20 United States-Chile Free Trade Agreement, *supra* note 7, annex 11.6 (Express Delivery).

21 The Chapter adopts a broad asset-based definition with a non-exhaustive list of assets that may be considered as investment owned and controlled by an investor [United States-Chile Free Trade Agreement, *supra* note 7, art. 10.27].

22 The pre-establishment phase is addressed in the National Treatment and Most-Favored-Nation Treatment Articles as well as in the definition of Investor of a Party, referring to "an investor that attempts to make … an investment" [United States-Chile Free Trade Agreement, *supra* note 7, art. 10.27 (Definitions)].

23 United States-Chile Free Trade Agreement, *supra* note 7, art. 10.1.3.

24 *Id*. art. 10.1.4.

25 With regard to specific financial services not provided by financial institutions the question of whether they are completely excluded by the Agreement or not and of the extent to which they are included in the scope of the CBTS and/or the Investment Chapter, remains open.

the Financial Services Chapter introduces specific investment provisions through cross-references to the specific obligations of the Investment Chapter.[26]

In general, the Agreement introduces a clear distinction between the CBTS and Investment Chapters, designed to restrict the interaction between the two. The Investment Chapter acts as the depository of, or controls, all investment provisions on both goods and services (except for financial services). The CBTS Chapter, partially inspired by the GATS, is devoted to the liberalization of services provided without a commercial presence. Both follow the negative list approach for lodging reservations for their respective obligations.[27]

A concrete interaction between the Investment and the CBTS Chapters is found in Paragraph 3 of Article 11.1 of the CBTS Chapter, establishing the application of the provisions of the Chapter on Market Access, Domestic Regulation and Transparency to investors of the other party and investments covered by the Investment Chapter. This cross-reference permits the lock-in of behind-the-border issues of particular interest to mode 3 commercial presence.

As in the case of the CBTS Chapter, the liberalization commitments of the Investment Chapter are introduced in the Non-Conforming Measures Article.[28] This provision allows parties to list their non-conforming measures with respect to the main obligations of the Chapter, namely, National Treatment, Most-Favored-Nation Treatment, Performance Requirements and Senior Management and Board of Directors, in their Annexes on reservations. If no measure is listed, it is understood that the specific sector has been liberalized and no measure can be found that is not in conformity with these obligations. Therefore, under the NAFTA approach, in principle, all investment sectors are included in the scope of application of the Investment Chapter and all measures are liberalized, except for restrictions listed in the Annexes on reservations relating to specific sectors. Furthermore, there is no possibility to introduce new restrictions in the future once the sector has been liberalized. In other words, the NAFTA-inspired agreements aim to provide market openness for all kinds of investments and grant non-discriminatory treatment for all sectors covered by the chapter.

The coverage of the NAFTA-inspired agreements is generally wider than that in GATS-inspired agreements and reservations are fewer, although some of them can be quite general, offering parties an opportunity to maintain or even introduce new non-conforming measures in a certain number of activities. The ratchet effect of NAFTA-inspired agreements locks in the investment regime and includes as commitments under a regional trade agreement any new effort towards liberalization. As a result, these agreements generally offer a higher degree of certainty and predictability for investors.[29]

Annexes I and II on reservations also apply for listing reservations under the obligations of the Investment Chapter in the same terms as it applies to the CBTS Chapter, and are consequently subject to the standstill and ratchet principles.

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26 The Articles on Expropriation and Transfers of the Investment Chapter explicitly included in the Financial Services Chapter are prime examples of the cross-reference technique.

27 OECD, International Investment Law: Understanding Concepts and Tracking Innovations, 243 (OECD 2008).

28 United States-Chile Free Trade Agreement, *supra* note 7, art. 10.7.

29 OECD, *supra* note 27 at 249.

Normally, when listing their non-conforming measures in each entry, the parties specify whether the reservation applies only for services and/or investment, and also define the obligation against which the measure is listed.

This NAFTA-inspired approach did not constitute a novelty for Chile. Chile had already followed this approach in its free trade agreements with Canada and Mexico. It was also the approach adopted in the negotiations of the free trade agreement with Korea, negotiated in parallel with that with the United States. Therefore, most of the measures contained in the Annexes on reservations of Chile were already identified during the negotiation of the free trade agreement with Canada in terms of content and degree of non-conformity. After the negotiation of the free trade agreement with the United States, Chile consolidated its current services and investment regimes and its legal framework due to the inclusion of a Market Access obligation and because of the level of ambition of the commitments taken in this free trade agreement, in terms of market openness and liberalization for the services and the investment sector.

C. Financial Services

The vast majority of free trade agreements adopted by Chile contain provisions and obligations on services' trade and investment that are now considered to be part of Chile's trade policy and an important aspect of its future trade negotiations. Currently, Chile has included financial services chapters in its free trade agreements with Canada,[30] the United States,[31] the European Union,[32] Japan,[33] Australia,[34] and the Pacific Alliance.[35] It also has agreed to introduce a financial services chapter in the Trans-Pacific Partnership (TPP), not yet in force.[36]

The inclusion of a financial services chapter in the free trade agreement with the United States was a novelty for Chile which did not have any previous experience in negotiating such provisions on the bilateral level. At the time of the negotiations with the United States, apart from the GATS, there was no other relevant agreement, while in the case of Mexico and Canada, this chapter was only

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30 Agreement to Amend the Free Trade Agreement Between the Government of Canada and the Government of the Republic of Chile, app. I, ch. H *bis* (Financial Services), Global Affairs Canada http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/chile-chili/amend2.aspx?lang=eng (last visited Oct. 4, 2016).

31 United States-Chile Free Trade Agreement, *supra* note 7, ch. 12.

32 Chile-European Free Trade Area Association Agreement, Jun. 26, 2016, ch. 2, *available at* https://www.direcon.gob.cl/wp-content/uploads/2012/01/Acuerdo-de-Asociaci%C3%B3n-Chile-Uni%C3%B3n-Europea-Parte-1.pdf.

33 Agreement between Japan and Chile for a Strategic Economic Partnership, Chi.-Jap., Mar. 27, 2007, ch. 10, OAS Information System on Foreign Trade, http://www.sice.oas.org/Trade/CHL_JPN/CHL_JPN_Index_e.asp.

34 Chile-Australia Free Trade Agreement, Jul. 30, 2008, ch. 12, OAS Information System on Foreign Trade, http://www.sice.oas.org/Trade/CHL_AUS_Final_e/CHL_AUSind_e.asp (last visited Oct. 4, 2016).

35 Pacific Alliance, Apr. 28, 2011, ch. 11, *available at* https://alianzapacifico.net/?wpdmdl=1327.

36 Trans-Pacific Partnership text released Jan. 26, 2016 following legal scrub, ch. 11, *available at* https://tpp.mfat.govt.nz/text.

subsequently negotiated. There are two main explanations for Chile's hesitation to include financial services in its trade policy. The first relates to the sensitivity of this sector, highly regulated in Chile in order to avoid future financial crises and therefore cannot be easily liberalized. The second relates to Chile's decision to pursue the gradual liberalization of this sector in order to avoid the errors of the past that led to the financial crisis in the 1980s. Chile requires to retain the possibility of restricting trade in the financial sector in the future, when facing financial distress.

Since the negotiation with the United States, Chile's approach in negotiating financial services was based on three principles: autonomy of the provisions, specificity of the commitments, and handing the institutional framework to experts. The autonomy principle is demonstrated by the inclusion of a specific self-contained financial services chapters, separate from the services and investment chapters. These chapters include their own provisions on the supply of financial services and the investment in financial institutions, such as national treatment and most-favored-nation treatment obligations, and some provisions are included by cross-reference from another chapter, such as in the transfers and expropriation obligations, incorporated from the investment chapter. At the same time, it is made clear that no provision of the free trade agreement apart from those included in the financial services chapter will apply to financial services. Another feature of the principle of autonomy is that the financial services chapter negotiated by Chile includes all four modes of supply with their own specific liberalization commitments, independently of the approach taken for the services and investment liberalization scheme. The specificity principle can be found in the particular obligations of the financial services chapter, to the extent that these provisions prevail over other provisions of the agreement and even they allow the possibility of imposing measures at the expense of market openness of the sector and their liberalization commitments. This is a key feature because it ensures the application of prudential measures. Finally, the institutional framework and the potential dispute settlement, State-State and Investor-State alike, of the financial services chapter are left in the hands of experts such as the experts committee and the panel of arbitrators. The architecture of the chapter thus departs from the original scheme of dispute settlement entrusted to international trade experts.[37]

In general terms, the negotiation of the Financial Services Chapter in the United States-Chile Free Trade Agreement followed the basic principles described above together with the NAFTA approach but included also some updates and improvements resulting from the experience accumulated under NAFTA, especially in relation to the application of the NAFTA's Financial Services Chapter. The final outcome was a chapter which includes an improved version of NAFTA with some new additions and features of GATS, especially with respect to provisions included in its Annex and in the Understanding on Commitments in Financial Services.[38]

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[37] *See* Lagos Weber & Araya Allende, *supra* note 19, at 111-12.

[38] Following the approach of the GATS, the NAFTA Financial Services Chapter adopted a national treatment model, submitting market openness to the domestic regulation of the country where the financial services are supplied. Financial institutions are therefore subject to a double regulatory burden, having to meet both the requirements of the country of origin and those of the country in which their services are supplied. The Chapter comprises all financial services, defined as services of any financial services nature, irrespective of whether they are supplied by a financial services supplier or

In terms of the substantive provisions of the financial services negotiations, the non-discrimination principle was introduced by the inclusion of the National Treatment and Most-Favored-Nation Treatment obligations. Nevertheless, the National Treatment Article differs from the corresponding article of NAFTA, mainly due to the fact that it introduces an obligation of general application, without specifications regarding the treatment accorded at the sub-federal level of government. However, in their specific commitments, the United States make clear that the national treatment obligation has to be understood as the treatment provided by the legislation of the state in which the supplier was established (home-state rule). Conversely, the Most-Favored-Nation clause is identical in both agreements.[39]

On the other hand, the United States-Chile Free Trade Agreement includes a specific provision on Market Access for Financial Institutions, similar to that of GATS Article XVI described above. However, the provision does not include the limitation relating to foreign equity participation as a Market Access restriction. It was agreed to introduce this restriction as a National Treatment limitation rather than as a Market Access limitation.

With respect to the obligation on Cross-Border Trade, which includes mode 1 and mode 2, a positive list included commitments for the supply of cross-border trade in services and for the consumption of specific services abroad. There is no standstill effect for the supply of services through modes 1 and 2 in sectors other that those specifically listed under this provision. Non-listed service sectors are excluded from the scope of the relevant obligations. In sum, the commitments made under the cross-border supply article were taken under a positive list for a specific number of financial services sectors and without standstill.

The provision on Senior Management is identical to the relevant NAFTA obligation in terms of prohibiting nationality and/or residency requirements for senior management positions and for more than a minority of the board of directors. The Transparency provision and the article on Treatment of Confidential Information introduce similar to the relevant NAFTA and GATS obligations.

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not. However, the Chapter distinguishes between financial services suppliers that might be regulated, and financial institutions that must be regulated. It also includes a Most-Favored-Nation Treatment clause, subject to a list of exceptions, thus allowing discrimination, especially in the area of the mutual recognition. As was the case in GATS, the National Treatment clause contained the obligation to provide to foreign suppliers treatment no less favorable than the treatment accorded to national suppliers. However, the main difference with GATS is that the treatment is applicable only when the foreign supplier is in the same or similar circumstances with the local service provider. Finally, NAFTA's Financial Services Chapter contains no provision similar to the GATS' Market Access Article. NAFTA includes also other relevant provisions such as transparency of regulations, prudential measures or exceptions, new financial services and data processing, the latter two inspired by the Memorandum of Understanding. In relation to commitments, reservations and market openness, NAFTA has followed a negative list approach, introducing standstill for commitments made on establishment, cross-border trade in financial services, national treatment, most-favored-nation treatment, new financial services and senior management. These commitments are also subject to the ratchet principle, providing for the automatic incorporation of any future liberalization of current reservations.

[39] Raúl E. Saéz & Sebastián Saéz, Las Negociaciones de Servicios Financieros de Chile 27 (N.U., CEPAL, Division de Comercio e Integración Jun. 2006).

As in the case of NAFTA, the Article on New Financial Services allows the authorization of new financial services, but recognizes the role of the supervisory body in regulating these activities, taking into account prudential considerations. The exception contained in Article 12.10 adopts the terms of NAFTA and GATS. It allows a party to adopt or maintain any measure for prudential reasons or in order to ensure the integrity and stability of the financial system, or any non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. Such measures may be introduced notwithstanding any commitment included in the Financial Services, the Investment, Services, Telecommunication, E-commerce and Competition Chapters. The Article also includes a specific exception related to the Transfers obligation and to measures related to the prevention of deceptive and fraudulent practices or to deal with the effects of a default on financial services contracts. The drafting of this Article recognizes the interaction between the different Chapters of the Agreement and the prevalence of the Financial Services Chapter, in the sense that these exceptions apply without prejudice not only to the commitments of the Financial Services Chapter, but also to those of the Services, Investment, E-Commerce, Competition and Telecommunication Chapters.[40]

For the Non-Conforming Measures Article, the Chapter adopted a hybrid approach for the scheduling of specific commitments. For some obligations a positive list approach was used whereas for others the parties adopted a NAFTA negative list approach. In the case of banking services and other services, with the exception of insurance, they followed a negative list approach with respect to the National Treatment, Most-Favored-Nation Treatment and Senior Management obligations; and for the Market Access obligation the parties adopted commitments under the form of Right of Establishment. However, in the insurance services sectors, the parties adopted a positive list approach with respect to the Market Access restrictions.[41]

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[40] *See* United States-Chile Free Trade Agreement, *supra* note 7, Ch. 12 (Financial Services), art. 12.10 ("Notwithstanding any other provision of this Chapter or of Chapters Ten (Investment), Eleven (Cross-Border Trade in Services), Thirteen (Telecommunications), Fifteen (Electronic Commerce), and Sixteen (Competition Policy, Designated Monopolies, and State Enterprises), including specifically Article 13.16 (Telecommunications - Relationship to Other Chapters), a Party shall not be prevented from adopting or maintaining measures for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial institution or cross border financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of this Agreement referred to in this paragraph, they shall not be used as a means of avoiding the Party's commitments or obligations under such provisions. Nothing in this Chapter or Chapters Ten (Investment), Eleven (Cross-Border Trade in Services), Thirteen (Telecommunications), Fifteen (Electronic Commerce), and Sixteen (Competition Policy, Designated Monopolies, and State Enterprises), including specifically Article 13.16 (Telecommunications - Relationship to Other Chapters), applies to nondiscriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 10.5 (Performance Requirements) with respect to measures covered by Chapter Ten (Investment) or Article 10.8 (Transfers) …").

[41] Most of the limitations or restrictions listed by Chile in their annexes on reservations are related to the right of Establishment Article and especially with respect to a specific legal juridical type of organization for the establishment of a company in their territory.

The scope of NAFTA's right of establishment article was further developed and enhanced in the United States-Chile Free Trade Agreement. This provision, as mentioned above, applies to banking and other financial services, excluding insurance services, and is not subject to the ratchet effect. To some extent, this provision restores the approach taken in the Understanding, facilitating the adoption of commitments under a negative list approach. On the other hand, inspired by GATS, the Market Access Article applies to insurance services and adopts a positive list approach for the listing of specific commitments.

D. Telecommunications

Chile has included telecommunication chapters in its agreements with the United States,[42] Canada,[43] Mexico,[44] Korea,[45] Australia,[46] the European Union[47] and the Pacific Alliance.[48] The telecommunication chapters of these agreements are not identical. They contain different commitments, mainly because they reflect the emergence of new technologies that have redefined this sector. The most straightforward example is that of the supply of fixed telecommunication services as opposed to the supply of mobile phone services.

However, the chapter's objective to provide common standards for the domestic regulation applicable to the supply of telecommunications services remains. Based on the NAFTA approach, the telecommunication chapters neither provide for market openness nor contain liberalization commitments. As a result, whether the sector is open to foreign suppliers of services and foreign investors or not depends on the commitments made under the Annexes on reservations for the CBTS and investment chapters, and not on the commitments made under this chapter.

At the time of the negotiations with the United States, Chile had already negotiated telecommunication chapters with Canada and Mexico, both of them on the basis of the text of NAFTA. Provisions on Telecommunications of United States-Chile Free Trade Agreement were structured on the basis of the obligations contained in the GATS Annex on Telecommunications and in the WTO Reference Paper on Basic Telecommunications. The Chapter therefore ensures that all service suppliers of the other party shall have access to and use of any public telecommunications network or service offered in its territory or across its borders in a timely fashion, on reasonable and non-discriminatory terms and conditions.[49]

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42 United States-Chile Free Trade Agreement, *supra* note 7, ch. 13.

43 Canada-Chile Free Trade Agreement, *supra* note 14, ch. I.

44 Chile-Mexico Free Trade Agreement, *supra* note 15, ch. 12.

45 Chile-Korea Free Trade Agreement, Feb. 15, 2003, OAS Information System on Foreign Trade, http://www.sice.oas.org/Trade/Chi-SKorea_e/ChiKoreaind_e.asp (last visited Oct. 4, 2016).

46 Chile-Australia Free Trade Agreement, *supra* note 34, ch. 11.

47 Chile-European Free Trade Area Free Trade Agreement, *supra* note 32.

48 Pacific Alliance, *supra* note 35.

49 The most important feature of the Telecommunications Chapter is the reasonable access to networks by foreign suppliers in a competitive environment. This depends on the ability of suppliers to access each other's facilities and services, in which the operators have the necessity to interconnect with each other, which normally requires to have access to the infrastructure of the competitors.

Accordingly, the Telecommunications Chapter contains provisions intended to ensure that local companies offer such access on a reasonable and timely basis while guaranteeing that foreign suppliers have equal access, relative to local suppliers, to government-controlled resources such as spectrum, rights of way, and phone numbers, necessary for the supply of the service, thus enhancing competition in the sector. In order to ensure access and use of public telecommunication networks for suppliers, the Chapter introduces an obligation of local suppliers of public telecommunications services to provide interconnection to foreign suppliers of such services.

The Chapter introduces also obligations on major suppliers of public telecommunications services in order to ensure a non-discriminatory treatment regarding the availability, provisioning, rates, or quality of like public telecommunications services, and the availability of technical interfaces necessary for interconnection. Moreover, it also contains disciplines regarding competitive safeguards, unbundling of networks, co-location and resale.

The relevant provisions on number portability and dialing parity were drafted in a general manner, taking into consideration the development of Chilean legislation at the time that did not allow the introduction of more ambitious commitments. However, the legislation ensuring number portability and dialing parity is now fully implemented. This new framework allows Chile to undertake much stronger commitments in these areas in the TPP negotiations. Similarly, the lack of an appropriate regulatory framework to ensure non-discriminatory access to submarine cable systems, made it challenging for Chile to include a stronger provision on Submarine Cables Systems, raising concerns among regulators.

In relation to the domestic legal framework for the supply of public telecommunications services, the Chapter includes provisions on transparency in rule-making, developing and enforcing rules, transparent criteria for the licensing procedure, ensuring the independence of the regulatory body as well as establishing due process and rights of appeal for resolving domestic telecommunication disputes. Finally, the Chapter also includes obligations in relation to the regulation of the telecommunications sector in general, such as the obligation to provide universal service, allocation and use of scarce resources, flexibility in the choice of technologies and forbearance.

E. E-Commerce

Chile included a Chapter on Electronic Commerce in a bilateral free trade agreement for the first time in its agreement with the United States.[50] Chilean past experience was limited to the multilateral level, through the work program established by the WTO on E-Commerce, a topic discussed in several WTO bodies and committees as well as on the APEC and the OECD level. E-commerce provisions relate to trade in goods, services, telecommunications and intellectual property rights. In that sense, the regulation of e-commerce has a multidimensional approach given that it addresses horizontal issues which are subject to different regulation.

Article 15.2 of the E-Commerce Chapter begins by recognizing that the supply of a service through digital means falls within the scope of the CBTS or

[50] United States-Chile Free Trade Agreement, *supra* note 7, ch. 15.

Financial Services Chapters, depending on the type of service supplied by digital means. As a result, reservations listed as non-conforming measures apply also to the E-Commerce Chapter. Moreover, the Chapter establishes the commitment not to apply any type of customs duties to digital products.[51] However, Article 15.1 prescribes that there is no obligation to prevent a party from imposing internal taxes, directly or indirectly, on digital products, provided they are imposed in a manner consistent with the Agreement.[52]

Article 15.4, perhaps the most important provision of the Chapter, guarantees the non-discrimination principle for the treatment of digital products of the other party. However, this obligation of National Treatment and Most-Favored-Nation Treatment is subject to specific requirements and to the possibility of listing exceptions or non-conforming measures, even though the parties have not exchanged any list of non-confirming measures under this Chapter. Finally, the parties introduced a Cooperation Article, highlighting the importance of small and medium enterprises in using and participating in the e-commerce, the importance of information sharing and regulatory experience and also of developing the private sector self-regulation in this field.

F. Temporary Entry of Business Persons

Finally, unlike the agreements of the United States with Central America and Dominican Republic (CAFTA-DR), Peru and Colombia, the United States-Chile Free Trade Agreement includes a Chapter on Temporary Entry of Business Persons.[53] This Chapter aims to facilitate the temporary entry of business persons on a reciprocal basis, establish transparent criteria and procedures for temporary entry as well as to ensure border security and protect the domestic labor force and permanent employment in the respective territories of the parties. The main obligation consists of applying all the measures relating to the entry in an expeditious manner so as to avoid unduly impairing or delaying the trade in goods or services or the conduct of investment activities.

The requirement of an entry visa for natural persons is not considered to be a breach of this Chapter. The obligation of granting temporary entry to business persons is subject to the relevant domestic regulation of the country in accordance with the provisions of the Chapter, including those of Annex 14.3. This latter defines entry requirements, activities and permits for specific categories of business persons, namely, for Business Visitors, Trade and Investors, Intra-Company Transferees and Professionals, each being subject to specific conditions and requirements for granting a temporary entry and for staying in the territory of the other party.

A major concession granted by the United States government was its commitment to annually approve up to 1.400 initial applications of Chilean business persons seeking temporary entry under Section D of Annex 14.3 to engage in a

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51 Digital products are defined as computer programs, text, video, images, sound recordings, and other products that are digitally encoded and transmitted electronically, regardless of whether a party treats such products as a good or a service under its domestic law.

52 The Agreement recognizes the same principle with respect to duties imposed on trade in goods [United States-Chile Free Trade Agreement, *supra* note 7, art. 3.5].

53 United States-Chile Free Trade Agreement, *supra* note 7, art. 14.1

business activity at a professional level. This advantage is of particular importance given that it has been granted only to Chile and Singapore and was never extended to other United States trading partners.[54]

IV. The Influence of the Nafta Approach

In relation to trade in services negotiations in the context of a free trade agreement with the United States, Latin American countries had to adopt and adapt to the U.S. model. Trade in services and related matters were largely inspired by the NAFTA as a general legal reference in terms of structure of commitments and disciplines in which trade in services is addressed. This approach has also included provisions from GATS/WTO obligations and new developments that have taken place since the entry into force of NAFTA, particularly in the telecommunications and financial services negotiations. The differences in the outcomes of the bilateral trade negotiations is explained by the countries' degree of liberalization at the moment of initiating negotiations and, as mentioned previously, by the entry into force of GATS. Although free trade agreements with the United States cover a wide range of services, financial and telecommunications services arise as the main targeted sectors.[55]

Moreover, when negotiating trade in services with other countries, Latin American countries apparently prefer to negotiate under the NAFTA-type approach. In this regard, the adoption of a negative list of reservations for cross-border services' trade and investment, the introduction of separate chapters on telecommunications and financial services and the inclusion of e-commerce and temporary entry provisions has been the preferred approach for some Latin American countries in the last 10 years, most notably for countries like Chile, Peru, Mexico, Colombia (the Pacific Alliance members).

Since NAFTA, Mexico has played a pivotal role in extending this liberalization approach and similar types of disciplines on services to other sub-regional agreements that it has signed with countries in South and Central America, such as Colombia,[56] Venezuela,[57] Bolivia,[58] Chile,[59] Costa Rica, Nicaragua, El Salvador, Guatemala, and Honduras.[60]

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54 *See* Lagos Weber & Araya Allende, *supra* note 19, at 130-31.

55 *See* Saéz, *supra* note 2, at 23-24.

56 Colombia-Mexico Free Trade Agreement, Col.-Mex., Jun. 13, 1994, OAS Information System on Foreign Trade, http://www.sice.oas.org/Trade/go3/G3INDICE.ASP (last visited Oct. 4, 2016).

57 Mexico and Venezuela originally signed a Free Trade Agreement as part of the Mexico-Colombia Agreement [*See* M. Angeles Villarreal, *Mexico's Free Trade Agreements,* Congressional Research Service 11 (2012) *available at* https://www.fas.org/sgp/crs/row/R40784.pdf (last visited Oct. 4, 2016)].

58 Bolivia-Mexico Free Trade Agreement, Bol.-Mex., May 17, 2010, OAS Information System on Foreign Trade, http://www.sice.oas.org/Trade/BOL_MEX_66/BOL_MEX_Ind_s.asp (last visited Oct. 4, 2016).

59 Chile-Mexico Free Trade Agreement, *supra* note 15.

60 Central America-Mexico Free Trade Agreement, Costa Rica-El Salv.-Guat.-Hond.-Nic.-Mex., Apr., 17, 1998, OAS Information System on Foreign Trade, http://www.sice.oas.org/Trade/CACM_MEX_FTA/Index_s.asp (last visited Oct. 4, 2016).

Likewise, countries that have negotiated services chapters with the United States after the entry into force of NAFTA have benefited from the experience and the reservations introduced by the NAFTA members. In fact, in many instances, some of the reservations introduced by non-NAFTA members in their negotiations with NAFTA members were "mirror reservations" covering important sensitive issues, including, among others, social services, minority and aboriginal affairs.[61] This was the case in the free trade agreements between the United States and Colombia,[62] Panama,[63] Peru,[64] and Central America and Dominican Republic (CAFTA-DR).[65]

In terms of structure, these free trade agreements have followed the pattern of the Investment, Services and Related Matters Part of NAFTA: a CBTS chapter regulating only modes 1, 2 and 4; an investment chapter addressing investments in all sectors, including mode 3 or commercial presence, a specific self-contained chapter on financial services dealing not only with the supply of financial services, but also with the establishment of a commercial presence; a telecommunications chapter regulating the access and use of public telecommunication networks; and a chapter including issues on e-commerce. In this respect, the only difference that could be identified is the lack of a temporary entry chapter. Since the negotiations with Chile and Singapore, the United States did not include a chapter on Temporary Entry of Business Persons in their free trade agreements negotiations.

With regard to the commitments made by the Latin American countries under these agreements, the results of the negotiations were similar to the concessions exchanged in other bilateral free trade agreements with other countries, but the trend has been to some extent broader and deeper in the commitments made under their agreements with the United States. On the other hand, the United States have not introduced any meaningful modification to their regulatory regime in the context of these negotiations, but committed themselves to maintaining their current level of liberalization of services' trade and investment in similar terms to their GATS Schedule of Specific Commitments, albeit subject to the standstill and the ratchet principles.

Substantive obligations of the free trade agreements between the United States and the Latin American countries have numerous differences. For example, in the case of the United States-Chile Free Trade Agreement, there was no provision for the transfers obligation included in the CBTS Chapter and, as stated before, the United States did not include a temporary entry chapter in their agreements with Central America and Dominican Republic (CAFTA-DR), Peru and Colombia. Such differences may be attributed to the specific interests of the parties involved in each bilateral negotiation.

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61 *See* Saéz, *supra* note 2, at 23-24.

62 United States-Colombia Trade Promotion Agreement, Aug. 24, 2006, https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text (last visited Oct. 4, 2016).

63 United States-Panama Trade Promotion Agreement, Oct., 31, 2012, https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text (last visited Oct. 4, 2016).

64 United States-Peru Trade Promotion Agreement, Feb. 9 2009, https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text (last visited Oct. 4, 2016).

65 United States-Dominican Republic-Central America Free Trade Agreement (CAFTA-DR), Costa Rica-Dom R.-l Salv.-Guat.-Hond.-Nic.-U.S., Aug. 05, 2016, https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text (last visited Oct. 4, 2016).

Several bilateral free trade agreements concluded among Latin American countries have also followed the approach of NAFTA. Chile and Peru negotiated a bilateral agreement including a CBTS chapter regulating modes 1, 2 and 4, an investment chapter for investments in all sectors and a temporary entry chapter for business persons. The agreement did not contain a telecommunications or a financial services chapter because these services were not part of their respective commercial interests. However, the agreement did include a commitment for future negotiations in financial services. The Mexico-Peru Free Trade Agreement,[66] follows the structure of the Chile-Peru Free Trade Agreement,[67] but includes also a financial services chapter. This is also the case for the Colombia-Mexico Free Trade Agreement[68] that includes also a telecommunications chapter. The Free Trade Agreement between Chile and Colombia includes also an e-commerce chapter and a future negotiation clause in relation to financial services.[69]

Most notably, the trend to adopt the NAFTA approach is not limited to free trade agreements negotiated among Latin American countries, it is also extended to their trade relations with Canada and to trade agreements with some Asia Pacific countries, such as Japan, New Zealand and Australia. Perhaps one of the reasons why most of those countries have been part of the TPP negotiations was the fact that they have already had experience in negotiations with the NAFTA model and most of them, with the exception of Japan and New Zealand, had already concluded a free trade agreement with the United States.[70]

Finally, the Pacific Alliance Trade Protocol constitutes a consolidation of the NAFTA model for trade in services. Mexico, Chile, Colombia and Peru decided to adopt a negative list approach for their commitments on services' trade and investment, introduce a specific self-contained chapter on financial services cross-border trade and investment and incorporate a separate chapter on telecommunications and e-commerce. Despite the differences between the substantive provisions of the Pacific Alliance Trade Protocol and the NAFTA prototype, the basic structure as well as the scope and coverage of the specific chapters and their interaction was maintained almost unaltered. This confirms the preference of the Pacific Alliance members for a NAFTA-inspired model of regulation of their trade and investment relations.

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66 Mexico-Peru Free Trade Agreement, Mex.-Per., Apr. 6, 2011, OAS Information System on Foreign Trade, http://www.sice.oas.org/Trade/MEX_PER_Integ_Agrmt/MEX_PER_Ind_s.asp (last visited Oct. 4, 2016).

67 Chile-Peru Free Trade Agreement, Chi.-Per., Aug. 22, 2006, OAS Information System on Foreign Trade, http://www.sice.oas.org/Trade/CHL_PER_FTA/Index_s.aspasp (last visited Oct. 4, 2016).

68 Colombia-Mexico Free Trade Agreement, *supra* note 56.

69 Chile-Colombia Free Trade Agreement, Chi.-Col., Nov. 27, 2006, OAS Information System on Foreign Trade, http://www.sice.oas.org/Trade/CHL_COL_FTA/CHL_COL_ind_s.asp (last visited Oct. 4, 2016).

70 Countries like Vietnam, Brunei and Malaysia adopted the negative list approach for services and investments and introduced chapters on telecommunication and financial services, for the first time in the context of free trade agreement negotiations. However, for the rest of the TPP member states, the negative list approach for trade in services and related matters has already been the preferable approach in their trade relations or at least they had prior some experience by adopting this model in some of a their free trade agreements.

V. Concluding Remarks

The establishment of the World Trade Organization and the adoption of GATS had a major impact on the definition and the development of global rules governing international trade flows. However, the NAFTA model has also shaped global trade relations among numerous countries, especially among those who had negotiated a free trade agreement with the United States and with the other NAFTA member states. Some aspects of the NAFTA model have moved beyond its members' trade policy scope and have been adopted by other countries, especially in Latin America and the Pacific Rim, as their preferred approach to their own bilateral trade arrangements.

In the case of Chile, the free trade agreement with the United States was, at that time, the most challenging bilateral trade negotiation, not only because of the importance of the trading partner, but also because of the level of ambition in terms of scope and coverage of the agreement. One of the most demanding issues was addressing the entire implications of the structure of the agreement and the interaction between different chapters in order to assess the effects of the commitments undertaken. These effects were particularly complex in the context of the services' trade related matters negotiations. Arguably, the rest of Latin American countries that entered into free trade agreement negotiations with the United States faced the same difficulties.

Unlike GATS, under the NAFTA approach trade in services is addressed in several chapters of the agreement. On one hand, the modes of supply of services having a cross-border element (modes 1, 2 and 4) are regulated in the CBTS chapter while the establishment of a commercial presence (mode 3) is regulated in the Investment chapter. On the other hand, the NAFTA approach involves the introduction of a separate and self-contained financial services chapter regulating all issues related to the supply of financial services and investment in financial institutions. Moreover, it involves the introduction of specific chapters on telecommunications, e-commerce and on occasions on temporary entry of natural persons, dealing with regulatory issues of specific sectors in order to facilitate the supply of telecommunications services, the entry of natural persons (mode 4) and some aspects of the electronic supply of services.

The trade liberalization aspects of the NAFTA approach are based on a negative listing, whereby all sectors and measures are to be liberalized unless otherwise specified in the annexes on reservations containing non-conforming measures to the obligations of mainly the CBTS and investment chapters. Under this so-called "list or lose" technique, listing refers to measures which are not in conformity with one or more of the obligations of the chapters (most-favored-nation treatment, national treatment, performance requirements, local presence, and market access). The same approach applies for commitments made under the financial services chapters. Apart from reservations for the specific commitments on financial services, the general reservations for CBTS and investment apply also to financial services.

In general terms, the content of obligations in NAFTA-inspired services trade negotiations and in GATS-type agreements do not differ much. National treatment and most-favored-nation treatment are the essential building blocks for any agreement on services. Despite the different techniques, substantive provisions in both cases are subject to some sort of reservations or exceptions, whether

through a positive list of specific commitments or through a list of reservations.[71] Likewise, agreements that have followed the NAFTA approach introduced general obligations of most-favored-nation treatment and national treatment. Country-specific reservations for both principles were introduced on services and investment sectors. Such reservations included measures that violated the principles and, in order for the parties to maintain them or continue to apply them, it was required to list them as exceptions to the specific principle. This approach applies also to the other obligations of the services chapter such as market access and local presence.

The investment chapter has exactly the same structure in terms of listing of non-conforming measures that violate the general obligations included therein. It also contains specific national treatment and most-favored-nation treatment provisions along with an article on performance requirements and senior management and board of directors. In this case, the annexes on reservations contain the non-conforming measures to both the CBTS and investment chapters. Furthermore, the non-conforming measures article of both chapters is subject to the standstill and ratchet principle.

The chapter on liberalization commitments in the financial services sector has its own specific set of reservations. The obligations and the specific financial services included depend on the way that the commitments are listed. In some cases a positive list of sectors is introduced and whereas in others a negative list is adopted. The ratchet principle has some exceptions.

Telecommunications, temporary entry and e-commerce chapters have no annexes on reservations since they relate to specific regulation on these topics and have no market liberalization component. Those chapters are designed to complement the market access granted by the main CBTS and investment chapters.

This negative list approach has been incorporated into a large majority of the sub-regional agreements in the Western Hemisphere encompassing services. Since NAFTA came into force the United States and Mexico have played an essential part in extending the NAFTA approach in Latin America and Asia Pacific. Likewise, Chile has adopted this NAFTA negative list approach as the preferred model for services negotiations and has concluded similar agreements with Canada, Mexico, Peru, Colombia, Central America, P4 (New Zealand, Singapore and Brunei Darussalam), Australia and Japan.

In Latin America and in the Pacific Rim, the network of bilateral and regional free trade agreements such as the Pacific Alliance and the TPP has created a significant amount of treaty practice for countries adopting the NAFTA approach, generating an opportunity for harmonizing global rules applicable to trade in services, at least on a regional level. In terms of importance, GATS continues to be the only multilateral agreement governing trade in services. However, the growing number of countries adopting the negative list approach has made the NAFTA model one of the most relevant frameworks for the adoption of trade in services commitments in the future.

[71] National Treatment under GATS is not a general obligation but rather the result of a specific commitment made by each member in its Schedule of Specific Commitments. This is also the case for the Market Access obligation. It is also important to bear in mind that even though the Most-Favored-Nation provision is a general obligation, it is subject to a list of exemptions.

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Free Trade Agreements With The United States: 8 Lessons For Prospective Parties From Australia's Experience

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ABSTRACT

This article identifies 8 key lessons for those States contemplating a free trade agreement with the United States (U.S.) arising from Australia's experience. The standards of intellectual property protection under the Australia-U.S. Free Trade Agreement and their impact on pharmaceutical prices in Australia are a particular focus. Prospective parties must first conduct a national interest self-assessment which reviews the desired strength of intellectual property protection under national law and their preference for using flexibilities available to them under the existing international intellectual property rights framework. The United States negotiates free trade agreements in light of previous ones, negotiating outcomes obtained in other fora and the decisions of international trade tribunals. Negotiations typically occur behind closed doors, which is a process having adverse implications for transparent decision-making, public consultation periods and contributions from interested non-governmental actors. A concluded agreement will build on prior treaties and influence the course of future international arrangements. But the impact of a United States free trade agreement is not always clear, including because of a lack of reliable data, and the extent of national legal change is a contested issue given existing reform agendas and external influences. The United States seek to redesign national health care systems in its own image and had little success in Australia's case. National legal systems need not be harmonised: although there can be some convergence in intellectual property rights regimes, significant differences may also remain. Negotiators must reconcile competing cultures, philosophies and perspectives between States for a free trade agreement to be worthwhile.

CONTENTS

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I. Introduction

The free trade agreement concluded between Australia and the United States (U.S.) was one of the first bilateral agreements between the United States and a developed country. The Australia-U.S. Free Trade Agreement (AUSFTA),[1] numbering some 1000 pages, covers a multiplicity of topics. Part II provides a very brief overview. This article then reviews the literature and other material relevant to the standards of intellectual property protection provided under this agreement. Because AUSFTA's implications for Australia's healthcare system and pharmaceutical prices were matters of considerable controversy when the treaty was first concluded in 2004, this article will focus on developments since that time with particular reference to one of the critical drivers: pharmaceutical industry interests. The key lessons for other States as derived from Australia's particular experience are identified and discussed in Part III. Part IV briefly puts several conclusions.

II. Overview of the AUSFTA

The AUSFTA was promptly negotiated and finalised. Negotiations commenced in November 2002. Trade representatives met over five rounds of negotiations between March 2003 and February 2004. The agreed text was finalised on February 8, 2004, signed on May 18, 2004, publicly released on 4 March 2004 and tabled in Parliament on March 8, 2004. The AUSFTA was then referred for parliamentary scrutiny, with two committees endorsing the agreement.[2] These committees confronted a very tight deadline in which to publicly consult and consider submissions about a complex agreement covering a wide array of controversial issues.

The U.S. Free Trade Agreement Implementation Act 2004 (Cth) was passed in August 2004 to implement the AUSFTA.[3] This legislation did not:

> represent the wholesale adoption of the US intellectual property regime. We have not stepped back from best practice elements of Australia's copyright regime-but we have strengthened protection in certain circumstances-providing a platform for Australia to attract and incubate greater creativity and innovation.[4]

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1 United States-Australia Free Trade Agreement (May 18, 2004) T.I.A.S. No. 6422; [2005] A.T.S. 1.

2 Parliament of Australia Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Final Report on the Free Trade Agreement between Australia and the United States of America (2004); Joint Standing Committee on Treaties, The Australia-United States Free Trade Agreement, Report No. 61 (2004). The Copyright Legislation Amendment Bill 2004 was referred for review to the Senate Legal and Constitutional Legislation Committee on 6 December and that Committee was required to provide its report on the very next day.

3 Treaties are not "self-executing" under Australian law but first require implementing legislation to take effect. For a review of the legislative provisions, *see* Australian Parliamentary Library, Free Trade Agreement Bill 2004 (Cth), Parliamentary Bills Digest No. 21 (2004-2005).

4 Hon. Mark Vaile, Minister for Trade, Reading Speech introducing the U.S. Free Trade Agreement Implementation Bill 2004, House of Representatives Hansard (Jun. 23, 2004), 31218.

The principal political opposition party supported the legislation but identified several problems arising from enhanced copyright protection.[5] The minor parties opposed the AUSFTA, with one commenting that:

> By adopting the worst aspects of American law, we are undermining the creative potential of many industries and the creative enjoyment and participation of our citizens.[6]

Additional legislation clarifying several copyright changes followed. These produced "some important, and in some cases radical" amendments to copyright protection in Australia whose effect and interaction with the existing law was "complex and unpredictable."[7] The scheme commenced on January 1st 2005. Australian copyright law thus underwent three separate tranches of amendments to ensure compliance with AUSFTA, with the final implementation stage completed in December 2006.

Intellectual property is addressed in Chapter 17 of the AUSFTA and by accompanying side letters.[8] Chapter 17 covers trade marks (Article 17.2), domain names (Article 17.3), copyright (Article 17.4), designs (Article 17.8), patents (Article 17.9), pharmaceutical and other data (Article 17.10), encrypted program-carrying satellite signals (Article 17.7) and enforcement (Article 17.11). The Chapter also outlines the liability of internet service providers (Article 17.11.29), the consequences for circumventing technological measures which control access (Article 17.4.8) and provisions for those who knowingly remove or alter electronic rights management information (Article 17.4.9).

III. Eight Lessons from the Negotiation of the AUSFTA

A. States Must Assess National Interests Before Adhering to a Free Trade Agreement

Free trade agreements are concluded by States in their sovereign capacity consistent with their perceived national interest. The negotiating objectives of the United States included establishing standards which built on existing international intellectual

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5 Colette Ormonde, *Copyright Overboard? The Debate After the Australia-United States Free Trade Agreement*, InCite 8 (2004).

6 Cth, In Committee, Senate, 12 Aug. 2004, 264051 (Senator Kerry Nettle) (Austl).

7 Jacob Varghese, *Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004* 8 (Australian Parliamentary Library Current Issues Brief No. 3, Aug. 3, 2004).

8 For an overview of Chapter 7, *see* Christopher Arup, *The United States-Australia Free Trade Agreement - The Intellectual Property Chapter*, 15 A.I.P.J. 205 (2004); David Richardson, *Intellectual Property Rights and the Australia-United States Free Trade Agreement* (Australian Parliamentary Library Research Paper No. 14, 2003-4). *See generally* Department of Foreign Affairs and Trade, Australia-United States Free Trade Agreement - Guide to the Agreement (2005); Vasantha Stesin & Paul Power, *Patents and the Australia-U.S.A. Free Trade Agreement*, 14 H.L.B. 1 (2005).

property agreements; enhancing protection for new technical areas (such as internet service provider liability); making Australia apply legal protection more consistent with U.S. law and practice; and strengthening domestic enforcement procedures (including criminal penalties) to address piracy and counterfeiting.[9]

Australia's negotiating objectives were to implement internationally-agreed intellectual property standards and maintain a balance between intellectual property rights holders and the interests of others (including users, consumers, communication carriers and distributors, as well as the education and research sectors).[10]

Australia agreed to the AUSFTA not because the copyright provisions were considered desirable or because Australia is a major producer of generic pharmaceuticals. There is at most a small industrial constituency in Australia resisting U.S. demands for market access. The potential for higher pharmaceutical prices was tolerated because Australian agricultural and farming interests would benefit.[11] Australia also perceived advantages for government procurement. In addition to the incumbent government's interest in establishing closer economic and political ties with the U.S., Australia's motivation included furthering Asian trade, remedying stalled multilateral trade negotiations, removing U.S. tariffs against the Australian wine industry and lamb imports, and securing access to senior Bush administration officials.

Australia's acquiescence to U.S. demands to expand intellectual property rights protection was consistent with its preconceived policy to that end.[12] Australia sought to increase U.S. market access, facilitate North American foreign investment and enhance protection for its American investments. Australia has a relatively small intellectual property rights-oriented industry so sacrificed very little to achieve these objectives. Strengthening intellectual property rights was unlikely to adversely affect Australia's economy. Australian negotiators sought to promote Australia's trade liberalization policies and provide economic opportunities for Australian businesses. Thus the Australian Minister for Trade said:

> We are pursuing the concept of a Free Trade Agreement with the United States because we see an opportunity to open better opportunities for Australian exporters in the world's largest and most dynamic economy.[13]

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9 United States Trade Representative Robert Zoellick, Letter to Congress (2002), *available at* www.ustr.gov/releases/2002/11/2002-11-3-australia-byrd (on file with the author).

10 Dep't Foreign Affairs & Trade, Statement of Australia Objectives, *available at* www.dfat.gov.au/trade/negotiations/us_australia_objectives.html (on file with the author).

11 Frederick Abbott, *Intellectual Property Rights in Global Trade Framework: IP Trends in Developing Countries*, 98 Am. Soc'y. Int'l L. Proc. 95, 97, 99 (2004). *See also* Kayleen Manwaring, *The Price of Beef in a Copyright Market: the Effects of Chapter 17 of the Australia-US Free Trade Agreement*, 23 Copy Reptr 60 (2005).

12 Ralph Fischer, *The Expansion of Intellectual Property Rights by International Agreement: A Case Study comparing Chile and Australia's Bilateral FTA Negotiations with the US*, 28 Loy. L.A. Int'l & Comp. L. Rev. 129, 164 (2006).

13 Hon. Mark Vaile, Australian Minister for Trade, Australia and Trade: Our Nation's Strength, Our Nation's Future, Speech delivered at the launch of the Trade Outcomes and Objectives Statement, Canberra (Apr. 3, 2001).

Nevertheless, the value to Australia of concluding a free trade agreement with the U.S. attracted controversy.[14] Tightening intellectual property rights protection to increase the level of rent for private industry could inflict substantial harm to a State. Existing intellectual property rights should not be enhanced absent a clear justification and after a State has comprehensively analysed the economic and social costs and benefits.

Thus, States such as New Zealand for example should be cautious about blindly following Australia and accepting the standard terms of a U.S. free trade agreement.[15] The United States seeks significantly higher levels of intellectual property protection than currently provided under New Zealand law. The AUSFTA increased intellectual property protection in Australia without a full public debate or clearly-drawn justifications. Intellectual property protection was traded off against concessions obtained in other areas. But New Zealand is in a weak negotiating position relative to the United States: it would pursue greater access to the U.S. agricultural market but has little to offer the United States other than strategic gains (for example, limiting polarisation within the Asia-Pacific region). Although some changes required by a New Zealand-U.S. Free Trade Agreement would be beneficial, significant economic cost would also be imposed on New Zealand users, the economy, and New Zealand's creative industries.

Furthermore, the AUSFTA has implications for a single agency with which to regulate pharmaceutical products within a trans-Tasman market. The Australia New Zealand Therapeutic Products Authority (ANZTPA) was intended to replace both the Australian Therapeutic Goods Administration (TGA) and the New Zealand Medicines and Medical Devices Safety Authority.[16] The ANZTPA could inherit significant obligations which were imposed on the TGA by the AUSFTA which could significantly impact pharmaceutical regulation in New Zealand.[17] Thus prospective parties such as New Zealand which contemplate a free trade agreement must first assess the compatibility of their ideology, national interests and perspectives with that of the United States.

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14 Compare Peter Drahos and David Henry, *The Free Trade Agreement Between Australia and the United States Undermines Australian Public Health and Protects US Interests in Pharmaceuticals*, 328 Brit. Med. J. 1271 (2004); Andrew Stoler, *Australia-U.S. Free Trade: Benefits and Costs of an Agreement*, *in* Free Trade Agreements: U.S. Strategies and Priorities 95 (Jeffrey Schott ed., Peterson Institute for International Economics 2004).

15 Anna Kingsbury, *Intellectual Property Provisions in Bilateral and Regional Free Trade Agreements: What Should New Zealand Expect from a New Zealand/United States Free Trade Agreement?,* 10 N.Z.B.L.Q. 222, 234-35 (2004).

16 *See further* Australia-New Zealand Agreement for the Establishment of a Joint Scheme for the Regulation of Therapeutic Products (Dec. 10, 2003) [2003] ATNIF 22; Joint Standing Committee on Treaties, Parliament of Australia, Inquiry into the Agreement Between the Government of Australia and the Government of New Zealand for the Establishment of a Joint Scheme for the Regulation of Therapeutic Products, Report No. 62, Canberra (2004).

17 Thomas Faunce, Kellie Johnston &Hilary Bambrick, *The Trans-Tasman Therapeutic Products Authority: Potential AUSFTA Impacts on Safety and Cost-Effectiveness Regulation for Medicines and Medical Devices in New Zealand*, 37 Vict. U. Wellington L. Rev. 365 (2006).

B. Free Trade Agreements Build on U.S. Past Experience

The AUSFTA established an agreed floor: the United States and Australia will provide a minimum level of protection and any additional protection or enforcement if not inconsistent with that treaty. Australia and the U.S. have moreover affirmed the importance of existing international frameworks for intellectual property protection. In particular, the AUSFTA will be interpreted in light of the principles and rules established by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[18] Thus Australia and the United States "affirm their rights and obligations with respect to each other under the TRIPS Agreement" (Article 17.1, AUSFTA). They also "affirm their existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which both Parties are party, including the WTO [World Trade Organization] Agreement" (Article 1.1, AUSFTA).

TRIPS contains provisions ("flexibilities") which seek to ensure that public health needs are met by lowering costs, increasing access to medicines and facilitating generic imports.[19] These flexibilities are particularly intended to promote access to affordable medication within developing States. Mandatory limitations and exceptions within an intellectual property regime can promote innovation, creativity and socially-beneficial uses. They are part of the "development agenda" promoted by the World Intellectual Property Organization among others and are reflected in international instruments including the Washington Declaration on Intellectual Property and the Public Interest.[20] Such efforts counter the trend towards using international trade agreements to enact highly specific and enforceable proprietor rights.

As a global agreement on intellectual property standards, TRIPS is especially relevant for States lacking that level of protection. TRIPS primarily affects developing States by imposing minimum legal standards and requiring enforcement. TRIPS has had little effect in developed market economies which already have strong intellectual property rights protection. Thus Australia's adoption of TRIPS in 1995 did not necessitate significant change to its intellectual property laws (apart from lifting the standard patent term from 16 to 20 years).[21]

The Doha Declaration states that TRIPS "can and should be interpreted and implemented in a manner supportive of WTO members' right to protect public health and, in particular, to promote access to medicines for all."[22] The U.S. Congress

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18 Agreement on Trade-Related Aspects of Intellectual Property Rights (Apr., 15, 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Results of the Uruguay Round, 1869 U.N.T.S. 299, 33 I.L.M. 1143 (1994), [1995] ATS 38.

19 *See e.g.,* Brook Baker, *Arthritic Flexibilities for Accessing Medicines: Analysis of WTO Action Regarding Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, 14 Ind. Int'l & Comp. L. Rev. 613 (2003).

20 Global Congress on Intellectual Property and the Public Interest, *Washington Declaration on Intellectual Property and the Public Interest*, 3 (2011), *available at* http://infojustice.org/wp-content/uploads/2011/09/Washington-Declaration-Print.pdf (last visited Jun. 7, 2016).

21 John Revesz, *Trade-Related Aspects of Intellectual Property Rights* (Australian Productivity Commission Staff Research Paper, May, 28, 1999).

22 World Trade Organization, Ministerial Declaration on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement and Public Health of Nov. 14, 2001, WT/MIN(01)/DEC/2, 41 I.L.M. 755 (2002).

committed itself to this Declaration and undertook to engage in "trade policies that promote access to affordable medicines."[23] The U.S. Trade Representative was called upon to "honor" the Declaration's affirmation of a State's right "to use 'to the full' the flexibilities" in TRIPS and "not place countries on the 'Special 301' Priority Watch List … for exercising the flexibilities on public health provided for in the TRIPS Agreement."[24] The use of the "Special 301" program and bilateral free trade agreements to escalate intellectual property standards in developing States can undermine the intent of the Doha Declaration.[25] Such techniques have generated opposition from international organizations and others,[26] with one UN Special Rapporteur observing that:

> [N]o rich State should encourage a developing country to accept intellectual property standards that do not take into account the safeguards and flexibilities included under the TRIPS Agreement. In other words, developed States should not encourage a developing country to accept 'TRIPS-plus' standards.[27]

The United States confronts mass copying of its intellectual property on a global scale. Its enforcement agenda springs from high intellectual property infringement in many States, particularly digital copyright "piracy." Forging links between international trade and intellectual property gives it additional leverage. Although its market size induced the acceptance of TRIPS by other States, TRIPS did not meet its strategic goals for greater international intellectual property rights protection.[28] Presently dissatisfied with that regime, the United States (as well as the European Union) has used bilateral agreements as a strategy for "regime shifting."[29] It pursues an upwards "global ratchet" of intellectual property standards, which includes a "process of forum shifting … from fora in which they are encountering difficulties" (such as the World Trade Organization and World Intellectual Property Organization) and "waves of bilaterals … followed by occasional multilateral standard-setting."[30]

The United States has moved through various international fora seeking to harmonise the world's intellectual property laws in its own image. The WTO was the primary forum during the 1980s and 1990s. But after TRIPS, other States became

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23 S. Res. 241, 110th Cong. (2007).

24 H.R. Res. 525, 110th Cong. (2007).

25 Frederick Abbott, *The Doha Declaration on the TRIPS Agreement and Public Health and the Contradictory Trend in Bilateral and Regional Free Trade Agreements* (Quaker United Nations Office Occasional Paper 14, 2004).

26 Sean Flynn, *Special 301 of the Trade Act of 1974 and Global Access to Medicine*, 7 J. Generic Med. 309, 310 (2010).

27 U.N. Secretary-General, *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Report of the Special Rapporteur, U.N. Doc A/61/338, 63 (Sept. 13, 2006).

28 Susan Sell, *TRIPS Was Never Enough: Vertical Forum Shifting, FTAs, ACTA, and TPP*, 18 Intell Prop. L. 447 (2011).

29 Laurence Helfer, *Regime Shifting: The TRIPS Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 Yale J. Int'l L. 1, 6-9 (2004).

30 Peter Drahos, *Expanding Intellectual Property's Empire: The Role of FTAs*, International Centre for Trade & Sustainable Development 7-9 (2003), *available at* http://ictsd.org/downloads/2008/08/drahos-fta-2003-en.pdf (last visited Jun. 7, 2016).

hostile to the U.S. agenda because, rather than a one-size-fits-all approach, ambiguity permitted governments to craft laws which best served their own policy objectives. The U.S. agenda then shifted to bilateral and plurilateral trade agreements. The Anti-Counterfeiting Trade Agreement, for example, was a plurilateral agreement which sought to establish a model that other States could accede to. The pursuit of greater intellectual property protection in successive bilateral and regional trade agreements has been partly driven by a U.S. desire to achieve standards it anticipated but failed to secure from TRIPS. The U.S. pharmaceutical industry also viewed TRIPS as falling short of its objectives, particularly preventing the delayed introduction of patent protection in those States which supply generic medicines.

Within several months of the Doha Declaration, the United States embarked on a bilateral and regional trade negotiation strategy incorporating "TRIPS-plus" intellectual property standards at odds with the intent of that Declaration. The United States offers increased market access to close allies and small economies in exchange for heightened commitments on domestic intellectual property regulation. This regulation greatly exceeded the minimum standards required by TRIPS and hindered resort to the flexibilities offered by it.[31] National commitments typically extend the scope of patentability, limit patent revocation, extend patent terms, prohibit parallel importation, link patent status with regulatory approval, limit compulsory licensing, protect data protection and make obligatory accession to other multilateral intellectual property agreements.[32] These TRIPS-plus conditions can impede States when addressing their own specific public health concerns.[33] The agreements circumscribe the ways in which States might develop future programmes and limit the scope to respond to market failure, regulate drug prices or promote affordable access.[34] The TRIPS-plus obligations pose potentially adverse impacts for each of these objectives.[35]

The United States bases its negotiation of free trade agreements on a model standard template. This template envisages a shared recognition of the importance of innovative pharmaceuticals in health care, research and development within the pharmaceutical industry and protecting intellectual property; promoting timely and affordable access to innovative pharmaceuticals through transparent, expeditious and accountable procedures;[36] and recognizing the importance of innovative pharmaceuticals through procedures which value their objectively-demonstrated

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31 Pedro Roffe & Christoph Spennemann, *The Impact of FTAs on Public Health and TRIPS Flexibilities*, 1 Int'l. J. Intell. Prop. Mgmt. 75, 76-80, 86 (2006).

32 Cynthia Ho, *A New World Order for Addressing Patent Rights and Public Health*, 82 Chi.-Kent L. Rev. 1469, 1496 (2007).

33 *See* generally Beatrice Lindstrom, *Scaling Back TRIPS-plus: An Analysis of Intellectual Property Provisions in Trade Agreement and Implications for Asia and the Pacific*, 42 N.Y.U. J. Int'l L & Pol. 917 (2010); Gaëlle Krikorian & Dorota Szymkowiak, *Intellectual Property Rights in the Making: The Evolution of Intellectual Property Provisions in US Free Trade Agreements and Access to Medicine*, 10 J. World Int'l Prop. 388 (2007).

34 Susan Sell, *TRIPS-Plus Free Trade Agreements and Access to Medicines*, 28 Liverpool L.R. 41 (2007).

35 U.N. Development Programme, U.N. AIDS, The Potential Impact of Free Trade Agreements on Public Health 3-5 (2012).

36 For example, AUSFTA annex 2C(1)(c) emphasises "timely and affordable access to innovative pharmaceuticals" through "transparent, expeditious, and accountable procedures."

therapeutic significance. This template is then modified in light of contemporary negotiating conditions, past experience and the results of U.S. initiatives in other fora (including the World Health Assembly). The final text of a free trade agreement is the outcome of a unique negotiation process between the United States and the other party. Agreements can be tailored to the objectives of the parties and a State's relationship with the United States. No two bilateral agreements are identical.

Several substantive TRIPS-plus provisions commonly appear. These provisions relate to treaty accession, patent term extensions, data exclusivity, limiting compulsory licensing, protecting second-use patents, limits on excluding life forms from patentability, patent exhaustion, restricting parallel imports and various forms of patent linkage.[37]

The AUSFTA is one such TRIPS-plus arrangement. For example, Article 17.9.7 restricts compulsory licensing to a more stringent standard than under TRIPS. The United States, having failed in multilateral fora to restrict this exemption to specific diseases, has achieved a restriction to a TRIPS-plus standard of "national emergency, or other circumstances of extreme urgency." Article 17.9.8 of the AUSFTA locks the parties into enhanced protectionist patent terms (an extra five years maximum) if there are delays in issuing patent approval. Article 17.9.4 prohibits parallel importation, which is something the United States had not achieved through multilateral negotiations. According to the United States, parallel importation-including to address national public health emergencies-is inconsistent with Article 6 of TRIPS.[38] However, the Doha Declaration leaves it to each WTO member to establish their own regime for exhausting intellectual property rights. Australia was repeatedly placed on the Special 301 watch list[39] in the 1990s because it loosened prohibitions on parallel imports in favour of significant economic benefits. Such a practice is largely unregulated under international copyright conventions and TRIPS leaves States parties free to allow parallel imports. A U.S. free trade agreement intends to modify that circumstance.

C. Free Trade Agreements are Typically Negotiated in Secret

In contrast to the open and transparent multilateral processes, the bilateral negotiating process for the AUSFTA was closed and secretive.[40] This approach limits input and

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37 Katrina Moberg, *Private Industry's Impact on U.S. Trade Law and International Intellectual Property Law: A Study of Post-TRIPS US Bilateral Agreements and the Capture of the USTR*, 96 J. Pat. & Trademark Off. Soc'y 228, 236, 244 (2014).

38 Frederick Abbott, *The TRIPS-Legality of Measures Taken to Address Public Health Crises: Responding to USTR State-Industry Positions that Undermine the WTO*, *in* The Political Economy of International Trade Law 320 (David Kennedy & James Southwick eds., 2002).

39 The "Special 301" watch list enables the U.S. Trade Representative to designate those States which "deny adequate and effective protection" to intellectual property rights: *Identification of Countries that Deny Adequate Protection, or Market Access, for Intellectual Property Rights Under Section 182 of the Trade Act of 1974 (Special 301),* 63 Fed. Reg. 25539-01 (May 8, 1998).

40 Australia followed this approach for the China-Australia Free Trade Agreement, negotiations for which commenced in 2005 and concluded in 2014. The text was only publicly released in 2015 after signature.

encourages informational asymmetry. Secrecy can be counter-productive because controversy is unnecessarily increased and the final text treated with derision. Such a strategy also risks backfiring if drafts are leaked. Intergovernmental negotiations for the AUSFTA were also characterised by a lack of public accountability. Stakeholder consultation occurred but without the agreement being available. Discussion, consultation and deliberation by the Australian government with stakeholders had hitherto occurred before important copyright amendments were made. Nevertheless, Australia asserted that it had consulted widely and that the AUSFTA's terms left flexibility in application.

A closed negotiation process has implications for interested non-governmental actors. Impeded access is not a concern for the U.S. pharmaceutical industry inasmuch as the U.S. Trade Representative is a captured regulatory agency. Industry unsurprisingly pursues high standards for intellectual property protection and enforcement, and linking these issues to productivity, economic growth, employment and living standards. Its research and development costs are partially funded by sales revenues. Pharmaceutical arbitrage-or the pricing gaps which encourage demand for cross-border pharmaceutical parallel trade-reduce the financial gains for States such as the United States which support product innovation. Voluntary differential pricing schemes which benefit low income consumers are also discouraged. But it is primarily a fear of arbitrage which justifies increased pharmaceutical intellectual property rights and related appropriation powers. Some forms of arbitrage are beneficial and deliver lower consumer prices without harming innovation.[41] Indeed, the threat to innovation and public health comes not from arbitrage but counterfeit medications.

Australian special interest groups contributed to the AUSFTA negotiations with varying degrees of success. The higher education sector, for example, seized the opportunity to set a new agenda: the possibility of transforming the current closed set of fair dealing defences into a single broad exception derived from the U.S. fair use model.[42] Such a possibility had been gestating since the 1990s, notwithstanding uncertainty whether the U.S. model complied with international standards.[43] Copyright infringement within a digital communications environment could be prevented, but the higher education sector would have to abandon its long-held reliance on a statutory licence framework. The public health sector, by contrast, has to become more engaged in future treaty negotiation processes than it was for AUSFTA to ensure that its particular interests are adequately represented and considered.[44]

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41 Kevin Outterson, *Pharmaceutical Arbitrage: Balancing Access and Innovation in International Prescription Drug Markets*, 5 Yale J. Health Pol'y, L. & Ethics 193 (2005).

42 Mary Wyburn, *Higher Education and Fair Use: A Wider Copyright Defence in the Face of the Australia-United States Free Trade Agreement Changes*, 17 A.I.P.J. 181, 203 (2006).

43 Ruth Okediji, *Toward an International Fair Use Doctrine*, 39 Colum. J. Trans'l. L. 75 (2000).

44 Peter Sainsbury, *Australia-United States Free Trade Agreement and the Australian Pharmaceutical Benefits Scheme*, 4 Yale J. Health Pol'y L & Ethics 387, 399 (2004).

D. The Intellectual Property Provisions of a Free Trade Agreement can Influence National Health Care Systems

By concluding bilateral and regional agreements, the United States is gaining greater influence over the domestic health care and drug coverage programs of its trading partners. This trend has implications for access to and the affordability of pharmaceuticals.[45] In particular, free trade agreements may not be an appropriate means of addressing issues of national health policy.

The U.S. (and Australian) pharmaceutical industry perceived a free trade agreement to present an opportunity to undermine the evidence-based, strict and effective procedures underpinning Australia's Pharmaceutical Benefits Scheme (PBS).[46] The PBS is a longstanding universal pharmaceutical subsidy programme operated by the government which is widely praised as delivering high quality, efficient and fair health services. The purchasing power of the Australian government lowers drug costs, and subsidies ensure that Australians do not pay the true market price.

Unsurprisingly, the pharmaceutical industry criticises aspects of the PBS (particularly reference pricing and cost effectiveness) as a nontariff barrier to overseas markets and an abusive and discriminatory price control. The PBS limits the freedom of drug manufacturers to charge whatever the market will bear and does not allow them to recoup investment in research. Consumers are accessing innovative medicines without contributing substantively to their cost. Criticism about high medicine prices in the United States was deflected by claiming that Australia was "free-riding" on U.S. product development and undermining innovation.

A contrary position is that the PBS is not a trade barrier and free trade arguments are simply being enlisted to undermine social policies which are barriers to excess corporate profit.[47] Although the PBS lowered pharmaceutical prices, it did not pose any tariff or quota barriers. The pharmaceutical industry wishes to derive rent from restrictive arrangements which exact higher prices. The changes to the PBS desired by U.S. manufacturers might transfer between AUD $1.0 and $2.4 billion per annum as profit. Industry's real concern was that the PBS effectively countered market power and remedied information asymmetry between customers and suppliers. Other countries, including some U.S. states, could implement a similar scheme, although the U.S. federal government was prevented from using its purchasing power to bargain down drug costs by industry-sponsored legislation.

For AUSFTA, U.S. negotiators pushed for enhanced transparency when evaluating drugs for inclusion in the PBS, an appeals mechanism for denied applications, and pricing mechanism changes. Australians were understandably concerned that AUSFTA would adversely affect their ability to obtain affordable

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45 Carlos Maria Correa, *Implications of Bilateral Free Trade Agreements on Access to Medicines*, 84 Bull. World Health Org. 399 (2006).

46 *See* generally Deborah Gleeson, Kyla Tienhaara & Thomas Faunce, *Challenges to Australia's National Health Policy from Trade and Investment Agreements*, 5 Med. J. Aus. 354 (2012).

47 Clive Hamilton, Buddhima Lokuge & Richard Denniss, *Barrier to Trade or Barrier to Profit? Why Australia's Pharmaceutical Benefits Scheme Worries U.S. Drug Companies*, 4 Yale J. Health Pol'y., L. & Ethics 373, 374, 377 (2004).

medicine. The Australian government reassured the public that the PBS would not be dismantled and the AUSFTA would not lead to increased drug prices. After the treaty's conclusion, however, drug manufacturers expressed delight with the implications for prices, profits and investment. Whereas the PBS uses health economics and therapeutic referencing systems, AUSFTA promotes pharmaceutical reimbursement. Paragraph (d) of the Agreed Principles to AUSFTA suggests a compromise as follows:

> The Parties are committed to facilitating high quality health care and continued improvements in public health for their nationals. In pursuing these objectives, the Parties are committed to the following principles:
>
> (a) the important role played by innovative pharmaceutical products in delivering high quality health care;
> (b) the importance of research and development in the pharmaceutical industry and of appropriate government support, including through intellectual property protection and other policies;
> (c) the need to promote timely and affordable access to innovative pharmaceuticals through transparent, expeditious and accountable procedures, without impeding a Party's ability to apply appropriate standards of quality, safety and efficacy; and
> (d) the need to recognize the value of innovative pharmaceuticals through the operation of competitive markets or by adopting or maintaining procedures that appropriately value the objectively demonstrated therapeutic significance of a pharmaceutical.

Most provisions affecting the PBS are located in Annex 2-C (Pharmaceuticals), Chapter 17 (intellectual property rights) and side-letters between Australian Trade Minister Vaile and U.S. Ambassador Zoellick confirming certain understandings. The United States and Australia both espoused victorious but somewhat contradictory messages, possibly to sooth domestic constituencies. The U.S. Trade Representative indicated that "Australia will make a number of improvements in its Pharmaceuticals Benefits Scheme (PBS) procedures that will enhance transparency and accountability in the operation of the PBS, including establishment of an independent process to review determinations of product listings."[48] The Australian Department of Foreign Affairs and Trade, by contrast, stated that "[t]he Pharmaceutical Benefits Scheme (PBS), in particular the price and listing arrangements that ensure Australians access to quality, affordable medicines, remains intact."[49]

In Australia considerable attention focused on AUSFTA's impact on the PBS.[50] The agreement did not eliminate the PBS or make any substantive changes. Thus

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48 United States Trade Representative, Summary of the US-Australia Free Trade Agreement, Free Trade "Down Under" (Feb. 8, 2004).

49 Austrade, Free Trade Agreement with the United States (Feb. 9, 2004).

50 Austl. Dep't of Health & Ageing, *Australia-United States Free Trade Agreement and the Pharmaceutical Benefits Scheme*, 2005; Kate Burton & Jacob Varghese, *The PBS and the Australia-U.S. Free Trade Agreement*, Australian Parliamentary Library Research Note No. 3 (2004); Maurice Rickard, *Free Trade Negotiations, the PBS and Pharmaceutical Prices*, Parliament of Australia (Feb. 10, 2004); Ken Harvey, Thomas Faunce, Buddhima Lokuge & Peter Drahos, *Will the Australia-United States Free Trade Agreement Undermine the Pharmaceutical Benefits Scheme?,* 181 Med. J. Aust. 256 (2004).

a U.S. free trade agreement might not significantly affect drug prices or jeopardise access to affordable medicine. Interestingly Canada, like Australia, wished to protect its citizens from high drug prices and faced pressure from the U.S. drug industry.[51] The substantive legal changes effected to the Canadian system under the North American Free Trade Agreement[52] were relatively more extensive than under the AUSFTA. However, Canada can still provide access to affordable pharmaceuticals. The AUSFTA left Australia's subsidisation programme substantively intact and effected only minor procedural change to PBS' operation. Communication was improved through enhanced decision-making transparency, a non-binding independent review process, consultative opportunities with applicant pharmaceutical companies and bilateral dialogue through a Medicines Working Group. Generic drug applicants in Australia must now meet certification requirements which are similar to Canada's "notice of compliance" conditions. Australia also indicated that many AUSFTA provisions required practices which were already followed when new medications were considered for listing.[53] Again, however, this assessment may have been issued to temporarily appease local constituencies.

Overall, the AUSFTA did not create any immediate and measurable price rises. Indeed, certain outcomes benefited the PBS. Greater listing transparency and enhanced stakeholder engagement brings openness and certainty to the process.[54] One long-term concern is that such measures shift the balance of power from Australia to the pharmaceutical industry. Some U.S. expectations will become disappointed if there is no concrete change (even if the United States may have to defend several of its own subsidised drug programmes). The final text expressed neither the absolute wishes of the U.S. nor Australia, and a compromise agreement which appears to benefit both States was produced.

That said, AUSFTA transformed intellectual property protection into a foreign policy issue. The Department of Foreign Affairs and Trade (responsible for conducting negotiations) focused on the treaty text and overlooked copyright policy goals. And whereas Australia could previously formulate its own policy position, it now has to be satisfied that Australian law and practice complies or is consistent with its AUSFTA obligations.[55] Australian intellectual property law is henceforth "extensively governed" by multilateral and bilateral treaty commitments.[56]

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51 Katherine Van Marent, *Bartering with a Nation's Health or Improving Access to Pharmaceuticals? The United States-Australia Free Trade Agreement*, 14 Pac. Rim L. & Pol'y J. 801, 816, 820 (2005). *See also* James Silbermann, *The North American Free Trade Agreement's Effect on Pharmaceutical Patents: A Bitter Pill to Swallow or a Therapeutic Solution?,* 12 J. Contemp. Health L. and Pol'y. 607 (1996).

52 North American Free Trade Agreement (NAFTA), U.S.-Canada-Mexico (Dec. 17, 1992) 32 I.L.M. 289 (1993).

53 Department of Foreign Affairs & Trade, The Australia-United States Free Trade Agreement: Pharmaceutical Benefits Scheme (PBS) Outcomes, Backgrounder (2004).

54 Bryan Mercurio, *The Impact of the Australia-United States Free Trade Agreement on the Provision of Health Services in Australia*, 26 Whittier L. Rev. 1051, 1097-9 (2004-2005).

55 Commonwealth Parliamentary Debates, House of Representatives Hansard, 22, 31 (Dec. 5, 2005).

56 Austl. Gov't, Government Response to the Final Report of the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, 4 (2004).

E. The Impacts of a U.S. Free Trade Agreement May Not Be Clear

The impacts of a U.S. free trade agreement are not self-evident.[57] On one hand is the view that such an agreement offers marginal effects. Many AUSFTA intellectual property provisions clarify or reconfirm existing law. For example, the information dissemination requirements for pharmaceutical manufacturers are not novel but merely reiterate the legal position then prevailing in the United States and Australia. Australia also stated during negotiations that many of the intellectual property provisions were already reflected under Australian law, policy or practice. Australia already complied with certain AUSFTA articles or needed to implement only minor legislative change. Some provisions (such as extending copyright terms from 50 to 70 years) brought Australia into line with the United States and the European Union (EU).

The United States claimed to have made substantive gains in intellectual property rights protection through AUSFTA but the outcome fell short of its ambitions.[58] The AUSFTA expanded the scope of patentability, limited patent revocation and compulsory licensing, prohibited parallel imports, extended test data protection, and imposed patent linkage and patent term extension provisions. But Australia already conformed to high (including some TRIPS-plus) standards prior to the AUSFTA, and several provisions (including patent term extension, data protection and prohibiting parallel imports) were reflected under Australian law. Nevertheless, these standards have been "future-proofed" by the AUSFTA (that is, prevent future domestic policy flexibility to reduce or remove them). Others provisions which appear to introduce substantive change have either been effectively nullified within the text itself or, while limiting Australia's future options, have had no material impact to date.[59]

Some provisions which initially aroused controversy offer little if any real change for Australia. For example, Article 17.10.4 of the AUSFTA requires Australia to implement measures which prevent pharmaceutical product marketing that is alleged to be patent-infringing. In other words, pharmaceutical marketing approval is linked with patent validity. Concerns were expressed that this would encourage patent "evergreening": that is, effectively extending existing patents beyond their 20 year term by obtaining additional patents on different aspects of the same product. The practice is a regulatory barrier for market entry by generic manufacturers and endemic in the United States and Canada. In 2004 amendments were made to the Therapeutic Goods Act 1989 (Cth) to establish a certification process.[60] But despite the political rhetoric, media debate and academic speculation, these amendments

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57 Compare, for example, Thomas Faunce et al, *Assessing the Impact of the Australia-United States Free Trade Agreement on Australian and Global Medicines Policy*, 1 Glob'n. & Health 1 (2005); Lauren McLeod, Andrew McRobert & David Wilson, *Australia-U.S. Free Trade Agreement-Impact on Intellectual Property Rights*, 16 I.P.L.B. 153 (2004).

58 Peter Drahos, Buddhima Lokuge, Tom Faunce, Martyn Goddard & David Henry, *Pharmaceuticals, Intellectual Property and Free Trade: The Case of the U.S.-Australia Free Trade Agreement,* 22 Prometheus 243, 249 (2004).

59 Kevin Outterson, *Agony in the Antipodes: The Generic Drug Provisions of the Australia-U.S.A. Free Trade Agreement,* 2 J. Gen. Med. 316, 321 (2005).

60 Canada implemented a similar scheme in 1993 after entering the North American Free Trade Agreement.

do not increase the prospect of evergreening because the ability to do so already existed under Australian law.[61] Indeed, additional "anti-evergreening" amendments allow Australia's Attorney-General to join injunctive applications by brand name patent holders against generic manufacturers and claim damages if a price rise occurs under the PBS.[62]

An alternative position is that the AUSFTA effected considerable change albeit not yet apparent. The AUSFTA demonstrated that free trade agreements can reach farther into domestic policy than ever imagined before.[63] Although not requiring change from either signatory, the AUSFTA locked-in existing law so that future governments cannot modify or repeal it without breaching or re-negotiating the treaty.

On this view, the AUSFTA contained detailed obligations and a strict implementation timetable which drove rapid, wholesale amendment of Australian copyright law. However, there was a pre-existing domestic reform agenda which the agreement partly galvanised and partly blocked, as well as setting a wholly new policy agenda post-AUSFTA.[64] Before 2004 various Australian copyright laws had been reviewed by law reform and other bodies. Many recommendations were unaddressed for a long time, thereby suggesting that they were difficult to implement if not unworkable. AUSFTA negotiations rendered moot many proposals because Australia's digital copyright law would have to be rewritten to fit the U.S. model. Significant change across the copyright regime would have to be made to implement the treaty as planned, some of which was contrary to previous assessments of national interest. AUSFTA made some already pending copyright changes more urgent, changed the policy environment and pushed aside much of the domestic law reform agenda. Controversy was further intensified by a short consultation period and a bare understanding of some provisions. Mistakes were made. Copyright reform dominated the political agenda and became a publicly salient issue (not least because of mass infringement by the Australian public). The government opted to pass a single, omnibus copyright-amending Act. 2004 was a "stormy" time for Australian copyright law because changes required by the AUSFTA interacted with several formally unrelated legislative reviews.[65]

In the post-AUSFTA environment, some copyright reviews were prompted by the treaty whereas others were not. For example, a new safe harbour regime was introduced for internet service providers because of the AUSFTA.[66] But several

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61 Rhonda Chesmond, *Patent Evergreening in Australia After the Australia-United States Free Trade Agreement: Floodgates or Fallacy*, 9 Flinders J. L. Ref. 51, 61 (2006).

62 In response, the U.S. Trade Representative reserved the rights of the U.S. in a final exchange of letters. The Australian Minister for Trade acknowledged that a difference of opinion had arisen which was insufficiently significant to prevent the AUSFTA from proceeding.

63 Laura Chung, *AUSFTA, KORUS FTA and Now TPP: Free Trade AgreementsAre Now Reaching Further into Domestic Health Policies than Ever Before,* 22 Currents: Int'l Trade L.J. 26, 27 (2013).

64 Kimberlee Weatherall, *Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms*, 31 Melb. U. L. Rev. 967 (2007).

65 *Id.* at 985.

66 *See* generally YiJun Tian, *WIPO Treaties, Free Trade Agreement and Implications for ISP Safe Harbour Provisions (The Role of ISP in Australian Copyright Law),* 16 Bond L.R. 186 (2004).

amendments were not similarly required but were instead domestic responses to the perceived strengthening of copyright law occasioned by the agreement. A perceived need to comply with prescriptive AUSFTA provisions prompted public processes which took into account Australian interests and skirted wholesale adoption of controversial U.S. aspects. Although some features of U.S. copyright law were clearly adopted, there was simultaneously a deliberate process of distancing Australia from U.S. approaches.[67]

In sum, Australia strove to do the absolute minimum necessary to implement its treaty obligations. For example, AUSFTA gave Australia only limited options on how to enact new anti-circumvention laws. Although the agreement summarised the U.S. system for managing copyright exceptions, reference to the associated U.S. machinery was omitted from the text and Australia was left with some choice as to how to manage the system and by whom. Ultimately the final arrangement looks very little like the U.S. model which formed the basis for the AUSFTA provision.[68]

Australians were assured that the PBS would not be adversely affected by the AUSFTA. Academics, non-government organizations and others were worried that the U.S. had obtained substantial inroads. The Agreed Principles of Annex 2C, for example, supported the valuation of "innovative pharmaceuticals." Procedural changes included establishing an independent review process and providing hearing opportunities for applicants before an expert formulary committee, the Pharmaceutical Benefits Advisory Committee (PBAC). Such changes, it was feared, would facilitate greater industry influence in decision-making, undermine the PBAC's capacity to deliver independent, evidence-based assessments, and erode Australia's capacity to ensure value for money. A joint U.S.-Australian discussion forum, the Medicines Working Group, was the means by which the United States would direct or influence future domestic policy-making in Australia around medicines.

Admittedly, the gains made by the United States were limited to matters of process and transparency in the formulary listing process. But there is no evidence that the AUSFTA impacted upon PBS decision-making, pricing mechanisms, or actual medicine prices. Many of AUSFTA's substantive provisions either reflected existing practices about transparency and timeliness, or were improvements to PBAC processes already underway or proposed. The independent review process cannot remake PBAC decisions and is only a quality assurance mechanism. The Medicines Working Group is a discussion forum having limited terms of reference, is chaired by health officials, and has no decision-making, advisory or reporting function.

By way of further illustration, the AUSFTA ostensibly permits direct to consumer advertising (DTCA) via the internet.[69] However, this is subject to

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67 *See* Evidence to Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Parliament of Australia, Canberra, 67 (Dep't Foreign Affairs & Trade, Stephen Deady) (Jun. 3, 2004); Evidence to House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 29 (Helen Daniels) (Dec. 5, 2005).

68 Emma Caine & Kimberlee Weatherall, *Australia-U.S. Free Trade Agreement: Circumventing the Rationale for Anti-Circumvention?*, 7 Internet L. Bull. 121 (2005).

69 AUSFTA, annex 2-C, art. 5 ("Each Party shall permit a pharmaceutical manufacturer to disseminate ... through the manufacturer's Internet site ... truthful and not misleading

dissemination under a Party's laws, regulations and procedures. DTCA continues to be prohibited in Australia. The rationale for retaining a provision within a negotiating template, even if a carve-out has been agreed, is to achieve a perception on the part of interested Sates that a normative provision was accepted which can be legitimately included in future trade agreements. Australia gained by including a specific treaty obligation about public transparency which facilitates disclosure of PBAC processes, evidence and outcomes to a degree which the pharmaceutical industry had previously resisted.

Perhaps most importantly, the prices of PBS medicines have not risen since the AUSFTA. Indeed, under administrative arrangements introduced in 2005 to reduce the price of generic products, the prices of many still-patented PBS medicines have been reduced. In 2007, when the PBS was separated into two formularies, it was feared that Australia had caved to U.S. pressure through the Medicines Working Group to dismantle reference pricing. However, the changes were a domestic response to longstanding concern about the need to reduce the price of generic products, take advantage of many patent expiries and generate savings to offset new listing costs.

It is disconcerting then that U.S.-Australia negotiations occurred despite a paucity of data.[70] Uncertain future impacts can be addressed through econometric studies of the likely impact of U.S. free trade agreements. For example, Oxfam estimated that between 2001 and 2006, the Jordan-U.S. Free Trade Agreement caused a 20 percent overall increase in medicine prices, and that data protection provisions delayed the introduction of generic equivalents for 79 percent of new medicines.[71] The putative benefits of this treaty promoted at the time of its conclusion were not realised: there was no increased foreign direct investment in Jordan's pharmaceutical industry, greater research and development or swifter introduction of innovative medicines.

F. A U.S. Free Trade Agreement Does Not Necessarily Lead to a Harmonization of or Convergence Between National Legal Systems

The U.S. pharmaceutical industry has long objected to the lack of harmonization, particularly about marketing approval requirements imposed by national regulatory authorities. Governments also wish to induce companies to bring new medicines to market more quickly. Thus simplified registration standards and processes might speed up market entry, especially if differential requirements deter innovators.

The trajectory of national intellectual property laws has been influenced by TRIPS. Whether TRIPS was beneficial for Australia cannot be assessed in isolation but requires considering all of Australia's gains and losses under the WTO

information regarding its pharmaceuticals that are approved for sale in the Party's territory").

70 Australia largely relied on Centre for International Economics, Economic Analysis of AUSFTA: Impact of the bilateral free trade agreement with the United States, Aust'l Dep't Foreign Affairs & Trade (2004).

71 Oxfam International, *All Costs, No Benefits: How TRIPS-Plus Intellectual Property Rules in the U.S.-Jordan FTA Affect Access to Medicines*, Oxfam Briefing Paper, 2, 15 (2007).

agreements then under negotiation. TRIPS was not thought to be in Australia's national interest because Australia is a net importer of intellectual property. But Australia's intellectual property exports are now growing faster than its imports.[72] Furthermore, TRIPS was one factor which drove the convergence of Australian and U.S. patent law. However, more subtle forces are also at play. For example, Australia has also adopted U.S. practices with respect to antitrust law, contract law, securities law, bankruptcy law and corporate law.[73] Explanatory variables include a common language, significant reciprocal trade, common trading partners, convenient trans-Pacific travel and exchanging popular culture.

Commentators disagree on whether the AUSFTA contributed to a harmonisation of intellectual property standards between U.S. and Australian law.[74] Some significant convergence of patent law was directly attributable to TRIPS.[75] Australia's regime for technological protection is now largely modelled on the U.S. framework following AUSFTA's implementation.[76] However, the bulk of the changes preceded that agreement because Australian law naturally developed along U.S. lines in order to address common challenges. Australian intellectual property law ordinarily requires reflecting on U.S. legal developments given the size and importance of the U.S. market. In 2001 there were still differences between U.S. and Australian patent law. Indeed, several instances of divergence in Australia may have been encouraged by dissatisfaction with TRIPS. Australia currently provides a much higher level of protection for industrial designs than the U.S. The AUSFTA merely requires each Party to "endeavour to reduce differences in law and practice" between industrial design systems (Article 17.8.2, AUSFTA). Thus change is not required for an issue in which harmonisation would have increased protection in the U.S. Designs law between the United States and Australia is not identical, and there is no reciprocity of protection. This divergence is also explicable by reason of Australia's particular trade policy and competition laws.

G. A Free Trade Agreement can Influence Future International Arrangements

Successive free trade agreements build on their predecessors. The United States has established a web of free trade agreements with Canada and Mexico (1992), Jordan (2001), Singapore (2003), Chile (2003), several Central America States (2004), Bahrain (2004), Morocco (2004), Peru (2006), Oman (2006), Panama (2007) and

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72 In 2002, before the conclusion of the AUSFTA, the U.S. received around $834m in intellectual property royalties from Australia as compared with $723m from China.

73 Paul von Nessen, *The Americanization of Australian Corporate Law,* 26 Syracuse J. Int'l L. & Comm. 239, 242, 245, 264-5 (1999).

74 For an overview of the legislative changes which were required to Australian patent law to accord with AUSFTA, *see* Lauren McLeod, Andrew McRobert & David Wilson, *Australia-U.S. Free Trade Agreement-Impact on Intellectual Property Rights*, 16(10) I.P.L.B. 153 (2004).

75 Joshua Harrison, *On the Convergence of U.S. and Australian Patent Law*, 2 Melb J. Int'l L. 351, 372 (2001).

76 Gwen Hinze, *Brave New World, Ten Years Later: Reviewing the Impact of Policy Choices in the Implementation of the WIPO Internet Treaties' Technological Protection Measure Provisions*, 57 Case W. Res. L. Rev. 779 (2007).

South Korea (2007). For example, much of the AUSFTA intellectual property chapter was imported from agreements concluded by the U.S. with Chile and Singapore.[77] The AUSFTA was the U.S.' first attempt to test whether a bilateral trade agreement could bind another State on domestic public health policy. The Korea-U.S. Free Trade Agreement (KORUS) was a second attempt. Both the AUSFTA and KORUS contain provisions by which the U.S. tried to limit the autonomy of its trading partners in evaluating, selecting, valuing and reimbursing medicines listed on their national formularies. For Australia, the U.S.' attempt was largely unsuccessful.[78] Nevertheless, the AUSFTA established an unfortunate precedent because it was the basis upon which the United States built for its approach to Korea. The U.S. was determined to succeed for KORUS where its efforts had been frustrated for AUSFTA by enhancing the market's role in determining the demand and prices of reimbursed medicines. It becomes increasingly difficult for third States to resist U.S. pressures and introduce generic medicines when other States have concluded a bilateral arrangement. Fences are being built around increasingly-isolated States such as India and Brazil which manufacture generic products.

More recent patent law proposals go further than both AUSFTA and KORUS. The Trans-Pacific Partnership (TPP) between twelve States including the United States and Australia poses the most aggressive intellectual property provisions for pharmaceuticals to date.[79] The intellectual property chapter heightens protection standards for rights holders beyond which the evidence supports, insufficiently ensures the interests of users, consumers or the public and is particularly harmful for developing States.[80] The text is also a bad bargain for participating States from a public health perspective.[81] The plant patent provisions could also seriously disrupt traditional farming practices within the Pacific Rim and threaten food security in poor farming communities.

For three reasons, the dynamics of the TPP do not favor the maximalist position proposed by the United States. First, the United States seeks to convince relatively poor States to adopt the same or higher intellectual property protection and enforcement mandates that exist in the U.S. or are reflected in agreements

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77 On the free trade agreement with Singapore, *see* Peter Kang & Clark Stone, *IP, Trade, and U.S./Singapore Relations-Significant Intellectual Property Provisions of the 2003 U.S.-Singapore Free Trade Agreement*, 6 J. World Int'l. Prop. 721 (2003); Kenneth Chiu, *Harmonizing Intellectual Property Law between the United States and Singapore: The United States-Singapore Free Trade Agreement's Impact on Singapore's Intellectual Property Law*, 18 Transnat'l L. 489, 509 (2005).

78 Ruth Lopert & Deborah Gleeson, *The High Price of "Free" Trade: U.S. Trade Agreements and Access to Medicines*, 41 J.L. Med. & Ethics 199, 205 (2013).

79 For background, *see* Roma Patel, *A Public Health Imperative: The Need for Meaningful Change in the Trans-Pacific Partnership's Intellectual Property Chapter*, 16 Minn. J.L. Sci. & Tech. 477 (2015). For Australia's position, *see* Department of Foreign Affairs and Trade, Trans-Pacific Partnership Agreement Negotiations (2016), *available at* http://www.dfat.gov.au/fta/tpp (on file with the author).

80 Sean Flynn, Brook Baker, Margot Kaminski & Jimmy Koo, *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 Am. U. Int'l L. Rev. 105, 119 (2012).

81 Burcu Kilic, Hannah Brennan & Peter Maybarduk, *What is Patentable Under the Trans-Pacific Partnership? An Analysis of the Free Trade Agreements Patentability Provisions from a Public Health Perspective*, 40 Yale J. Int'l L Online 1 (2015).

concluded with high-income countries. The United States wishes to selectively export the protections available under U.S. law but not the exceptions. States which accepted these standards in free trade agreements sought to achieve access to U.S. markets, and many TPP States have already implemented these agreements. U.S. proposals moreover abandon data-exclusivity flexibilities which were granted to Peru and Colombia in free trade agreements concluded with them.

Second, the United States intends to harmonize substantive patent and data protection law in TPP member States to U.S. standards. The proposals build upon recent free trade agreements by restraining the flexibility permitted under TRIPS. This position adversely affects the availability of affordable medicines in developing States and increases the price of inputs for many industries. The TPP prevents pharmaceutical innovators in developing countries from undertaking research and development via reverse engineering and creating functional equivalents or product improvements. The TPP will prevent independent action by States to develop generic medicines. Prospective parties would be unable to adopt the kind of pre-grant opposition processes found to be useful in India. U.S. proposals are a long-term campaign to implement standards that will ultimately be globalized to include India among others.

Third, the TPP contains provisions which have previously been considered and rejected by States during the TRIPS negotiations. One provision in TRIPS, for example, permitted the U.S. to continue to implement its own relatively lax standard on patentability without requiring other States to do so. The TPP, however, potentially exports that standard to all member States. Patent/registration linkage is not mentioned in TRIPS or required in many States, including most TPP countries. Nevertheless, it has become a common feature of U.S. free trade agreements.

H. A Free Trade Agreement Must Reconcile Competing Cultures and Perspectives

Is the U.S. model an appropriate global standard? Standards which increase intellectual property protection but constrain domestic drug coverage programmes advance pharmaceutical industry interests and attempt to export and impose U.S. values abroad. Free trade agreements reflect the U.S.' enduring adherence to market-based solutions, coupled with a conviction that government intervention is unnecessary and unhelpful. Thus the U.S. Trade Representative is mandated to pursue "the elimination of government measures such as price controls and reference pricing which deny full market access for United States products" in overseas markets.[82] This is despite the U.S. health care system itself exhibiting the characteristics of market failure.

One U.S. objective regarding trade-related intellectual property rights is that the "provisions of any multilateral or bilateral trade agreement ... entered into by the United States reflect a standard of protection *similar* to that found in United States

[82] *Trade Promotion Authority Act*, Public Law No. 107-210 (2002); International Trade Administration, Pharmaceutical Price Controls in OECD Countries: Implications for U.S. Consumers, Pricing, Research and Development, and Innovation, U.S. Department of Commerce (2004).

law."[83] U.S. proposals do not purely reflect U.S. law (particularly legal principles or judicial interpretations) and run counter to the national law of proposed parties. Nor do they reflect the tempering standards or qualifications available under U.S. law. Although essentially based on the principles of U.S. intellectual property law, free trade agreements omit important checks and balances that mitigate their effects in the United States. Furthermore, some provisions could be a back-door means of compelling recognition of an issue. For example, enabling triple damages for patent violations is extreme because U.S. law confines such awards to wilful patent infringement. The TPP standard does not contain this precondition which might not be appropriate for all States. Another TPP proposal requires that nearly every copyright violation is a criminal offence, thereby implementing a position which the United States lost in a recent WTO dispute with China.[84]

The United States deploys an aggressive trade agenda to expand markets for U.S. goods and services which can clash with the social equity or fairness objectives of other States.[85] The United States promotes a distinctive vision on the governmental role to advance markets but also a desire to safeguard its national industry. The U.S. bilateral trade agenda not only undermines the pursuit of value-driven health care by its trading partners but remakes other nations' health systems in its own image. Those interests that promote notions of choice or freedom and resist government pricing structures in the United States also consider eliminating comparable constraints in the global economy to be equally essential.

Current U.S. strategy is damaging its own political interests because the United States will not secure substantive copyright harmonisation or build long-term support for future multilateralisation of its preferred standards. An apparent disregard for Australian traditions generated a perception of U.S. unilateralism, double standards and high-handed ignorance.[86] Australia's reaction was sustained, hostile and sprung from many sources.[87] The United States was perceived to have imposed its copyright rules on Australia, watched implementation with a critical eye and demonstrated scant regard for Australian sovereignty or its Parliamentary processes. The AUSFTA was overly-detailed, its "standard form" failed to respect Australian traditions and suggested that the United States had a petty and patronizing attitude. Australians resented being scolded by a country that had long failed to adequately protect foreign authors and itself refused to wholly conform to international norms.[88] AUSFTA sought to lock Australia into a U.S. domestic legal position whose appropriateness was too early to determine. Although the United States is theoretically vulnerable insofar as treaty obligations apply reciprocally, AUSFTA could be ignored where it proved inconvenient to the U.S.

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83 *Trade Act of 2002* §2102(b)(4)(a)(i)(II), 19 U.S.C. §3802(b)(4)(A)(i)(II) (2006) (emphasis added).

84 *See* further Daniel Gervais, *China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, 103 Am. J. Int'l L. 549, 552-53 (2009).

85 Ruth Lopert & Sara Rosenbaum, *What is Fair? Choice, Fairness and Transparency in Access to Prescription Medicines in the United States and Australia*, 35 J.L. Med. & Ethics 643, 651 (2007).

86 Robert Burrell & Kimberlee Weatherall, *Exporting Controversy? Reactions to the Copyright Provisions of the U.S.-Australia Free Trade Agreement: Lessons for U.S. Trade Policy*, U. Ill. J.L. Tech. & Pol'y 259 (2008).

87 *Id.* at 283-5.

88 *Id.* at 288, 291.

Furthermore, the gains produced by the AUSFTA were at best limited.[89] AUSFTA did very little to bring the U.S. and Australian copyright systems closer together and any harmonisation is little more than superficial.[90] The AUSFTA did not compel Australia to lift copyright standards, and its implementation under Australian law produced outcomes which diverge from the U.S. position. Thus significant conceptual and structural differences remain between U.S. and Australian copyright law. Rather surprisingly for a bilateral agreement, the AUSFTA did not address the individual circumstances of the contracting parties.[91] Nor did AUSFTA secure a meaningful increase in protection standards for U.S. copyright holders. Indeed, the increases resulting from AUSFTA are not all favourable to those interests and are unlikely to be welcome.

A free trade agreement with the United States must accommodate a nation's historical trajectory, competing ideology and different philosophy.[92] Whereas the United States emphasizes innovation as the fundamental tenet, Australian public health care policy has historically focused on equity and distributive justice. Contemporary pharmaceutical policy developments taking place at the time when negotiations with the United States are occurring will also be influential. There are also global trends which run counter to bilateral agreements, including stronger national regimes and technological solutions. Ultimately a State contemplating a U.S. agreement must balance the interests of rights holders with those of users and the community.

Trade partners require space to implement their international obligations in a manner that satisfies their particular circumstances. One of the pitfalls of bilateral-in contrast to multilateral-negotiations is exposure to bargaining power inequality. Powerful States can demand much and offer little in terms of market access. For example, a U.S. free trade agreement from Malaysia's point of view is likely to adversely affect pharmaceutical product access because the intellectual property protections exceed what is appropriate for its social and economic needs.[93] Access to affordable medicine can be delayed or put beyond the reach of Malaysians, and the drive towards innovation might not be appropriately balanced against public health.

Consensus from the European Union is vital if a new multilateral standard is to be established. But the European Union may not accept the U.S.' lead in setting new international intellectual property standards. Europe has distinctive philosophical underpinnings to copyright protection. For example, all economic rights in copyright must be "freely and separately" transferable, and persons acquiring copyright by contract shall "enjoy fully the benefits derived from that right" (Article 17.4.6(a), AUSFTA). Other recent U.S. free trade agreements contain similar provisions. The United States evidently seeks to prevent trade partners from introducing unwaivable or unassignable rights of a kind that enjoys support within Europe.

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89 *Id*. at 261.

90 *Id.* at 270, 306.

91 *Id*. at 298, 301-2.

92 Patricia Ranald, *The Australia-U.S. Free Trade Agreement: A Contest of Interests*, 57 J. Austl. Pol. Econ. 30 (2007).

93 Robert Galantucci, *Data Protection in a U.S.-Malaysia Free Trade Agreement: New Barriers to Market Access for Generic Drug Manufacturers*, 17 Fordham Intell. Prop. Media & Ent. L.J. 1083, 1099 (2007).

Germany and Austria, for example, prohibit the outright assignment of copyright. Article 17.4.6(a) could also prevent unwaivable rights to equitable remuneration (such as those created under the EU's Rental Rights Directive) and exclude the compulsory collective administration of rights (which enjoys some popularity in Europe). One provision in AUSFTA about the graphic representation of trademarks intends to ensure that Australia does not follow the European approach which has made it almost impossible to register olfactory marks. In sum, there are formidable political and cultural obstacles deterring the European Union from subscribing to the standards laid down in recent U.S. free trade agreements.

IV. Conclusions

The trend towards bilateral agreements reflects U.S. dissatisfaction with decision-making in multilateral fora. Although the United States sought to lock Australia into a TRIPS-plus position-and one which does not purely reflect the entirety of U.S. law-AUSFTA was also negotiated with an eye to non-party third States. In Australia's case, bilateral negotiations highlighted a conflict between commercial ambitions (including innovation and efficiency) with public health goals (namely, prices based on therapeutic value which promote affordable access). Considered overall, U.S. efforts to remake Australia's health care system in its own image proved largely unsuccessful. Thus rhetoric must be distinguished from reality when other States are contemplating the value and likely impact of concluding a U.S. free trade agreement.

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The Brave New (American) World of International Investment Law: Substantive Investment Protection Standards in Mega-Regionals

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ABSTRACT

Mega-Regionals are transforming and shaping the future of international investment law, concerning both the settlement of investment disputes and the substantive disciplines governing investor-state relations. Focusing on the latter, the present article shows how Mega-Regionals depart from the so far dominant European model of investment protection by going beyond crudely worded post-establishment protections for foreign investment. Instead, Mega-Regionals pursue the twin policy goals of investment liberalization through greater market access commitments and strengthening state control by ensuring host governments sufficient space to regulate in the public interest. In light of these policy goals, and considering the deeper reasons for structural changes to the investment rules in Mega-Regionals, the article argues that the models and conceptual foundations of Mega-Regionals build on prototypes first developed in the context of U.S. and NAFTA investment practices. This suggests that the future of international investment law will be shaped to a considerable extent against the background of U.S. experiences, rather than be forged anew by the mechanics of international diplomacy and negotiation.

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CONTENTS

I. The Advent of Mega-Regionals: Whose Brave New World?

International investment law is in a process of significant transformation, driven by the conclusion and continued negotiation of so-called Mega-Regionals. Being formed between countries or regions with a major share of world trade and foreign investment flows, Mega-Regionals emerge as deep integration partnerships. Their substantive obligations typically go beyond existing disciplines established in the World Trade Organization (WTO), integrate trade and investment disciplines in the same agreements, and often address (at least some) interaction between economic disciplines and competing concerns, such as the environment or labor standards. In addition, Mega-Regionals regularly create their own institutional infrastructure, including for purposes of dispute settlement and for the operationalization of inter-governmental or inter-agency regulatory cooperation, amongst others. Posing challenges to both the WTO's multilateral trading system and the traditional mechanism of investment governance through bilateral agreements with their strong focus on investment dispute settlement, Mega-Regionals show their potential to form the nucleus of the global economic governance of the future, in respect of both trade and investment.[1] With a sense of wonder about the prospects of this new future, one is reminded of Shakespeare's words: "O brave new world."[2]

Commonly cited examples of Mega-Regionals are the Trans-Pacific Partnership (TPP), which was concluded in October 2015,[3] as well as the Transatlantic Trade and Investment Partnership (TTIP)[4] and the Regional Comprehensive Economic

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1 While consensus does not exist on the definition of what constitutes a Mega-Regional, certain characteristics are named in a recurring fashion: 1) the agreement is usually negotiated between a larger number of parties; 2) the countries represent a large share of global trade, gross domestic product (GDP), and population; and 3) the substance of the agreements goes beyond existing commitments under the World Trade Organization (WTO), regional trade agreements, and bilateral investment treaties (BITs). To this list, a fourth criterion is sometimes added, namely the ability of the agreement to transform into a pillar of economic governance. *See* Global Agenda Council on Trade and Foreign Direct Investment, *Mega-Regional Trade Agreements: Game-Changers or Costly Distractions for the World Trading System?* (2014) 7, *available at* http://www3.weforum.org/docs/GAC/2014/WEF_GAC_TradeFDI_MegaRegionalTradeAgreements_Report_2014.pdf; *see also* Peter Draper, Simon Lacey & Yash Ramkolowan, *Mega-Regional Trade Agreements: Implications for the African, Caribbean, and Pacific Countries* 8 (ECIPE Occasional Paper No. 2/2014), *available at* http://www.ecipe.org/app/uploads/2014/12/OCC22014_.pdf.

2 William Shakespeare, The Tempest (Virginia Mason Vaughan & Alden T. Vaughan, eds., Arden Shakespeare, 1999), Act 5, Scene 1, 182-83.

3 There are 12 countries that signed the TPP, namely Brunei, Chile, New Zealand, Singapore, Australia, Malaysia, Peru, the United States, Vietnam, Canada, Japan and Mexico. *See* Office of the United States Trade Representative, Trans-Pacific Partnership Agreement, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text (last visited May 12, 2016).

4 The only indication as to the possible content of the investment chapter in TTIP stems from the proposal made by the EU. *See* Proposal of the European Union for Investment Protection and Resolution of Investment Disputes, Nov. 12, 2015, *available at* http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf [hereinafter EU TTIP Proposal].

Partnership (RCEP),[5] which are both currently under negotiation. While often little is known about the precise content of the agreements under negotiation beyond (at times incompletely) published or even leaked negotiation texts and negotiating mandates, their impact on international economic law is foreshadowed by the content of other recent major regional trade and investment agreements that may not themselves qualify as Mega-Regionals, but whose participants also partake in the negotiation of Mega-Regionals and more generally in the development of models for such agreements. Examples on point are the trade and investment treaty practice of the Association of Southeast Asian Nations (ASEAN), including the ASEAN Comprehensive Investment Agreement (ACIA)[6] and so-called ASEAN+ agreements between ASEAN and third-countries,[7] and the trade and investment agreements currently being negotiated by the European Union (EU), in particular the recently finalized Comprehensive Economic and Trade Agreement (CETA) with Canada[8] and the Free Trade Agreement with Singapore.[9]

While it is clear that the content and institutional structures of both international trade law and international investment law are going to be deeply transformed in the years to come through the negotiation and conclusion of these agreements, calling the jury on the effect of Mega-Regionals on the debate about multilateralism versus bilateralism in international economic governance,[10] on changes to power relations

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5 RCEP is negotiated among 16 countries: the 10 Members of ASEAN and six countries with which ASEAN has existing free trade agreements (FTAs), that is, Australia, China, India, Japan, Korea, and New Zealand. *See* Amokura Kawharu, *The Admission of Foreign Investment Under the TPP and RCEP: Regulatory Implications for New Zealand*, 16 J. World Inv. & Trade 1058 (2015).

6 ASEAN Comprehensive Investment Agreement (ACIA), Feb. 26, 2009, *available at* http://cil.nus.edu.sg/rp/pdf/2009%20ASEAN%20Comprehensive%20Investment%20Agreement-pdf.pdf.

7 These include, among others, the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, Feb. 27, 2009, *available at* https://www.asean.fta.govt.nz/assets/_securedfiles/FTAs-agreements-in-force/AANZFTA-ASEAN/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area-1.pdf [hereinafter ASEAN-AUS-NZ FTA]; the Agreement on Investment of the Framework Agreement on the Comprehensive Economic Cooperation between the Association of Southeast Asia Nations and the People's Republic of China, Aug. 15, 2009, *available at* http://fta.mofcom.gov.cn/inforimages/200908/20090817113007764.pdf [hereinafter ASEAN-PRC Investment Agreement]; the Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of Southeast Asian Nations and the Republic of Korea, Jun. 2, 2009, *available at* http://www.thaifta.com/trade/askr/akia.pdf [hereinafter ASEAN-Korea Investment Agreement].

8 Canada-European Union Comprehensive Economic and Trade Agreement (CETA), Feb. 29, 2016, ch. 8, *available at* http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf.

9 EU-Singapore Free Trade Agreement, Oct. 8, 2014, ch. 9, *available at* http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf [hereinafter EU-Singapore FTA].

10 *See* the debate between Jagdish Bhagwati and Richard Baldwin on whether regionalism is considered a building block that helps achieve multilateralism or a stumbling block for multilateral world trade. Bhagwati considers regionalism as a stumbling block, whereas Baldwin finds that regionalism is a building block towards a multilateral trade regime. Jagdish Bhagwati, Termites in the Trading System: How Preferential Agreements Undermine Free Trade (2008); Richard E. Baldwin, *Multilateralising Regionalism:*

among nations,[11] and on the relationship between economic interests and competing public concerns and regulatory powers[12] is probably too early. Too much depends on whether these agreements will overcome wide-spread popular opposition, what further concessions may be made, for example, to concerns for human rights, environmental protection, and corporate responsibility, how these agreements are going to be used and implemented in practice and what their relationship with the existing multilateral trading system will be. What we can consider already, by contrast, is who the key actors are that drive the proliferation of Mega-Regionals and, above all, which actors shape the models and conceptual foundations these agreements build on. Who, in other words, are the rule-makers and rule-shapers that influence the content of Mega-Regionals through their ideological, ideational and conceptual leadership? The United States, the EU, and actors in Asia, above all China, are obvious contenders for leadership roles.

In developing an answer to the question of who shapes the future of international economic law, in the present article we do not look comprehensively at the full range of subject-matters covered by Mega-Regionals and other important free trade agreements. Instead, we limit ourselves to rules governing the relation of host states and foreign investors, principally as found in the investment chapters in TPP, CETA, ACIA, and ASEAN+ agreements, supplemented with occasional references to the most recent EU negotiation draft for TTIP's investment chapter. Moreover, our focus is on the substantive rules governing investor-state relations, to the exclusion of rules on dispute settlement.[13] This limitation is due to the fact that questions of investment dispute settlement are much more in flux than questions of substance where global consensus, in our view, is more clearly emerging.[14]

Spaghetti Bowls as Building Blocks on the Path to Global Free Trade, 29 The World Economy 1451 (2006).

11 *See, e.g.,* Andrew Lang, World Trade Law After Neoliberalism: Re-imagining the Global Economic Order 43-53 (2011).

12 *See, e.g.,* Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. Int'l L. 1 (2014); Ingo Venzke, *Making General Exceptions: The Spell of Precedents in Developing Article XX GATT Into Standards for Domestic Regulatory Policy*, 12(5) German L. J. 1111, 1116-37 (2011); Aikaterini Titi, The Right to Regulate in International Investment Law (2014).

13 For an in-depth analysis of the envisaged dispute settlement disciplines in Mega-Regionals, *see* Stephan W. Schill, *Authority, Legitimacy, and Fragmentation in the (Envisaged) Dispute Settlement Disciplines in Mega-Regionals*, *in* Mega-Regional Agreements: TTIP, CETA, TiSA. New Orientations for EU External Economic Relations (Stefan Griller, Walter Obwexer & Erich Vranes eds., 2017) (forthcoming).

14 Apart from lingering efforts in Latin America (see the contributions in Katia Fach-Gómez & Catharine Titi (eds.), *Special Issue: The Latin American Challenge to the Current System of Investor-State Dispute Settlement*, 17(4) J. World Inv. & Trade 511-699 (2016)), the debate about reforming investment dispute settlement is particularly vivid since the EU tabled a proposal generally to abandon arbitration as a mechanism to settle investor-state disputes and instead to establish an 'Investment Court System' which is to involve a permanent court-like body with an appeals mechanism and staffed by judges who are appointed by the state parties to the agreement, not anymore by the parties to a concrete dispute. *See* EU TTIP Proposal, *supra* note 4, subsec. 4. In CETA, Canada and the EU have already agreed to include this court-like system (CETA, *supra* note 8, art. 8.29), but it is an open question whether the United States is going to accede to the EU proposal or insist on what has to be considered its preferred model for investment

The emerging consensus we see in reviewing the substantive rules governing investor-state relations, as we will outline in more detail in the following sections, is one that parts ways in several regards with the traditional lean European model that served as the basis for most of the more than 2,000 bilateral investment treaties (BITs) that were concluded since the late 1950s.[15] Instead, the predominant model for rules governing investor-state relations in substance that we see emerge in Mega-Regionals and other modern trade and investment agreements is the one that has been pushed for by the United States (and to some extent also by Canada) for roughly two decades through evolving versions of the U.S (and Canadian) Model BITs[16] and through the free trade agreements that the United States (and to a lesser degree Canada) is a party to, most importantly the North American Free Trade Agreement (NAFTA).[17]

In our view, the "brave new world" of international investment law is therefore to a large extent a "brave new American world". In its results, our argument resembles that by Wolfgang Alschner who is arguing that the evolution of international investment law generally has to be understood as an "Americanization of the BIT Universe".[18] Together with Dmitriy Skougarevskiy, he has impressively shown that the United States' influence can be traced in the TPP by comparing its provisions to that of U.S. treaty practice and the 2012 U.S. Model BIT.[19] The method we employ in the present article is however not an empirical text-as-data analysis, as that employed by Alschner and Skougarevskiy, but a traditional jurisprudential approach that analyzes and traces the evolution of legal concepts in the investment chapters of Mega-Regionals.

Two developments are key for the argument that the United States has assumed predominant rule-, idea-, and concept-shaping power in international investment law.

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dispute settlement, that is, a reformed version of investor-state arbitration, as illustrated by the TPP (sec. B: Investor-State Dispute Settlement). Moreover, how other countries the world over are going to react to the EU proposal is still much too early to tell.

15 Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60(4) Int'l Org. 811-46 (2006).

16 *See* Kenneth Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation (2010).

17 North American Free Trade Agreement (NAFTA), Dec. 17, 1992, 32 I.L.M. 296 and 695 (1993).

18 Wolfgang Alschner, *Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law*, 5(2) Go. J.I.L. 455, 484 (2013). *See also* Wolfgang Alschner, *State-Driven Change in International Investment Law and Its (Uncertain) Impact on Investor-State Arbitration: An Empirical Big Data Analysis* (Unpublished PhD Dissertation, Graduate Institute Geneva, 2015).

19 Wolfgang Alschner & Dmitriy Skougarevskiy, *The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe*, 17 J. World Inv. & Trade 339 (2016). Similarly, other authors have shown that U.S. positions and NAFTA practice are predominant in reshaping the future of international investment law. For an analysis of the impact of U.S. positions on China *see* Axel Berger, *Hesitant Embrace: China's Recent Approach to International Investment Rule-Making*, 16 J. World Inv. & Trade 843 (2015); Axel Berger, *Investment Rules in Chinese PTIAs - A Partial "NAFTA-ization"*, *in* Preferential Trade and Investment Agreements: From Recalibration to Reintegration 297 (Rainer Hofmann, Stephan W. Schill & Christian J. Tams eds., 2013). For an analysis of the evolving EU position *see, e.g.,* August Reinisch, *Putting the Pieces Together ... an EU Model BIT?*, 15 J. World Inv. & Trade 679 (2014).

First, unlike the European model prior to the EU's involvement, the United States has always seen BITs as instruments for the protection of investments post-establishment as well as for the liberalization of market access for foreign investors.[20] This vision has found its way into NAFTA and by now has become, to different degrees, and subject to many nuances, the predominant model for Mega-Regionals and modern trade and investment agreements. Most of these agreements, including the ones that the EU is currently negotiating, focus not only on the protection of existing investment (post-establishment), but include provisions on investment liberalization through market access (pre-establishment) (further discussed in Part II).

Second, the substantive investment standards found in Mega-Regionals and other important trade and investment agreements also follow evolving U.S. investment policies as laid down in the U.S. Model BITs of 2004 and 2012[21] and in the practices that developed in the context of NAFTA in another respect. Investment chapters in Mega-Regionals, without exception, are much more specific than the broadly worded principles of investment protection contained in classical European BITs. They not only clarify and concretize the extent of investor rights, but also the scope of regulatory powers of host states through more precise treaty drafting and the inclusion of provisions that recalibrate the textual basis for the relationship between investment protection and host states' regulatory powers (further discussed in Part III).[22] All in all, Mega-Regionals will therefore strengthen state control during the post-establishment phase, while, at the same time, introducing new limits on government powers in the pre-establishment phase.

After zooming in on these developments, we consider some of the deeper structural reasons for the changes to the investment rules in Mega-Regionals that make the content of these agreements a good indicator for the future of international investment law more generally (see Part IV) and close with a reflection on the prospects of continued U.S. leadership in shaping the framework for international investment governance more generally (see Part V).

II. INVESTMENT LIBERALIZATION THROUGH MEGA-REGIONALS

Compared to traditional European BITs, the first major change in Mega-Regionals is their expansion to serve also as instruments of investment liberalization. European BITs, in contrast, generally focused on the protection of investments only after they had entered the host state, following the approach of customary international law,

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[20] The investment treaty practice of the United States has always been an exception in this respect, given that U.S. BITs have regularly also extended national and MFN treatment to market access. *See* RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 56-57 (1995).

[21] U.S. Model BIT 2004, *available at* http://www.state.gov/documents/organization/117601.pdf; U.S. Model BIT 2012, *available at* http://www.state.gov/documents/organization/188371.pdf.

[22] *See also* Caroline Henckels, *Protecting Regulatory Autonomy Through Greater Precision in Investment Treaties: The TPP, CETA and TTIP*, 19(1) J. INT'L ECO. L. 27 (2016).

under which foreign investors do not have the right of entry or establishment.[23] Mega-Regionals go further in this respect and follow the U.S. BIT practice of generally including greater market access commitments that aim at reducing restrictions on the entry of foreign investments and eliminating discrimination at the pre-establishment phase.[24] Examples of investment liberalization provisions found in Mega-Regionals include national treatment and most-favored-nation (MFN) treatment at the pre-establishment phase (see Section A) and restrictions on performance requirements (see Section B). At the same time, Mega-Regionals maintain important exceptions and restrictions on investment liberalization (see Section C). In central aspects, these developments mirror the trend the United States has followed since the start of its BIT program in 1981 and later through its participation in trade and investment agreements, in particular under NAFTA.

A. Non-Discriminatory Market-Access

The customary way of achieving liberalization is with the implementation of provisions that give investors non-discriminatory access to a foreign market or a right of establishment, which is traditionally incorporated through national treatment and MFN clauses. Both NAFTA and BITs involving the United States have traditionally applied non-discriminatory norms of national and MFN treatment to the entry of foreign investments.[25] A number of Mega-Regionals likewise will provide both national treatment and MFN treatment concerning the entry and establishment of investments.[26] These agreements accord investors and investments treatment no less favorable than the treatment accorded to domestic investors or investors of any third country in like situations. This usually covers the full range of investment activities from establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of the investments.

CETA, among others,[27] engages in this liberalization trend. It contains a provision that limits the ability of states to restrict investors' market access,[28]

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23 UNCTAD, *International Investment Arrangements: Trends and Emerging Issues* 26 (UNCTAD Series on International Investment Policies for Development, United Nations 2006), *available at* http://unctad.org/en/docs/iteiit200511_en.pdf.

24 *Id*. 25.

25 *See* NAFTA, *supra* note 17, arts. 1102 and 1104.

26 Other agreements, such as the ASEAN-PRC Investment Agreement, *supra* note 7, arts. 4 and 5(1), include an MFN provision that extends to the admission and establishment of investments, but limit the national treatment protection to the post-establishment phase only. Again other agreements provide pre-establishment national treatment without providing for MFN treatment; *see* ASEAN-AUS-NZ FTA, *supra* note 7, ch. 11, art. 4. *But see* ASEAN-AUS-NZ FTA, *supra* note 7, ch. 8, art. 7, where the agreement stipulates that parties shall enter into future discussions regarding the application of the MFN treatment.

27 *See further* TPP, *supra* note 3, arts. 9.4 and 9.5; ASEAN-Korea Investment Agreement, *supra* note 7, arts. 3 and 4; ACIA, *supra* note 6, arts. 5 and 6 (all providing for pre-establishment rights with respect to both national treatment and MFN obligations). The ACIA additionally lists in art. 1(a) as one of its main objectives the "progressive liberalization of the investment regimes of Member States" and includes liberalization as a guiding principle in art. 2(a) and (b) "with a view towards achieving a free and open investment environment in the region."

28 CETA, *supra* note 8, art. 8.4.

providing for national and MFN treatment at the pre-establishment phase.[29] CETA adopts the "negative list"-approach, which opens all industries and sectors to liberalization except those that are specifically excluded in either of two annexes.[30] This is in contrast to the "positive list"-approach that is adopted by the WTO General Agreement on Trade in Services (GATS), which only opens those sectors to admission that are listed in a schedule of commitments.[31] The EU-Singapore Free Trade Agreement follows this latter "positive list"-approach.[32]

B. Performance Requirements

Other liberalization provisions in Mega-Regionals include prohibitions on the imposition of performance requirements.[33] Prohibitions on performance requirements are considered liberalization provisions because "the imposition of performance requirements can be used to frustrate the right of establishment through the back door by allowing governments to impose significant demands that make an investment uneconomical."[34]

Mega-Regionals tend to include a prohibition on the use of performance requirements using one of two approaches. The first approach affirms the parties' commitment to the WTO Agreement on Trade-Related Investment Measures (TRIMs).[35] The ACIA, amongst others,[36] adopts this approach.[37] The second, and more liberalizing, approach is to follow NAFTA and restrict the use of performance measures beyond those specified in the TRIMs.[38] CETA has opted for this broader approach. It includes a long enumeration of prohibited performance requirements

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29 *Id*. arts. 8.6 and 8.7.

30 *Id*. art. 8.15. *See also* ACIA, *supra* note 6, art. 6, n. 4.

31 General Agreement on Trade in Services (GATS), Apr. 15, 1994, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

32 EU-Singapore FTA, *supra* note 9, art. 9.3. The national treatment provision extends non-discriminatory treatment to the post-establishment phase only and there is no provision on MFN treatment.

33 Some agreements do not limit performance requirements. The ASEAN-PRC Investment Agreement, *supra* note 7, and the EU-Singapore FTA, *supra* note 9, are two agreements that seem to contain no limits on performance requirements.

34 Howard Mann, *Investment Liberalization: Some Key Elements and Issues in Today's Negotiating Context* 5 (Issues in International Investment Law: Background Papers for the Developing Country Investment Negotiators' Forum, 2007), *available at* http://www.iisd.org/pdf/2007/inv_liberalization.pdf.

35 Agreement on Trade-Related Investment Measures (TRIMs), Apr. 15, 1994, 1868 U.N.T.S. 14.

36 *See, e.g.,* ASEAN-AUS-NZ FTA, *supra* note 7, ch.11, art. 5; ASEAN-Korea Investment Agreement, *supra* note 7, art. 6.

37 *See* ACIA, *supra* note 6, art. 7(2). This article of ACIA also mentions that the Member States will engage, within a certain time frame, in a joint assessment of existing performance requirements and consider whether additional commitments should be made in the future.

38 The Canadian and U.S. BIT models follow the approach established in NAFTA. *See* Canada 2004 Foreign Investment Protection Agreement, *available at* http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf [hereinafter Canada 2004 FIPA], art. 7; U.S. Model BIT 2012, *supra* note 21, art. 8.

in connection with the establishment, acquisition, expansion, management, conduct or operation of investments in the host state. The prohibitions include, for example, restrictions on export requirements, domestic content requirements, and technology transfer requirements.[39]

C. Limitations on Investment Liberalization

The inclusion of market access commitments notwithstanding, no Mega-Regional seeks to commit to unfettered liberalization. Importantly, the liberalizing effect of non-discrimination provisions and prohibitions on performance requirements depends in large part on what the countries exempt from market access or pre-establishment requirements and on whether such provisions are included within the scope of investor-state dispute settlement. Placing limitations on investment liberalization provisions is not a new trend. The NAFTA parties, while extending national treatment and MFN treatment to the pre-establishment phase, and prohibiting the imposition of performance requirements, have nonetheless excluded certain measures, sectors and/or activities from liberalization.[40] For example, NAFTA has detailed annexes that carve out sectors from MFN treatment (e.g. aviation, fisheries and maritime matters),[41] reservations for existing non-conforming measures (e.g. transportation sector exceptions),[42] as well as reservations for the introduction of future measures (e.g. excluding measures favoring Canada's aboriginal population).[43]

Mega-Regionals similarly follow in NAFTA's footprints in that they contain broad exceptions to national treatment, MFN treatment and the prohibition on performance requirements for existing, and sometimes even for the introduction of new, non-conforming measures.[44] Also, Mega-Regionals may exempt certain sensitive areas from the scope of national treatment and MFN treatment, including government procurement and subsidies or grants.[45] Additionally, some Mega-Regionals temper the liberalizing effect of the agreement by omitting provisions on market access and prohibitions on performance requirements from the scope of investor-state dispute settlement.[46] But even with these limitations, Mega-Regionals

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39 CETA, *supra* note 8, art. 8.5. *See also* TPP, *supra* note 3, art. 9.10.

40 *See, e.g.,* NAFTA, *supra* note 17, annex I (Canada has excluded measures favoring its aboriginal peoples from the scope of arts. 1102, 1103 and 1106).

41 *See* NAFTA, *supra* note 17, annex IV (Exceptions from Most-Favored-Nation Treatment).

42 *See* NAFTA, *supra* note 17, annex I (Reservations for Existing Measures and Liberalization Commitments).

43 *See* NAFTA, *supra* note 17, annex II (Reservations for Future Measures).

44 *See, e.g.,* ASEAN-AUS-NZ FTA, *supra* note 7, ch. 11, art. 12; ASEAN-PRC Investment Agreement, *supra* note 7, art. 6; ASEAN-Korea Investment Agreement, *supra* note 7, art. 9; CETA, *supra* note 8, art. 8.15; TPP, *supra* note 3, art. 9.12.

45 TPP, *supra* note 3, art. 9.12(6); CETA, *supra* note 8, art. 8.15 (5); EU-Singapore FTA, *supra* note 9, art. 9.2.

46 *See, e.g.,* CETA, *supra* note 8, sec. F, art. 8.18. Similarly, the EU's TTIP negotiating mandate states that "ISDS shall not apply to market access provisions." *See* Council of the European Union, *Directives for the Negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America,*

on the whole seem to commit to improving market access for foreign investments and eliminating discrimination at the pre-establishment phase. This makes them potentially much more important in governing the future global economy than BITs, which were more limited concerning market access.

III. STRENGTHENING STATE CONTROL THROUGH MEGA-REGIONALS

In addition to promoting investment liberalization, Mega-Regionals are also recalibrating the substantive standards of treatment traditionally contained in BITs in order to strengthen the state's sovereign right to pursue public policies (so-called "policy space" or "regulatory space"). This goal is achieved, inter alia, by limiting the scope of application of investment protection standards in Mega-Regionals (Section A), making room for more policy space in the formulation of substantive standards of treatment (Section B), and introducing new institutional safeguards that allow contracting parties to increase control over investor-state dispute settlement (Section C). These aspects also build on models first developed in the context of U.S. and NAFTA investment practices.

A. Limiting the Scope of Application of Investment Protection Standards

Limiting the scope of application of investment protection standards in the post-establishment phase is one way through which Mega-Regionals ensure additional policy space for host states. Such limits can be put in place through a variety of different provisions, including carve-outs (see Subsection 1) and general exceptions (see Subsection 2), but also "denial of benefits"-clauses (see Subsection 3) and "in accordance with host state law"-clauses (see Subsection 4). Many Mega-Regionals make use of all, others of parts, of these provisions and in one way or another build on trends seen prominently in U.S. and NAFTA approaches to recalibrating international investment protection rules.

1. Carve-Outs

Carve-outs are a popular tool in Mega-Regionals to protect host states' regulatory freedom by ensuring that certain measures are not subject to investment treaty disciplines in the first place. Mega-Regionals may offer three main types of carve-outs: 1) carve-outs from the entire agreement; 2) carve-outs from specific treaty obligations; and 3) carve-outs for certain industries or areas of regulation. Notably, all three types of carve-outs can be found in U.S. and NAFTA practice.[47]

Brussels 10, Jun. 17, 2013, *available at* https://www.laquadrature.net/files/TAFTA%20_%20Mandate%20_%2020130617.pdf.

[47] For example, the U.S. Model BIT 2012, *supra* note 21, provides a carve-out for taxation measures (art. 21), government procurement or subsidies or grants (art. 14(5)(a)-(b)); offers exceptions to the prohibition on certain performance requirements (art. 8(3)); and establishes an exception for certain measures related to intellectual property (art. 14(4)).

Some of the most common carve-outs for entire Mega-Regional agreements include those for taxation measures, subsidies or grants, government procurement, and services supplied in the exercise of governmental authority.[48] Other agreements provide carve-outs from certain treaty obligations, most notably national treatment, MFN treatment, the prohibition on performance requirements and rules on the nationality of senior management. As addressed above,[49] Mega-Regionals tend to stipulate that non-contingent standards of treatment, the prohibition on performance requirements and rules on the nationality of senior management and board of directors do not apply to non-conforming measures (existing, continuing or amending).[50] A final type of carve-out found in Mega-Regionals is for specific industry sectors, such as audiovisual services,[51] cultural industries,[52] or air services.[53] Other sensitive areas, such as financial services[54] or sovereign debt,[55] also benefit

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48 ACIA, *supra* note 6, art. 3(4); ASEAN-PRC Investment Agreement, *supra* note 7, art. 3(4); ASEAN-AUS-NZ FTA, *supra* note 7, ch. 11, art. 1(2); ASEAN-Korea Investment Agreement, *supra* note 7, art. 2(2). *See further* CETA, *supra* note 8, art. 8.15, which excludes government procurement and subsidies, or government support relating to trade in services, from the scope of the market access, national treatment, MFN treatment, and senior management and board of directors provisions. CETA's treatment of taxation measures is more sophisticated than a simple carve-out and tries to balance taxation powers and investment protection in a more fine-tuned manner. *See* CETA, *supra* note 8, art. 28.7.

49 *See supra* Part II, Sec. C.

50 ACIA, *supra* note 6, art. 9 (provisions on national treatment and on senior management and board of directors shall not apply to non-conforming measures); ASEAN-PRC Investment Agreement, *supra* note 7, art. 6 (national and MFN treatment shall not apply to non-conforming measures); ASEAN-AUS-NZ FTA, *supra* note 7, ch. 11, art. 12 (national treatment and, in the case of Laos, the prohibition on performance requirements do not apply to non-conforming measures); TPP, *supra* note 3, art. 9.12 (national treatment, MFN treatment, performance requirements, and provisions on senior management and board of directors do not apply to non-conforming measures). The TPP, *supra* note 3, art. 9.12 includes these carve-outs and adds that national treatment, MFN treatment, and the rules on senior management and board of directors do not apply to government procurement, subsidies or grants. The EU-Singapore FTA, *supra* note 9, art. 9.3 exempts subsidies, grants, procurement and audio-visual services from the scope of the national treatment provision and also includes a special carve-out in relation to Singapore in annex 9-D.

51 EU-Singapore FTA, *supra* note 9, art. 9.3(b) (audio-visual services); CETA, *supra* note 8, art. 8.2(3) (audio-visual services for the EU).

52 CETA, *supra* note 8, art. 8.2(3) (cultural industries for Canada).

53 *Id*. art. 8.2(2)(a) (air services).

54 *Id*. art. 8.3(1). The investment chapter does not apply to financial services, which is covered by Chapter Thirteen of CETA. This Chapter also contains investment protection rules, but modifies them to grant additional policy space; see CETA, *supra* note 8, art. 13.16 (prudential carve-out) and art. 13.17 (specific exceptions). The TPP, *supra* note 3, art. 9.3(3) similarly contains a separate chapter dealing with financial services. Like CETA, this chapter also provides room for policy space that goes beyond that available in other areas. See TPP, *supra* note 3, art. 11.11 (exceptions).

55 The TPP, *supra* note 3, art. 9.1 in the definition of an investment includes "other debt instruments and loans" but in a footnote clarifies that "some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics." In its annex 8-B (Public Debt), CETA limits the application of investment treaty standards in respect of sovereign debt restructurings.

from modification to the general rules that grant additional safeguards for states' policy space.

2. General Exception Clauses

In addition to carve-outs, Mega-Regionals also regularly include general exception clauses that clarify that investment treaty disciplines do not override the governments' right to take measures for the protection of competing concerns. General exception clauses appear in a variety of forms and contexts and may vary in their content. Often they are modelled on Article XX of the General Agreement on Tariffs and Trade (GATT) and Article XIV of the GATS. General exception clauses permit states to take measures that, for example, are necessary to "protect public morals or to maintain public order,"[56] "to protect human, animal or plant life or health,"[57] "to secure compliance with laws or regulations,"[58] to protect "national treasures of artistic, historic or archaeological value,"[59] or for the "collection of direct taxes."[60] Interestingly, however, NAFTA has not taken this path.[61] Similarly, the TPP and the 2004 and 2012 U.S. Model BITs borrow from GATT Article XX, but only to set out exceptions on the prohibition on performance requirements.[62] The issue of general exceptions may therefore be an area where at least some Mega-Regionals escape the influence of the United States.

CETA, for example, includes a general exception clause that is contained in a separate chapter.[63] In fact, Article 28.3 of CETA contains two exceptions. The first is found in paragraph one and simply incorporates GATT Article XX into the Agreement.[64] The second paragraph contains another general exception clause, which is also modelled on GATT Article XX, but contains slight differences. For example, unlike the GATT model, CETA provides an exception for measures that are necessary for the "prevention of deceptive and fraudulent practices" or for the "protection of the privacy of individuals in relation to the processing and dissemination of personal data."[65] The EU-Singapore Free Trade Agreement also

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56 ACIA, *supra* note 6, art. 17(1)(a); ASEAN-PRC Investment Agreement, *supra* note 7, art. 16(1)(a).

57 ACIA, *supra* note 6, art. 17(1)(b); Canada 2004 FIPA, *supra* note 38, art. 10(1)(a); ASEAN-PRC Investment Agreement, *supra* note 7, art. 16(1)(b).

58 ACIA, *supra* note 6, art. 17(1)(c); Canada 2004 FIPA, *supra* note 38, art. 10(b); ASEAN-PRC Investment Agreement, *supra* note 7, art. 16(1)(c).

59 ACIA, *supra* note 6, art. 17(1)(e); ASEAN-PRC Investment Agreement, *supra* note 7, art. 16(1)(e).

60 ACIA, *supra* note 6, art. 17(1)(d); ASEAN-PRC Investment Agreement, *supra* note 7, art. 16(1)(d).

61 NAFTA, *supra* note 17, art. 2101 incorporates GATT art. XX exceptions, but this article explicitly does not apply to the investment chapter. The Canada 2004 FIPA, *supra* note 38, art. 10, however, contains a general exceptions provision that is very similar to GATT, art. XX.

62 TPP, *supra* note 3, art. 9.10(3)(d) provides a carve-out for the general prohibition for certain performance requirements when they, for example, are necessary to protect human, animal, or plant life or health.

63 *See* CETA, *supra* note 8, art. 28.3(1) and (2).

64 *Id.* art. 28.3(1).

65 *Id.* art. 28.3(2)(c).

has a general exception clause, which applies, however, only in the context of the national treatment provision.[66]

3. "Denial of Benefits"-Clauses

"Denial of benefits"-clauses are also regularly included in Mega-Regionals as a tool to limit the application of the treaty in denying protection to certain investors and their investments. Such clauses attempt to deny treaty protection to "shell" or "mailbox" corporations that are controlled by nationals of a non-contracting state. "Denial of benefits"-clauses appear in the practice of both the United States and Canada, including in NAFTA.[67] The most common ground upon which contracting states may deny the benefits of the treaty includes the situation where the investor is a national of a third party and has no substantial business activities in the territory of the contracting state.[68] Some of the Mega-Regionals include this requirement in the definition of investor instead of in a separate "denial of benefits"-provision.[69] Another ground that may trigger a "denial of benefits"-clause is where the investor is a national of a country with no diplomatic relations with the contracting parties.[70] Some agreements add an additional requirement that the clause only operates subject to prior notification and/or consultation.[71]

4. "In Accordance with Host State Law"-Clauses

Finally, Mega-Regionals often use "in accordance with host state law"-clauses to limit the protection of investments made in conformity with domestic law. The NAFTA and the U.S. Model BITs do not have "in accordance with host state law"-clauses, but nonetheless arguably require as a general principle of law that

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66 EU-Singapore FTA, *supra* note 9, art. 9.3(3).

67 *See, e.g.,* NAFTA, *supra* note 17, art. 1113; U.S. Model BITs 2004 and 2012, *supra* note 21, art. 17; Canada 2004 FIPA, *supra* note 38, art. 18.

68 *See, e.g.,* NAFTA, *supra* note 17, art. 1113; U.S. Model BITs 2004 and 2012, *supra* note 21, art. 17; TPP, *supra* note 3, art. 9.15; ACIA, *supra* note 6, art. 19; ASEAN-PRC Investment Agreement, *supra* note 7, art. 15; ASEAN-AUS-NZ FTA, *supra* note 7, ch. 11, art. 11; ASEAN-Korea Investment Agreement, *supra* note 7, art. 17.

69 CETA, *supra* note 8, art. 8.1 defines "enterprise of a Party" as "an enterprise that is constituted or organized under the laws of that Party and has substantial business activities in the territory of that Party…" It also stipulates that an "investor" means "a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party." This excludes shell companies from the protection of the agreement. Similarly, EU-Singapore FTA, *supra* note 9, art. 9.1.

70 *See, e.g.,* NAFTA, *supra* note 17, art. 1113; U.S. Model BITs 2004 and 2012, *supra* note 21, art. 17; ACIA, *supra* note 6, art. 19.

71 Canada 2004 FIPA, *supra* note 38, art. 18(2); NAFTA, *supra* note 17, art. 1113(2); ACIA, *supra* note 6, art. 19; ASEAN-PRC Investment Agreement, *supra* note 7, art. 15(1); ASEAN-AUS-NZ FTA, *supra* note 7, ch. 11, art. 11; ASEAN-Korea Investment Agreement, *supra* note 7, art. 17(2). The "denial of benefits"-clauses in the ASEAN+ agreements make further special exceptions for Thailand and the Philippines. *See* ASEAN-PRC Investment Agreement, *supra* note 7, art. 15(2) and (3); ASEAN-AUS-NZ FTA, *supra* note 7, ch. 11, art. 11(3) and (4); ASEAN-Korea Investment Agreement, *supra* note 7, art. 17(4) and (5).

investments be made in accordance with the rules of the domestic legal order.[72] Mega-Regionals, however have decided to be more specific in their approach and have opted for one of two main approaches or forms of "in accordance with host state law"-clauses – one that ties compliance with domestic law to the definition of "covered investment" and one which limits the scope of application of the relevant investment treaty to investments made in compliance with domestic law.[73] Although Mega-Regionals opt for different ways to frame an "in accordance with host state law"-clause, the legal effects are the same,[74] that is, they both deprive an illegal investment from the protection under the relevant investment treaty. Most Mega-Regionals follow the first approach and include an "in accordance with host state law"-clause in the definition of "covered investment."[75] But at least one agreement follows the second approach and includes an "in accordance with host state law"-clause in the provision dealing with the scope of the relevant agreement.[76] Either way, such clauses stress the continuous importance of domestic law for the regulation of foreign investment and thereby aim at ensuring additional host state policy space.

B. Reformulation of Substantive Standards of Treatment

Yet, Mega-Regionals not only ensure policy space by limiting the scope of application of investment treaty disciplines. They also seek to achieve a better balance between the protection and promotion of foreign investment and the policy space of host states, often in response to expansive interpretations of substantive standards by arbitral tribunals, by reformulating the substantive standards of protection. CETA and the EU's TTIP proposal are explicit in this regard; they each contain a separate provision that reaffirms a government's "right to regulate" for legitimate policy objectives, including for the protection of public health, safety and the environment.[77] Other Mega-Regionals have opted for a more nuanced approach that makes room for regulatory objectives within the specific substantive provisions. Examples of this recalibration are, among others, clarifications to the provisions on direct and indirect expropriation (see Subsection 1), limitations on fair and equitable treatment (see Subsection 2), and restrictions on capital transfer provisions (see Subsection 3). All of this follows closely the developments under NAFTA and in the 2004 and 2012 U.S. Model BITs.

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72 Stephan W. Schill, *Illegal Investments in Investment Treaty Arbitration*, 11 Law & Prac. Int'l Cts & Tribunals 281, 310-21 (2012).

73 *Id*. at 283-88.

74 *Id*.

75 *See, e.g.,* CETA, *supra* note 8, art. 8.1. The ACIA and ASEAN+ agreements all define "covered investment" subject to the "laws, regulations, and national policies" of a Member State. *See* ACIA, *supra* note 6, art. 4. *See also* ASEAN-Korea Investment Agreement, *supra* note 7, art. 1; ASEAN-AUS-NZ FTA, *supra* note 7, ch. 11, art. 2; ASEAN-PRC Investment Agreement, *supra* note 7, art. 1.

76 EU-Singapore FTA, *supra* note 9, art. 9.2.

77 CETA, *supra* note 8, art. 8.9; EU TTIP Proposal, *supra* note 4, sec. 2, art. 2.

1. Clarifications to Expropriation Provisions

All Mega-Regionals include a provision that prohibits states from expropriating or nationalizing an investment except for a public purpose, in a non-discriminatory manner, in accordance with due process of law, and against payment of prompt, adequate, and effective compensation.[78] Additionally, they often contain an annex similar in content to the U.S. and Canadian Model BITs that redefines the scope of protection under the expropriation clause in order to ensure sufficient regulatory space.[79] However, the way this objective is achieved differs.

A first way to ensure regulatory space and to reduce constraints on government conduct is to follow the U.S. approach[80] and link the expropriation provision to customary international law. An earlier draft of the TPP favored this option,[81] but the final text of the TPP dropped the link between customary international law and the expropriation provision.[82] A second method, which is also inspired by the U.S. Model BIT,[83] is to clarify the object of expropriation and require that an expropriation can only occur if there is interference "with a tangible or intangible property right or property interest."[84] This links the determination of the object of an expropriation to the domestic legal system, which defines whether an investor's interest is given the characteristics of property, or whether it merely constitutes a privilege that can freely be revoked.

The third way is to limit specifically the scope of the concept of indirect expropriation. This is achieved in a variety of ways. CETA, for example, explicitly

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78 *See* ASEAN-AUS-NZ FTA, *supra* note 7, ch. 11, art. 9(1)(a-d); ASEAN-Korea Investment Agreement, *supra* note 7, art. 12; ACIA, *supra* note 6, art. 14(1)(a-d); EU-Singapore FTA, *supra* note 9, art. 9.6(1)(a-d); TPP, *supra* note 3, art. 9.8 (1)(a-d); CETA, *supra* note 8, art. 8.12(1)(a-d); *see also* ASEAN-PRC Investment Agreement, *supra* note 7, art. 8(b) (instead of referring to due process of law, the agreement requires that the measure be "in accordance with applicable domestic laws, including legal procedures").

79 While the ACIA and ASEAN-AUS-NZ FTA both include an annex in regard to the expropriation provision (*see* ACIA, *supra* note 6, Annex 2 - Expropriation and Compensation; ASEAN-AUS-NZ FTA, *supra* note 7, Annex on Expropriation and Compensation, paras 1-4); the ASEAN-PRC and the ASEAN-Korea Investment Agreements do not have annexes.

80 U.S. Model BITs 2004 and 2012, *supra* note 21, annex B. The decision to limit the scope of the expropriation provision to that which exists at customary international law is arguably in response to the expansive interpretations given by arbitral tribunals in the NAFTA context. *See, e.g., S.D. Myers v. Canada*, UNCITRAL Arbitration Rules, Partial Award on the Merits (Nov. 13, 2000) para. 282.

81 Draft Trans-Pacific Partnership (June 2012), annex 12-B, *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf.

82 TPP, *supra* note 3, annex 9-A now only links the minimum standard of treatment provision to customary international law. TPP, *supra* note 3, art. 9.8 (Expropriation), by contrast, does mention customary international law, but only in a footnote clarifying the term "public purpose," which it delimits to a concept in customary international law.

83 U.S. Model BITs 2004 and 2012, *supra* note 21, annex B, para. 2. This type of limit may also have been developed in response to expansive interpretations by arbitral tribunals. *See, e.g.,* S*.D. Myers v. Canada*, *supra* note 80, para. 281, where the tribunal asserted "in legal theory, rights other than property rights may be 'expropriated.'"

84 ACIA, *supra* note 6, annex 2, para. 1; ASEAN-AUS-NZ FTA, *supra* note 7, Annex on Expropriation and Compensation, para. 1; TPP, *supra* note 3, annex 9-B, para. 1.

requires that an indirect expropriation occur only where a measure or series of measures exceeds a certain threshold by "substantially depriv[ing] the investor of the fundamental attributes of property in its investment."[85] In addition, many agreements spell out a specific method for determining whether an indirect expropriation has occurred, or whether the government's measure remains a non-compensable regulation. In this regard, several Mega-Regionals are inspired by U.S. takings law, albeit with slight variations,[86] and require "a case-by-case, fact based inquiry" that considers certain factors.[87] Under the TPP, which adopts the wording of the U.S. Model BIT verbatim, these are:

> (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
> (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
> (iii) the character of the government action.[88]

By providing a methodological blueprint,[89] Mega-Regionals attempt to focus the task of arbitrators to a particular list of factors that should be considered when determining whether an indirect expropriation has occurred; in doing so, they limit the discretion of arbitrators and strengthen state control.

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85 CETA, *supra* note 8, annex 8-A, para. 1.

86 *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) where the U.S. Supreme Court developed the criteria for deciding whether a particular governmental action constitutes a "taking" of property within the meaning of the Fifth Amendment of the U.S. Constitution.

87 *See* ACIA, *supra* note 6, annex 2, para. 3; ASEAN-AUS-NZ FTA, *supra* note 7, Annex on Expropriation and Compensation, para. 3; CETA, *supra* note 8, annex 8-A, para. 2; EU-Singapore FTA, *supra* note 9, annex 9-A, para. 2; TPP, *supra* note 3, annex 9-B, para. 3(a).

88 *Id.* annex 9-B, para. 3(a)(i-iii). This is also the wording of the Canada 2004 FIPA, *supra* note 38, annex B.13(1).

89 The factors to be considered vary from agreement to agreement. Most of the agreements require that the economic impact of the government action be taken into account (*see, e.g.,* EU-Singapore FTA, *supra* note 9, annex 9-A; CETA, *supra* note 8, annex 8-A). Some agreements additionally require the duration of the measure to be assessed (*see* EU-Singapore FTA, *supra* note 9, annex 9-A, para. 2(a); CETA, *supra* note 8, annex 8-A), para. 2). Variations of the need for "reasonable investment-backed expectations" of the investor are also found in several agreements. ACIA and ASEAN-AUS-NZ FTA, for example, offer a narrower rendition and account for whether the "government action breaches the government's prior binding written commitment," whereas the EU-Singapore FTA appears to offer broader coverage by requiring an examination into the extent to which the measure "interferes with the possibility to use, enjoy or dispose of the property" (*see* ACIA, *supra* note 6, annex 2, para. 3(b); ASEAN-AUS-NZ FTA, *supra* note 7, Annex on Expropriation and Compensation, para. 3(b); EU-Singapore FTA, *supra* note 9, annex 9-A, para. 2(b)). The character of the governmental action is a factor that seems to run through most Mega-Regionals but, again, slight variations exist. While some of the agreements follow the U.S. and TPP approach and simply refer to "the character of the government action," other agreements append a disproportionality analysis (*see* ASEAN-AUS-NZ FTA, *supra* note 7, Annex on Expropriation and Compensation, para. 3(c); ACIA, *supra* note 6, annex 2, para. 3(c)).

The fourth way Mega-Regionals enhance the policy space of the host state under the expropriation provision is to include a specific exclusion from the expropriation provision for government regulation. The ACIA agreement includes the broadest regulation exclusion. It provides that "non-discriminatory measures of a Member State that are designed and applied to protect legitimate public welfare objectives … do not constitute expropriation."[90] Other agreements qualify the scope of the provision by adding the phrase "except in rare circumstances."[91] This is the approach taken in the Canada and U.S. Model BITs.[92] In addition to this qualifier, CETA clarifies that:

> except in rare circumstance where the impact of the measure or series of measures is so severe in light of its purpose that it appears *manifestly excessive*, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[93]

The inclusion of the words "manifestly excessive" arguably limits the scope of the provision even further. Despite the variance in threshold and scope, regulation exceptions appear to be a common tool of Mega-Regionals.

Together with both the introduction of a clear threshold that has to be passed before a measure can even be considered an expropriation and the listing of factors that need to be taken into account when determining whether an indirect expropriation has occurred, the exception for regulations aims at ensuring that legitimate government action for the protection of public interests does not constitute a direct or indirect expropriation.

2. Limitations on Fair and Equitable Treatment

A further example for how Mega-Regionals limit substantive standards in order to reserve policy space and strengthen state control concerns changes to the fair and equitable treatment standard. Similar to the provisions on expropriation, there are different means to achieve the end of limiting the standard's potency.

One way is to tie fair and equitable treatment to the standard offered by the domestic laws of the host state. ACIA can be seen, at last in the view of some, as adopting this approach.[94] Its Article 11 provides that "[e]ach Member State shall accord investments of investors of any other Member State, fair and equitable treatment and full protection and security."[95] "For greater certainty," ACIA states,

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90 ACIA, *supra* note 6, annex 2, para. 4. *See* ASEAN-AUS-NZ FTA, *supra* note 7, Annex on Expropriation and Compensation, para. 4. *See also* EU TTIP Proposal, *supra* note 4, annex 1, para. 3.

91 CETA, *supra* note 8, annex 8-A, para. 3.

92 *See* U.S. Model BITs 2004 and 2012, *supra* note 21, annex B; Canada 2004 FIPA, *supra* note 38, annex B.13(1).

93 CETA, *supra* note 8, annex 8-A, para. 3 (emphasis added).

94 *See* Diane Desierto, *Regulatory Freedom and Control in the New ASEAN Regional Investment Treaties*, 16 J. World Inv. & Trade 1018 (2015).

95 ACIA, *supra* note 6, art. 11(1). *See also* ASEAN-Korea Investment Agreement, *supra* note 7, art. 5.

in the next paragraph, "fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process."[96] This may be read as requiring that the fair and equitable treatment provision is only breached when the government measure in question violates domestic notions of due process and denial of justice.[97]

Another approach is to tie fair and equitable treatment to customary international law. This is the approach first adopted under NAFTA through an authoritative interpretation of the agreement by the NAFTA Free Trade Commission, which explicitly linked the fair and equitable treatment to the minimum standard of treatment under customary international law.[98] This interpretation was subsequently incorporated into the 2004 and 2012 U.S. Model BITs.[99] The TPP follows this approach and clarifies that the fair and equitable treatment standard prescribes the "customary international [minimum] standard of treatment of aliens."[100] The TPP goes on to suggest that the fair and equitable treatment standard "includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings" and incorporates a comparative analysis that takes into account due process principles "embodied in the principal legal systems of the world."[101]

A third approach is to provide a closed list of elements, inspired by current arbitral interpretations that concretize the meaning of fair and equitable treatment. CETA, Article 8.10, for example, states that the obligation of fair and equitable treatment prohibits the following:

> (a) Denial of justice in criminal, civil or administrative proceedings;
> (b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
> (c) Manifest arbitrariness;
> (d) Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
> (e) Abusive treatment of investors, such as coercion, duress and harassment; or
> (f) A breach of any further elements of the fair and equitable obligation adopted by the Parties …[102]

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96 ACIA, *supra* note 6, art. 11(2)(a).

97 The ASEAN-PRC Investment Agreement, *supra* note 7, art. 7 has the same fair and equitable treatment standard with one modification. Instead of using "requires," the ASEAN-PRC Investment Agreement states "fair and equitable treatment *refers* to the obligation of each Party not to deny justice in any legal or administrative proceedings" (emphasis added). The U.S. Model BIT 2004, *supra* note 21, art. 5, for example, uses the word "includes."

98 *See* NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (July 31, 2001).

99 *See* U.S. Model BITs 2004 and 2012, *supra* note 21, art. 5(2)(a). *See also* Canada 2004 FIPA, *supra* note 38, art. 5. The ASEAN+ agreements also tie the fair and equitable treatment provision to that which is required by customary international law. *See, e.g.,* ASEAN-AUS-NZ FTA, *supra* note 7, ch. 11, art. 6(2)(c); ASEAN-Korea Investment Agreement, *supra* note 7, art. 5(2)(c).

100 TPP, *supra* note 3, art. 9.6(2).

101 *Id.* art. 9.6(2)(a). *See also* U.S. Model BITs 2004 and 2012, *supra* note 21, art. 5(2)(a).

102 CETA, *supra* note 8, art. 8.10.

The provision's use of restrictive language, such as "fundamental breach," "manifest arbitrariness," and "targeted discrimination" signifies a high threshold for a breach of fair and equitable treatment.[103] The provision further stipulates that the Parties shall periodically review the content of the fair and equitable treatment provision and make recommendations to the CETA Joint Committee.[104] The use of a closed list of elements using restrictive qualifiers, coupled with a mechanism to amend the provision, arguably limits the discretion of future arbitral tribunals and increases the regulatory space of host states.[105]

The fair and equitable treatment is a ubiquitous, pervasive standard that has seen variable interpretations. The unpredictability of the standard is likely reflected in the various fair and equitable treatment provisions mentioned above. Nonetheless, parties to Mega-Regionals have all seized the opportunity to refine the scope, nature and content of fair and equitable treatment, taking steps to move away from a purely autonomous understanding of the standard, while clearly aiming to ensure the preservation of their policy space.

3. Restrictions on Capital Transfer Provisions

A final example of a provision commonly found in Mega-Regionals that provides states with greater flexibility and control, as compared to classical BITs, relates to restrictions placed on free capital transfer provisions. Reacting to recent financial crises, these restrictions provide states with the ability to control inflow and outflows of capital more effectively.

Traditionally, BITs included "open-ended transfer rights."[106] Today, however, beginning with NAFTA,[107] many Mega-Regionals contain exceptions that include, for example: (i) bankruptcy, insolvency, and protection of the rights of creditors; (ii) issuing, trading or dealing in securities; (iii) criminal or penal offences; (iv) ensuring compliance with orders or judgments in judicial or administrative proceedings; and (v) taxation.[108] Departing from U.S. practice,[109] NAFTA along with some Mega-Regionals go a step further and are accompanied with safeguard

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[103] This resonates of certain NAFTA arbitral tribunal's interpretation of Article 1105(1). *Cf. Glamis Gold v. United States*, UNCITRAL Arbitration Rules, Award (June 8, 2009) paras. 614-616.

[104] The article also stipulates that the Tribunal "may take into account" the legitimate expectations of the investor.

[105] The EU-Singapore FTA also makes use of lists to concretize what fair and equitable treatment means. It differs from CETA in an important aspect. Unlike CETA, it includes a breach of the investor's legitimate expectations as part of the closed list (EU-Singapore FTA, *supra* note 9, art. 9.4(2)(e)). CETA, by contrast, merely provides that a tribunal "*may* take into account" the investor's legitimate expectation in interpreting the listed elements (CETA, *supra* note 8, art. 8.10(4)) (emphasis added).

[106] Andrew Newcombe & Lluis Paradell, Law and Practice of Investment Treaties 414 (2009).

[107] NAFTA, *supra* note 17, art. 1109(4).

[108] *See, e.g.,* EU-Singapore FTA, *supra* note 9, art. 9.7(2); TPP, *supra* note 3, art. 9.9(4); CETA, *supra* note 8, art. 8.13(3); ACIA, *supra* note 6, art. 13(3).

[109] The 2012 U.S. Model BIT does not contain a balance-of-payments exception. *See* U.S. Model BIT 2012, *supra* note 21, art. 7 (Transfers).

provisions in case of serious balance-of-payments difficulties.[110] The ACIA and ASEAN+ agreements, for example, have such safeguards. Thus, under ACIA, "[i]n the event of serious balance-of-payments and external financial difficulties or threat thereof" Member States are allowed to "adopt or maintain restrictions on payments or transfers related to investments."[111]

Outside the ASEAN framework, safeguard provisions are also present.[112] Using almost identical wording as ACIA, CETA and TPP make reference to the Articles of Agreement of the International Monetary Fund (IMF Articles) and permit Parties to adopt or maintain temporary safeguard measures where serious balance-of-payments problems or external financial difficulties, or threats thereof, exist.[113] The EU-Singapore Free Trade Agreement also includes a safeguard provision; however, it does not make reference to the IMF Articles. It permits Parties to take safeguard measures "[w]hen in exceptional circumstances, capital movements cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in either Party." These measures must be temporary, "strictly necessary," and require the Party adopting the measures to inform the other Party of a time schedule for their removal.[114]

Mega-Regionals, arguably influenced by NAFTA's Article 2104, recognize that exceptional circumstances can exist in which a host state should maintain the flexibility to introduce measures that restrict transfers where the party experiences serious balance-of-payments difficulties, or threat thereof. Notwithstanding minor distinctions, restrictions on capital transfer provisions in Mega-Regionals have become important tools to reduce financial vulnerability in times of crisis, thereby ensuring that governments can act efficiently to protect public interests.

C. Institutional Safeguards

Finally, many Mega-Regionals not only aim at providing additional policy space to host states by recalibrating the applicable standards of treatment. They also introduce institutional safeguards that seek to reign in some of the discretion given to arbitral tribunals in the interpretation of the broadly worded standards of treatment and to place power back into the hands of states.

One such institutional safeguard, first adopted under NAFTA,[115] and later advanced in U.S. Model BITs,[116] is the establishment of committees with

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110 *See* NAFTA, *supra* note 17, art. 2104.

111 ACIA, *supra* note 6, art. 16. These restrictions must be (i) consistent with relevant International Monetary Fund provisions; (ii) avoid unnecessary damage to the commercial, economic, and financial interests of another Member State; (iii) not exceed those necessary to deal with the circumstances; (iv) applied for a limited period of time; and (v) taken in a nondiscriminatory manner (*id.* art. 16(2)). *See also* ASEAN-Korea Investment Agreement, *supra* note 7, art. 11; ASEAN-PRC Investment Agreement, *supra* note 7, art. 11; ASEAN-AUS-NZ FTA, *supra* note 7, art. 8(4).

112 TPP, *supra* note 3, art. 29.3; CETA, *supra* note 8, art. 28.5. *See also* EU-Singapore FTA, *supra* note 9, art. 9.7(3).

113 TPP, *supra* note 3, art. 29.3; CETA, *supra* note 8, art. 28.5.

114 EU-Singapore FTA, *supra* note 9, art. 9.7(3).

115 NAFTA, *supra* note 17, art. 1131.

116 U.S. Model BITs 2004 and 2012, *supra* note 21, art. 30(3).

representatives of the contracting parties that have the competence to adopt authoritative interpretations of the investment protection standards that are binding on arbitral tribunals. This permits the Parties to provide indications as to how they wish the agreement to be interpreted. In the case of CETA, this mechanism is expressly not only thought for issuing binding interpretations, but also to allow Parties to adapt, and add content to, the fair and equitable treatment standard.[117]

Another institutional mechanism that is foreseen by certain Mega-Regionals is the establishment of an appellate mechanism that could oversee decisions by arbitral tribunals under the respective agreement.[118] Other than the CETA, which includes an appellate mechanism,[119] Mega-Regionals so far only offer the possibility of introducing such a mechanism in the future; but this may well change with the ongoing discussions in the EU about the appropriate institutional structure for investor-state dispute settlement. CETA, for example, establishes an appellate tribunal that may "uphold, modify or reverse a Tribunal's award" based on errors in the application or interpretation of applicable law, manifest errors in the application of the facts, and grounds set out under Article 52(1) of the ICSID Convention. Independently of the prospects of whether Mega-Regionals will actually create an appellate structure for investment dispute settlement more generally, the institutional safeguards they foresee are part of the larger trend of shifting control from arbitral tribunals back to states in parallel with the limits introduced to the scope of application of investment treaties and the recalibration of substantive standards of treatment.

IV. The Impact of Mega-Regionals on International Investment Law

Mega-Regionals have transformed substantive investment protection standards in a way that has met the treaty parties' goals of investment liberalization and greater sovereign control over the system of international investment law. This section critically analyzes the transformation of international investment law Mega-Regionals will bring about. In the first part, Mega-Regionals will be contextualized from the perspective of the current trends in international investment law (see Section A). In the second part, the reasons for the evolution in the content of Mega-Regionals will be discussed (see Section B). All in all, viewing Mega-Regionals in this broader context reinforces the view that the transformation of international investment law takes shape through developments that first took root in NAFTA, and the experience made in particular by the United States, and later spread to the global level.

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[117] *See, e.g.,* CETA, *supra* note 8, arts. 8.10(3) and 8.44(3)(d). *See also* EU-Singapore FTA, *supra* note 9, art. 9.33. Likewise, the EU TTIP Proposal envisages a provision that will allow the Committee to adopt decisions interpreting investment protection provisions in cases where "serious concerns arise as regards matter of interpretation." *See* EU TTIP Proposal, *supra* note 4, subsec. 2, art. 13(5).

[118] TPP, *supra* note 3, art. 9.23, para. 11; EU-Singapore FTA, *supra* note 9, art. 9.33; EU TTIP Proposal, *supra* note 4, subsec. 2, art. 10; CETA, *supra* note 8, art. 8.44(3)(e).

[119] CETA, *supra* note 8, art. 8.28.

A. FUSING MEGA-TRENDS IN INTERNATIONAL INVESTMENT LAW

The content of Mega-Regionals appears to be moving in parallel with the major trends found in investment treaty making more generally.[120] However, like a loom, Mega-Regionals take different trends in international investment law and interlace them to form a unique fabric for the future of global economic governance. In fact, Mega-Regionals weave together four mega-trends in international investment law, all of which are foreshadowed by U.S. and NAFTA practices.

The first trend is the combination of trade and investment rules into one agreement. This amalgamation of trade and investment governance arguably exhibits a movement towards deeper integration of international economic law and recognition of the inherent interconnection between these two areas of law.[121] While the integration of trade and investment rules has been common practice for Canada and the United States since the conclusion of the Canada-United States Free Trade Agreement in 1988,[122] which later inspired NAFTA and many other U.S. trade and investment agreements, this is a newer development for the EU given that it was only granted competence for "foreign direct investment" in the Lisbon Treaty.[123] The EU has now started putting this competence into practice and has concluded negotiating trade and investment agreements with Canada, Singapore and Vietnam. Further treaties of this nature are currently being negotiated inter alia, with India, China, Malaysia and Thailand.[124] At the same time, the trend to combine rules on trade and investment can be found in virtually any other Mega-Regional, whether TPP, TTIP, or RCEP.

The second trend is the growth of regionalism in international investment law, which involves two components: first the rise in regional agreements granting investment protection to its members, and second the increasing involvement of regional organizations as parties to international investment agreements.[125] NAFTA, in fact, is an example of the first category. The trend towards regionalism in both senses can also be detected in Mega-Regionals. First, Mega-Regionals are instruments that grant, as regional agreements, investment protection to the participating members. Mega-Regionals are either inter-regional agreements (that connect treaty parties from two or more different geographical regions) or intra-regional agreements (that connect treaty parties from within one geographical

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120 For a discussion of these trends, *see* Stephan W. Schill & Marc Jacob, *Trends in International Investment Agreements, 2010-2011: The Increasing Complexity of International Investment Law*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY 2011-2012 145 (Karl P. Sauvant ed., 2012).

121 *See* Tomer Broude, *Investment and Trade: The "Lottie and Lisa" of International Economic Law?*, *in* PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY 139-55 (Roberto Echandi & Pierre Sauvé eds., 2013).

122 Canada-United States Free Trade Agreement, ch. 16, Jan. 2, 1988, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/cusfta-e.pdf.

123 *See* Treaty on the Functioning of the European Union, arts. 207(1) and 3(1)(e).

124 *See* European Commission, *Overview of FTA and Other Trade Negotiations* (Jan. 27, 2015), *available at* http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

125 *See further* the contributions in REGIONALISM IN INTERNATIONAL INVESTMENT LAW (Leon E. Trakman & Nicola W. Ranieri eds., 2013).

region). The inter-regional type would include the TPP, which links Asia, Australia, and the Pacific side of the Americas, and the TTIP, connecting the EU and the United States. Intra-regional agreements would include ACIA, which includes an internal investment agreement amongst ASEAN members, or RCEP, which links different countries in the Asia-Pacific region. Second, many Mega-Regionals also involve regional organizations as treaty parties, most notably the EU and ASEAN.

The third trend in international investment law, which also reflects in Mega-Regionals, is the recalibration of international investment law in terms of both investor-state dispute settlement and substantive standards, which is inspired by developments in U.S. and NAFTA practices on the protection of foreign investment. As discussed, Mega-Regionals contain rules that are different from those in traditional BITs and aim at striking a more appropriate balance between investor protection and non-investment related public interests. This trend reflects, inter alia, in more elaborate agreements with greater specificity, clarifications, exceptions and carve-outs, more refined substantive investment protection standards, and the introduction of institutional safeguards to influence the interpretation of the agreements.[126]

Finally, the fourth trend that is reflected in Mega-Regionals is a shift in the geography of international investment law, which is discernible in two movements. The first is the shift in focus from transatlantic to transpacific treaty making. The second is the shift away from Europe and North America, as the two so far prevailing capital-exporting regions and most significant rule-makers in international investment law, to Asia. While CETA and TTIP are both attempts to maintain the momentum of transatlantic rule-making in global economic governance, the importance of Mega-Regionals with a specific focus on the Asia-Pacific region, including TPP, ACIA, and RCEP, illustrate the general shift in international investment law from a transatlantic to a transpacific focus. While NAFTA, as well as the U.S. Model BIT, still remain strong blueprints for international investment agreements, with the changing geography and the strong participation of Asian actors in Mega-Regionals, "the future center of investment treaty-making [may move] eastwards: from its current focus on transatlantic cooperation towards Asia-Pacific and transpacific cooperation."[127]

As shown, Mega-Regionals, following on the threads of NAFTA and U.S. practices, weave together these major trends in international investment law, including the unification of trade and investment into one agreement, the rise of regionalism, the recalibration of investment standards, and the shifting geography. How the eventual fabric of international investment law will look like, however, is still subject to speculation at this point. Much will depend on how (and if) the EU and the United States manage to conclude TTIP. If TTIP materializes as planned, the EU and the United States will likely maintain a strong foothold on rule-making power in international investment law. If these negotiations fail, the pattern may change towards displaying stronger threads of the Asia-Pacific Region. Be that as it may, Mega-Regionals, not BITs, are going to be the instruments shaping the future of international investment law. Mega-Regionals, not BITs, are going to determine what the standards will be for the governance of investor-state relations in the future.

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[126] *See supra* Part III.

[127] Schill & Jacob, *supra* note 120, at 143.

B. STRUCTURAL DIFFERENCES BETWEEN MEGA-REGIONALS AND TRADITIONAL BITS

As can be seen in relation to the major trends, Mega-Regionals are departing from the architecture of traditional BITs. However, Mega-Regionals are not merely evolved versions of modernized BITs. Instead, Mega-Regionals have emerged as unique agreements that attempt to achieve the twin goals of investment liberalization and increasing state control. To do this, Mega-Regionals have recalibrated substantive standards of investment protection in a way that is both innovative and ambitious. The changes to substantive standards of treatment are not solely caused by changes in preferences and policy. The changes are also due to deeper structural reasons, including changes in the structure of contracting parties (see Subsection 1), the amalgamation of trade and investment (see Subsection 2), and renewed interest of the general public in all stages of investment treaty making (see Subsection 3).

1. More and Different Contracting Parties

Compared to traditional BITs, contracting parties involved in Mega-Regionals are different in two main respects. First, the number of contracting parties has expanded from simple two-party bilateral arrangements to complex and intricate treaty negotiations between a wide range of parties. Mega-Regionals have been concluded, for instance, between countries from a particular region (e.g. ACIA), between countries from around the world (e.g. the TPP), and between individual countries and supra-national organizations (e.g. the EU) or regional trading blocs (e.g. RCEP). With an increase in numbers of contracting parties, Mega-Regionals must accommodate more interests. This reflects both in more, and more specific, exceptions, like the TPP tobacco carve-out,[128] but also in a generally more limited level of substantive investment protection compared to traditional BITs, reflecting the need to find an often lower common denominator.[129]

Second, the contracting parties involved in Mega-Regionals are different in character. Typically, traditional BITs were concluded principally between capital-exporting countries (i.e. countries in Europe and North America) and capital-importing, developing countries. The underlying rationale for most of these agreements was to protect investors from developed countries who invested in developing countries against illegitimate government conduct, such as expropriations without compensation or other types of illegitimate interferences with their investment. Although at a formal level these agreements were reciprocal in nature, as both parties undertook the same obligations, "in practice the obligations all fell on the developing country party."[130] Consequently, the substantive standards of protection in the agreements were formulated with the protection of investors from developed countries in mind (but not necessarily the other way around). This led to language with no, or few, public interest-related exceptions or clarifications. The agreements instead covered investments in a broad sense and listed the traditional range of investor guarantees, including fair and equitable treatment, full

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128 *See* TPP, *supra* note 3, art. 29.5.

129 *See supra* Part III.

130 Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 171 (2005).

protection and security, non-discrimination, and the prohibition of expropriations without much attention to host state regulatory space.

In contrast, Mega-Regionals reflect a changed environment in which investment flows are no longer unidirectional; instead they flow both ways. Treaties, in consequence, no longer solely accommodate the offensive interests of capital-exporting countries, but are negotiated from the start based on an overall assessment of offensive and defensive interests by every negotiating party, whether developed or developing. With investments flowing in two ways, Mega-Regionals have altered the matrix underlying the negotiation of investment disciplines, and for this reason come along with recalibrated substantive standards of treatment that not only contain rules on investment protection, but also emphasize host state policy space.

2. Combination of Rules on Trade and Investment

The second major structural difference between Mega-Regionals and traditional BITs, as mentioned above, is the combination of trade and investment in one agreement.[131] Customarily, investment promotion and protection treaties were self-standing agreements that focused exclusively on investment protection and ignored any connection investment may have had with trade.[132] Mega-Regionals (re)unite trade and investment rules as part of one field of international economic law. The effect of this combination may explain some of the changes in substantive standards of treatment, which are no longer generated solely in the context of the investment regime, but are recalibrated under the influence of international trade law.

First, with trade and investment rules now being negotiated side-by-side, there is an increase in the potential for cross-deals. In BIT negotiations, by contrast, where the sole focus is on the level of investment protection, cross-deals (more or less investment protection in exchange for concessions in other areas of negotiation) were practically non-existent. However, in Mega-Regionals, contracting parties may concede a certain level of substantive investment protections in exchange for a more favorable deal in another sector. In this way, negotiators may strategically use or demand concessions on investment protection and investor-state dispute settlement as bargaining chips to cut cross-issue deals. This may explain, to a certain extent, differences in the investment rules agreed to under Mega-Regionals.

Second, unlike with the negotiations of BITs, which usually involved one or two ministries of the contracting parties (depending on the internal organization, often the ministry for economic affairs and the foreign ministry), Mega-Regionals mandate greater involvement from multiple departments of government, including, for example, ministries for social affairs, environment, etc., with each of them having different interests, expertise, and new ideas. These actors already have been involved for a long time in the negotiation of trade agreements and now, with the reunion of investment and trade, also get involved in the negotiation of investment

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131 *See supra* Part IV, Sec. A.

132 Alireza Falsafi, *Regional Trade and Investment Agreements: Liberalizing Investment in a Preferential Climate*, 36(1) Syracuse J. Int'l L. & Com. 43, 45 (2008). This is not an entirely new trend, however. In fact, the Friendship, Commerce and Navigation (FCN) treaties the United States had started concluding in the 19th century traditionally addressed investment and trade aspects in one agreement.

rules. The increased involvement at the domestic level is likely responsible for longer and more complicated negotiations that result in treaties containing more exceptions and more elaborate provisions, but that also exhibit more complete approaches to economic governance.

Finally, the combination of trade and investment rules in Mega-Regionals blends the trade and investment law communities. This also has repercussions on how the substantive rules of investment protection in Mega-Regionals are crafted and applied as compared to traditional BITs.[133] While trade lawyers traditionally had little impact on shaping the rules governing investor-state relations, their interaction with investment lawyers in the context of Mega-Regionals may lead both to occasional struggle, when different perspectives and underlying philosophies collide, but also to increased cross-fertilization.[134] One example of this cross-fertilization is the inclusion of general exception clauses that mirror GATT Article XX in Mega-Regionals.[135] The appearance of such clauses would have been unlikely without the spill-over of similar debates about the relationship between economic and non-economic concerns from trade to investment. Likewise, the blending of trade and investment communities may also have the potential to embed investment law more firmly into the public international law system, where the trade law system firmly stands.

All in all, the combination of trade and investment in one agreement is a game-changer that not only affects the general impact of Mega-Regionals as pillars of global economic governance, but also accounts for further developments of the investment provisions contained in the agreements.

3. Increased Public Attention

The final structural difference with classical BITs consists in the greater public attention to the negotiation, ratification and implementation of Mega-Regionals. Traditionally, BITs were negotiated quietly and with little, if any, public attention. Mega-Regionals differ radically in this respect and attract public attention in all stages of treaty making. This is mainly due to the fact that Mega-Regionals have a broader coverage of interests, including environmental, human rights and labor issues, and involve more stakeholders. With the increase in potential impact of Mega-Regionals on those interests, more members of the public and more special interest groups, including non-governmental organizations, get involved in the political process surrounding the negotiation of Mega-Regionals. This not only indirectly affects the negotiations of Mega-Regionals; it may have concrete influence on the procedures through which negotiation positions in different constituencies are formed. In the EU, for example, the European Commission launched an

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133 After all, the socialization of lawyers and the sociological composition of those who engage in the negotiation and application of investment rules influences their substance. *Cf.* Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875 (2011).

134 *See, e.g.,* Nicholas DiMascio & Joost Pauwelyn, *Non-Discrimination in Trade and Investment Treaties: World Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48 (2008); Jürgen Kurtz, THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS (2016).

135 *See supra* Part III, Sec. A.2.

online public consultation on investment protection and investor-state dispute settlement in TTIP to channel criticism and to improve communication between those who negotiate Mega-Regionals and the general public.[136] The outcome of this consultation has subsequently influenced the EU's stance on investment protection in the proposal made to the United States for TTIP's investment chapter.[137] This shows that increased public attention fundamentally changes the negotiation process and has repercussions on the content of the agreements, including the substantive standards of investment protection.

Examples, where the increase in public attention has had practical consequences for the content of Mega-Regionals are the inclusion of more exceptions, carve-outs, and clarifications that aim to protect host state policy space and interests the public is particularly concerned about. In addition, with an increase in public attention come corresponding demands for greater transparency, both as regards the negotiation of Mega-Regionals, but also their implementation, including through investor-state dispute settlement. This explains the inclusion of provisions on transparency that grant the public access to documents that are relevant for arbitral proceedings[138] and to hearings[139] and that allow *amici curiae* to make submissions in arbitration proceedings.[140] Finally, increasing public attention may also lead to greater difficulties for the conclusion, ratification and implementation of Mega-Regionals, as critics of these agreements start organizing themselves and using political fora and campaigns, but potentially also court proceedings to influence the content of these agreement or even block them altogether.

Mega-Regionals have important structural differences compared to traditional BITs in that they seek to balance the goals of investment liberalization and increasing state control. These structural changes were first witnessed with NAFTA, which already combined more than two contracting parties, including two developed and one developing country, fused trade and investment into one agreement, and started to attract public attention in the mid-1990s after claims were advanced by investors under NAFTA Chapter 11 and subsequently responded to greater demands for transparency.

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136 European Commission, *European Commission Launches Public Online Consultation on Investor Protection in TTIP*, Press Release, Mar. 27, 2014, *available at* http://europa.eu/rapid/press-release_IP-14-292_en.htm. The European Commission received almost 150,000 responses to its online consultation. *See* European Commission, *Report on the Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the TTIP*, Brussels, Jan. 1, 2015, Commission Staff Working Document 2015 SWD (2015) 3 final, *available at* http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf.

137 EU TTIP Proposal, *supra* note 4.

138 *See, e.g.,* TPP, *supra* note 3, art. 9.24(1) (Transparency of Arbitral Proceedings); EU-Singapore FTA, *supra* note 9, annex 9-C, art. 1 (Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions); CETA, *supra* note 8, art. 8.36 (Transparency of Proceedings).

139 *See, e.g.,* TPP, *supra* note 3, art. 9.24(2) (Transparency of Arbitral Proceedings); EU-Singapore FTA, *supra* note 9, annex 9-C, art. 2 (Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions); CETA, *supra* note 8, art. 8.36 (Transparency of Proceedings).

140 *See, e.g.,* TPP, *supra* note 3, art. 9.23(3); EU-Singapore FTA, *supra* note 9, annex 9-C, art. 3 (Rules on Public Access to Documents, Hearings and the Possibility of Third Persons to Make Submissions).

V. CONCLUDING REMARKS

Mega-Regionals are cutting-edge agreements that are transforming the substantive standards of investment protection in a way that simultaneously seeks to achieve two main policy goals. First, Mega-Regionals promote investment liberalization through greater market access commitments. Second, Mega-Regionals strengthen state control in order to ensure that governments have sufficient space to regulate in the public interest. In pursing these twin-goals, Mega-Regionals both introduce new limits on states at the pre-establishment phase, including non-discriminatory treatment provisions and restrictions on performance requirements, and strengthen state powers at the post-establishment phase, by limiting the scope of investment protection standards, reformulating substantive standards of treatment, and including certain institutional safeguards.

Yet, Mega-Regionals are more than just one trend in international investment law. They are contributing to transforming international investment law more generally. Mega-Regionals can be likened to a loom that weaves all major trends in investment treaty making together, including the amalgamation of investment and trade law, strengthening regionalism, recalibrating investment disciplines, and changing the geographical landscape of international investment law. In addition to being investment "trendsetters," Mega-Regionals also reflect deeper structural changes to international economic governance as compared to traditional BITs. These changes result from differences in contracting parties, the linking of trade and investment, and the increased public attention in the treaty-making process. Provided Mega-Regionals will materialize as currently negotiated, they are likely to constitute the new blueprints for rules and institutions of international economic governance more generally. In the investment law context, they will replace the structure and content of traditional and lean European-style BITs with the more elaborate provisions that follow the treaty practices under NAFTA and of the United States.

Considering the influence of the United States, directly and via NAFTA, on the form and content of investment rules in Mega-Regionals, a key question for the future will be whether the United States can continue to exercise its rule-shaping power for international investment relations, or whether we will see the rise of new rule-shapers. Actors from Asia are certainly candidates for such a position, not only in light of the region's growing economic importance, but also because several Asian actors are engaged in a critical rethink of international investment policy that may potentially have global repercussions.[141] At present, however, it is still too early to tell how powerful Asian actors are going to be in this respect - not least because many of them still face considerable obstacles in assuming global leadership in the field. Moreover, the United States is strongly engaged in investment treaty negotiations with actors in the Pacific and hence seems well-placed to exercise its rule-shaping power, which is influenced and modeled on its NAFTA experience and subsequently recalibrated Model BITs.

The other important rule-shaper in international investment law with global ambitions is, of course, the EU. Its proposal to replace investor-state arbitration

[141] *See* the contributions in Stephan W. Schill (ed.), *Special Issue: Dawn of an Asian Century in International Investment Law?*, 16 J. WORLD INV. & TRADE 765-1123 (2015).

with an 'investment court system' is likely going to lead to a struggle for intellectual leadership with the United States about forging the rules and institutions of the future in international investment law.[142] When looking at the substantive rules on international investment protection, by contrast, the U.S. approach is still dominant. Except for the EU's position to lay down the right to regulate as an express treaty provision, its stance on substantive investment protection rules more generally is very influenced by the recalibrated U.S. approach as laid down in the U.S. Model BITs of 2004 and 2012. At least, in this respect, the EU is not developing its own, distinctly European approach. Independently of whether TTIP negotiations conclude successfully, and whether international investment law-making will continue to be shaped in transatlantic relations, there is little doubt that the substance of international investment relations is likely going to reflect the brave new American world of international investment treaty making. What will be crucial to ensure, however, is that this world does not only reflect American values and preferences, but a just international economic order under the rule of law that is universally accepted.

[142] *See* Stephan W. Schill, *US versus EU Leadership in Global Investment Governance*, 17 J. World Inv. & Trade 1 (2016).

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Investor-State Dispute Settlement and the Future of the Precautionary Principle

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ABSTRACT

The proliferation of bilateral investment treaties and investment chapters in trade mega-treaties and the associated increase in the preference of investors for investor-state dispute settlement has given rise to concerns that the regulatory sovereignty of both developed and developing states might be compromised. In response to these concerns many trade agreements (including the recently concluded Comprehensive Economic Trade Agreement between the European Union (EU) and Canada) have incorporated provisions designed to protect the regulatory sovereignty of nation states, especially in relation to labour standards, public health, phytosanitary and environmental protection. This paper examines the nature and scope of environmental protection measures in investment chapters and attempts to analyse the extent to which these measures will, in practice, prevent challenges by investors seeking to chill or prevent environmental regulations which might threaten their investments. The analysis concentrates particularly on measures based on the precautionary principle and uses the current EU restrictions on neonicotinoid pesticides as a case study. The paper concludes that the measures included in investment chapters designed to prevent such challenges by investors will not necessarily achieve the desired level of protection for environmental regulatory sovereignty.

CONTENTS

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I. Introduction

Free trade agreements can be traced back to the ancient empires which existed before the Common Era.[1] However, the heyday of trade expansion came in the nineteenth century when the transport innovations of the industrial revolution, combined with Empire, and an adherence to laissez-faire economics - particularly in Great Britain - opened up enormous trade opportunities across the world.[2] An early example of bilateralism, which featured the now-familiar most favoured nation status, was the Cobden-Chavalier agreement of 1860 between Great Britain and France. This led to a series of similar European agreements which created something of a golden era of trade in Europe. Unfortunately this was short-lived; an economic depression in the 1870s ushered in a period of increasing protectionism which was ultimately to lead to great instability and nationalism culminating in a half-century of economic and military conflict in the twentieth century.[3] Following World War II, the General Agreement on Tariffs and Trade - the first major multilateral trade agreement and the forerunner of the WTO[4] - was created in 1948, having been salvaged from the failed attempt to create an international trade organisation at a conference of states in the Cuban capital in 1947.[5]

GATT, and later, the WTO, facilitated the growth of the global economy in the later twentieth and twenty-first centuries, and offered an independent dispute settlement service in the form of the WTO's dispute settlement body and appellate panel. These offered a means of settlement of trade disputes that avoided, initially at least, some of the political and diplomatic hurdles presented by state-state negotiation. However, the WTO seems to have become a victim of its own success. Viviane de Beaufort takes the view that despite its considerable success in attempting to broker agreements between 159 states, progress at the WTO has foundered on: "confrontations between states"; the increasingly complex nature of the negotiations which have moved from concerns with tariffs to complex technical matters such as phytosanitary protection and intellectual property; and the rise of "concerns on sovereignty."[6] As a result multilateralism on the WTO model has suffered a decline in popularity originating in "a general lack of enthusiasm from states and … WTO governance issues."[7] Consequently states have moved towards bilateral or multilateral free trade agreements, including the recent so-called Mega-Treaties, brokered without direct input from the WTO. A number of such agreements also contain provisions on investment and these tend to follow established patterns in bilateral investment treaties (BITs), and commonly define

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1 World Trade Organisation, World Trade Report 2011, 49, *available at* https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf (last visited May 4, 2016).

2 *Id.*

3 *Id*. at 50-51.

4 Which replaced GATT in 1995.

5 *See The GATT years: from Havana to Marrakesh*, World Trade Organisation, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited May 4, 2016)

6 Viviane de Beaufort, *The European Union and the New Face(s) of International Trade*, 1 Int. Bus. L. J. 39, 41 (2015).

7 *Id.*

the terms for investments between states, make provision for most-favoured nation status, define what is meant by fair and equitable treatment, prohibit expropriation and may even make provision for dispute settlement, which may permit an investor to sue a host state directly.

In recent times, the United States has been particularly active in embracing this model of trade and, since its first free trade agreement with Israel in 1985, is now party to 20 free trade agreements,[8] including the North American Free Trade Agreement (NAFTA),[9] and the recently concluded Trans-Pacific Partnership (TPP).[10] It is also a party to 42 bilateral investment treaties[11] as well as 52 trade and investment framework treaties.[12] While the use of BITs by the United States may appear impressive it is dwarfed by Germany's 135 (of which 32 are in force) and the United Kingdom's 106 (96 in force). In fact, the proliferation of this type of agreement worldwide has been such that the United Nations Conference on Trade and Development puts the current number of BITs at 2948, of which 2317 are in force.[13] The proliferation of BITs was near-exponential between 1970 (five agreements) and the peak in 1996 (221 agreements). Since then, the scope for new BITs has declined with only 11 BITs concluded in 2013.[14]

This increase of BITs and investment chapters in free trade agreements is coupled with a spectacular increase of case load in investor-state dispute settlement (ISDS) fora. The last summary of the case load statistics for the International Centre for the Settlement of Investment Disputes (ICSID) indicated that 52 applications were currently registered. Just a decade earlier, in 2005, the figure was approximately half that (at 27 applications), and in 1995 was a mere three applications.[15] In the years 1972 to 1994, ICSID applications totalled only 32; by December 2015 this total had risen to 549. This has occurred against the background of a rise in preference for arbitration generally as evidenced by the growth in other arbitral fora. [16]

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8 For a list of the U.S. free trade agreements *see* https://ustr.gov/trade-agreements/free-trade-agreements (last visited May 4, 2016).

9 North American Free Trade Agreement, US-Can.-Mex., Dec.17, 1992, 32 I.L.M 289 (1993), *available at* https://ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta.

10 A conglomerate of 12 states: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, USA and Vietnam. At the time of writing TPP is yet to be ratified. Trans-Pacific Partnership text released Jan. 26, 2016 following legal scrub, *available at* https://ustr.gov/tpp/.

11 For a list of U.S. bilateral investment treaties, *see* http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (last visited May 4, 2016).

12 For a list of U.S. trade and investment framework treaties, *see* https://ustr.gov/trade-agreements/trade-investment-framework-agreements (last visited May 4, 2016).

13 *See* UNCTAD, Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA (last visited May 4, 2016).

14 Figures compiled from data from the ICSID Database of Bilateral Investment Treaties, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/resources/Pages/Bilateral-Investment-Treaties-Database.aspx (last visited May 31, 2016).

15 *The ICSID Caseload - Statistics,* International Centre for the Settlement of Investment Disputes, (Issue 2016-1) at 7, Chart 1, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202016-1%20(English)%20final.pdf.

16 By way of illustration, business of the International Court of Arbitration of the International Chamber of Commerce has grown from 529 cases in 1999 to 801 in 2015 [*See*

The reasons for the rise in popularity in BITs and the introduction of investment chapters in free trade agreements, particularly the recent Mega-Treaties are not difficult to find. There are distinct advantages to states in brokering agreements directly and, as Caroline Foster has pointed out, such agreements "encourage and support international commercial private actors' freedoms to invest, disinvest, repatriate capital, buy and sell goods and services, employ, navigate, exploit communal resources, and take business decisions."[17] As such, both developing and developed states favour investment agreements; developing states, because they facilitate foreign direct investment, and developed states, because they offer an attractive trading platform for private actors - invariably economically important multinational corporations - amongst others, with the introduction of an ISDS mechanism which avoids the diplomatic and political vagaries of state-state settlement..

However, there are some distinct disadvantages to ISDS. In particular, it permits aggrieved investors to take host states directly to international arbitration; it is not necessarily the case that the investor need first exhaust domestic remedies,[18] especially

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Statistics, International Chamber of Commerce, *available at* http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/ (last visited May 4, 2016)], international cases of the Arbitration Institute of the Stockholm Chamber of Commerce have grown (albeit irregularly) from 56 cases in 2005 to 101 in 2015 [*See SCC Statistics,* Arbitration Institute of the Stockholm Chamber of Commerce 2015, *available at* http://www.sccinstitute.com/statistics/ (last visited May 4, 2016)]; the China International Economic and Trade Arbitration Commission, known also since 2000 as the Arbitration Court of the China Chamber of International Commerce case load involving 'foreign' disputes has varied between 331 and 562 cases per annum between 2006 and 2015, though these are not ISDS cases. However, total case load (including domestic disputes) has risen from 981 cases in 2006 to 1968 cases in 2015 [See *Statistics*, China International Economic and Trade Arbitration Commission *available at* http://www.cietac.org/index.php?m=Page&a=index&id=40&l=en (last visited April 15, 2015)]. These supplement and complete with the longer established centres in London and Paris.

17 Caroline Foster, *A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law'*, 64 Int'l & Comp L.Q. 461, 462 (2015) (citing T.W. Waelde). For a wider treatment of the advantages and disadvantages of ISDS *see* Ahmad Ali Gouri, *The Evolution of Bilateral Investment Treaties, Investment Treaty Arbitration and International Investment Law,* Int. A.L.R. 14, 189-204 (2011); Mojtaba Dani & Afshin Akhtar-Khavari, *The Uncertainty of Legal Doctrine in Indirect Expropriation Cases and the Legitimacy Problems of Investment Arbitration,* 22 Widener L. Rev. 1 (2016); Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours,* 12 Santa Clara J. Int'l L. 7 (2013); Becky L. Jacobs, *Perplexing Paradox: "De-Statification" of "Investor-State" Dispute Settlement?* 30 Emory Int'l L. Rev. 17 (2015-2016); Ivan Pupolizio, *The Right to an Unchanging World Indirect Expropriation in International Investment Agreements and State Sovereignty,* 10 Vienna J. on Int'l Const. L. 143 (2016); Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law,* 17 Eur. J. Int'L 121-50 (2006).

18 E.g. Article 26 of the ICSID Convention states that "A Contracting State *may* require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention" (emphasis added) *see* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965 17 U.S.T. 1270, 575 U.N.T.S. 159, art. 26, *available at* https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf (last visited May 4, 2016). [hereinafter ICSID Convention] (Note that the preamble to the 2000

if they consider that seeking such remedies might be futile.[19] Once at ICSID, or a similar forum, the nature of the ISDS that follows is profoundly different from normal "private" arbitration, in that one of the parties (the state) is constrained by public interest considerations that do not affect the other. This use of arbitration has been described as "internationalized public law"[20] and, in effect, takes the established principles of domestic public law and places them in an international arbitration forum which is not necessarily well suited for the purpose. Arbitration was developed for private investors as a relatively swift alternative to contentious litigation where the remedy was decided according to the dictates of commercial expediency and with a view to maintaining the commercial relationship. The rules of natural justice, due process, *stare decisis* and the requirements of transparency (i.e. justice being seen to be done) are secondary considerations. Perhaps most controversial is the fact that decisions of ICSID tribunals are not subject to appeal,[21] apart from an annulment procedure which can overturn a decision on limited grounds.[22] This limitation does not apply to disputes involving non-parties who may take advantage of the ICSID Additional Facility rules; such decisions *are* subject to appeal.[23]

The paper will examine just one aspect of ISDS, but one which has profound implications for regulatory sovereignty in nation states. At issue is the question of whether BITs and investment chapters in recent Mega-Treaties permit investors to challenge regulatory decisions on the basis, *inter alia,* that they amount to a lack of fair and equitable treatment for investors or are tantamount to expropriation of their assets. This is most likely to arise where regulation is based on an interpretation of scientific data (often related to public health or environmental protection) which is susceptible to different regulatory responses. In the European Union such decisions are often predicated on the precautionary principle - which is an important element of European primary law[24] - whereas in the United States and Canada,

BIT between Croatia and the United States (signed by President Clinton) states that international arbitration is available to investors as an *alternative* to domestic courts.)

19 *See Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (Jul. 2, 2013) ¶¶71-74 where the arbitral panel analyses why the claimant had no need to exhaust domestic remedies before proceeding to international ISDS.

20 Foster, s*upra* note 17.

21 *See* ICSID Convention, *supra*, note 18, art. 53(1) "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention."

22 *Id.* art. 52. The grounds of annulment are "(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

23 For example, the award in *Metalclad Corporation v. United Mexican States,* ICSID Case No. ARB(AF)/97/1 (Aug. 30, 2000) was subject to appeal in the Supreme Court of British Columbia following considerable disquiet about the scope of that decision and its effect on Mexican municipal sovereignty. Although Mexico is not a signatory to the ICSID Convention, the appeal was possible because Mexico had nonetheless elected to use ICSID (under the Additional Facility Rules) to determine its NAFTA dispute over a hazardous waste site with U.S. and Canadian investors in Metalclad Inc.

24 Treaty on the Functioning of the European Union (Consolidated Version), 2008 O. J. (C 115), 47, art. 191(2).

the precautionary principle is viewed with suspicion if not outright hostility.[25] Should an arbitral tribunal be tasked with having to decide whether the regulatory decision is a proportionate one, this could embroil it, not so much in an assessment of the scientific evidence *per se*, but in an assessment of the relative merits of the precautionary principle compared to the cost-benefit approach favoured elsewhere in the world. In other words an assessment of how uncertainty in scientific evidence should best be built into regulatory decision-making. This, in effect, places a tribunal in the position of adjudicating in the public interest, a role normally associated with a fully constituted judiciary. Moreover, its decision, if made according to normal arbitration principles, could have the effect of subjugating national sovereignty to private commercial interest. It might also permit one state to use its private sector investors to "adjust" or "chill" regulation in another. This is certainly a fear among some in the European Parliament as it continues to debate the negotiation of the Transatlantic Trade and Investment Partnership (TTIP) between the United States and the European Union.[26] This paper attempts to assess the reality of that fear.

However, rather than discuss this issue in purely abstract and theoretical terms, an attempt has been made to analyse the possibilities through a real-life and current issue, namely the European Commission's restriction on the use of neonicotinoid insecticides. Hence this paper will assess what the possibilities might be were an investor to challenge this restriction under the terms of the proposed (though partly hypothetical)[27] investment chapter of TTIP and to reach some tentative conclusions on the reality of the threat to regulatory sovereignty in respect of the precautionary principle.

II. Investment Chapters and the Balance Between Private and Public Interests in an Environmental Context

The European Commission has been at great pains to reassure concerned parties (including the "European Parliament, Member States, national parliaments and

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25 *See e.g.* Cass R. Sunstein, Laws of Fear: Beyond the Precautionary Principle (2005).

26 Pressure from a centre-left coalition of members of the European Parliament resulted in the postponement of a vote on TTIP in the EU Parliament in June 2015 owing to the vast number of tabled amendments [*See* http://www.europarl.europa.eu/us/en/news_events/news/news_2015/newsletter_articles/newsletter_articles_june_2015/ttip_overview.html (last visited May 31, 2016)]. Among the amendments put forward by this coalition was Amendment 27: "... *to ensure* that foreign investors are treated in a non-discriminatory fashion and have a fair opportunity to seek and achieve redress of grievances, while benefiting from no greater rights than domestic investors; to oppose the inclusion of investor-state dispute settlement (ISDS) in TTIP, as other options to enforce investment protection are available, such as domestic remedies ..." (emphasis added).

27 The putative text of the TTIP is not generally made available to interested parties outside the EU Commission and the U.S. State Department. However, the European Commission has recently redrafted the proposed investment chapter and published it online, albeit in different stages of completion, *see infra* note 128 and associated text. The Commission draft is *available at* http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf (last visited May 31, 2016).

stakeholders"[28]) that any ISDS arrangements in TTIP will not affect regulatory sovereignty. In its press release in September 2015 on new proposals for an "Investment Court System for TTIP and other EU trade and investment negotiations" it reassured readers that "governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements."[29]

The Commission was perhaps well-advised to issue this reassurance since scrutiny of the operation of investment chapters in existing agreements, by analysis of the arbitral decisions that have emerged from them, could lead an analyst to a rather different conclusion. This Part will examine the general nature of the protections for environmental regulatory sovereignty in typical investment agreements, proposed and extant, before examining, in Part III, some of the arbitral decisions which have engaged with these types of provisions.

Modern model investment treaties such as the 2012 U.S. Model BIT[30] contain, at least on the face of it, built-in protection of the ability of states to regulate without interference from external investors. For example, Article 12 of the 2012 U.S. Model BIT concerns "Investment and Environment" and makes impermissible any attempts by states to:

> waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws … in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[31]

This recognises the well-established fact that weakening environmental regulatory standards can have the effect of distorting trade and seeks to avoid a race to the bottom in terms of environmental protection.[32]

The 2012 U.S. Model BIT also recognises the sovereignty of states in promulgating environmental regulation. Article 12(5) states that:

> Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[33]

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28 Press Release, European Commission, Commission Proposes New Investment Court System for TTIP and other EU Trade and Investment Negotiations, IP/15/5651 (Brussels, Sept. 16, 2016), *available at* http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

29 *Id.*

30 2012 U.S. Model Bilateral Investment Treaty, *available at* http://www.state.gov/documents/organization/188371.pdf.

31 *Id.* art. 12(2). This text is incorporated, for example into Article 12(1) of the United States-Uruguay Bilateral Investment Treaty agreed in 2005, *available at* http://www.state.gov/e/eb/ifd/bit/117402.htm.

32 Though it must be said that this protection is a relatively recent addition to the U.S. Model BIT and this provision does not feature in the older BIT agreements entered into by the United States, *see id.*

33 *See* United States-Uruguay Bilateral Investment Treaty, *supra* note 31, art. 12(2).

Thus treaties based on the 2012 U.S. Model BIT not only attempt to protect the sovereignty of states in maintaining, adopting and enforcing environmental regulation but also ensure that states do not weaken protection in order to attract investment.

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, concluded in September 2014,[34] is viewed by many as presaging the likely final contents of the TTIP and has drawn on existing model BITs (including the 2012 U.S. Model BIT) for many of its provisions.[35] CETA makes provision for investment protection[36] which is similar to existing model BIT texts, though the investment chapter was significantly modified following legal analysis such that:

> Canada and the EU will strengthen the provisions on governments' right to regulate; move to a permanent, transparent, and institutionalised dispute settlement tribunal; revise the process for the selection of tribunal members, who will adjudicate investor claims; set out more detailed commitments on ethics for all tribunal members; and agree to an appeal system.[37]

Hence the principal changes to the investment chapter in CETA were to create a bespoke Tribunal and Appellate Tribunal for the purposes of investor-state dispute settlement, including bespoke rules for the appointment of members of the arbitration and appellate tribunals. This is in contrast to the original text of CETA which drew on the existing services of ICSID. The new version makes use of certain of the rules of the ICSID Convention and of the ICSID Secretariat's services but the arbitration hearings themselves will take place outside the ICSID system. This change was made to assuage some of the concerns, particularly in Europe, over the appointment and independence of ICSID arbitrators and the unavailability of appeal against ICSID arbitration decisions under Article 53(1) of the ICSID Convention.

In terms of CETA's protection of environmental regulation in state parties' territories, the investment chapter makes several concessions. Under Section B of CETA (Market Access),[38] the following do not constitute a denial of market access for the purposes of investment:

> (a) a measure concerning zoning and planning regulations affecting the development or use of land, or another analogous measure

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[34] Though still to be signed and ratified by the parties as of June 10, 2016. The document has undergone legal analysis in the European Union, the text of which was released in December 2015 [*See* In Focus: Comprehensive Economic and Trade Agreement (CETA), http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm (last visited June 10, 2016)]. The consolidated text, issued on February 29, 2016 is available at http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm.

[35] Cf. 2012 U.S. Model Bilateral Investment Treaty, *supra* note 5, art. 4 and Comprehensive Economic and Trade Agreement, *supra* note 8, art. 24.1 on the definition of "environmental law".

[36] Comprehensive Economic and Trade Agreement, *supra,* note 34, ch. 8..

[37] Joint statement by Cecilia Malmström, EU Commissioner for Trade, and Chrystia Freeland, Minister of International Trade of Canada, Feb. 29, 2016, *available at* http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154330.pdf.

[38] Comprehensive Economic and Trade Agreement, *supra* note 34, arts. 8.4 and 8.5.

> (b) …
> (c)
> (d) a measure seeking to ensure the conservation and *protection of natural resources and the environment,* including a limitation on the availability, number and scope of concessions granted, and the imposition of a moratorium or ban;[39]

Similarly, for the purposes of Section D of CETA (Investment Protection),[40] which includes the provisions for fair and equitable treatment, compensation, expropriation, transfers and subrogation,[41] a clarification is included at the beginning of the section:

> For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, *the environment* or public morals, social or consumer protection or the promotion and protection of cultural diversity.[42]

The recently agreed TPP uses similar language in its investment chapter in relation to performance requirements:

> Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c), 1(f), 2(a) and 2(b) shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
>
> (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;
> (ii) necessary to protect human, animal or plant life or health; or
> (iii) related to the conservation of living or non-living exhaustible natural resources.[43]

In relation to the TPP investment chapter as a whole, a general provision is included in Article 9.15:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken *in a manner sensitive to environmental, health or other regulatory objectives.*[44]

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39 *Id.* art. 8.4.2(a) (emphasis added).
40 *Id.* arts. 8.9-8.14.
41 *Id.* arts. 8.10-8.14 respectively.
42 *Id.* art. 8.9.1. (emphasis added).
43 Trans-Pacific Partnership, *supra* note 10, art. 9.9.3(d).
44 *Id.* art. 9.15 (emphasis added).

The latest text of the investment chapter of the putative TTIP - though evidently incomplete[45]- is very similar to that of CETA, and also makes provision for a bespoke "Tribunal of First Instance" and a "permanent appeal Tribunal" for investor-state dispute settlement.[46] It also contains articles, like CETA, relating to fair and equitable treatment, compensation, direct and indirect expropriation, transfers, subrogation and denial of benefits.[47]

Very similar protections for important public interest matters are to be found in other, more established, trade agreements such as the North American Free Trade Agreement (NAFTA) and these, unlike the texts of CETA, TTP and TTIP, *have* been the subject of arbitral decisions. For example, the preamble to NAFTA, *inter alia,* exhorts the three state parties to "STRENGTHEN the development and enforcement of environmental laws and regulations"[48] and Article 1114 relates specifically to the investment chapter of the agreement and states that:

> 1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken *in a manner sensitive to environmental concerns.*
> 2. The Parties recognize that *it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures*. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.[49]

On the face of it such provisions should prevent interference with the environmental regulatory sovereignty which states must exercise in the public interest and prevent the dismantling of existing regulation as a means of attracting foreign direct investment. However, the reality has not always reflected these expectations. Some arbitral decisions have suggested that investor interests can, in certain circumstances, outweigh the right of a state to exercise sovereignty. It is to these decisions that we now turn.

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45 E.g. there are references to National Treatment and Most Favoured Nation Status at Annex II (Public Debt) to section 2, paragraph 2, *see supra* note 27. This paragraph refers to "Section 1: Liberalisation of Investments", but the full text of this section is not yet included in this Commission document; a separate document on investment protection is still under negotiation (*see infra* note 128).

46 *Id.* sec. 3 (Resolution of Investment Disputes and Investment Court System), arts 9 and 10 respectively.

47 *Id.* sec. 2 (Investment Protection), arts 3, 4, 5, 6, 8 & 9 respectively.

48 North American Free Trade Agreement, *supra* note 9, Preamble.

49 *Id.* ch. 11, part Five (Investment, Services and Related Matters), art. 1114 (emphasis added).

III. Investor-State Dispute Settlement and the Threat to Environmental Sovereignty

Most ISDS proceedings have taken place under the auspices of the ICSID and a number of these have involved challenges based on attempts - at least on the face of it - to protect the environment or to preserve local sovereignty in respect of activities perceived to be environmentally unacceptable or contrary to local or national public health imperatives.

Perhaps the most controversial of these was the *Metalclad* arbitration, issued in August 2000 and heard under the Additional Facility rules of the ICSID Convention.[50] These rules were applied owing to the fact that Mexico, the state party, was not a party to the ICSID convention but had opted to use ICSID as a forum to determine a dispute relating to the construction and operation of a hazardous waste facility in the La Pedrera valley near Guadalcazar in the State of San Luis Potosi in southern Mexico.[51] The arbitration was required to determine whether the Mexican municipal authorities had acted in such a way, in preventing the operation of the site (in response to strong local opposition), as to contravene Articles 1105 and 1110 of the NAFTA which state:

> Article 1105(1):
> Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
> …
> Article 1110:
> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;
> (c) in accordance with due process of law and Article 1105(1); and
> (d) on payment of compensation
> …

In short, the U.S. and Canadian investors in Metalclad were seeking to show that the lack of transparency in the operation of the Mexican regulatory system relating to hazardous waste sites, and the decision of the local municipality to create a nature reserve which included the entire site (thereby rendering it inoperable), amounted to a lack of fair and equitable treatment and to measures tantamount to expropriation.

The decision in relation to Article 1105(1) was based on the fact that there was considerable uncertainty on the part of the Mexican federal, state and municipal

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50 *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

51 Mexico was able to take advantage of this procedure by virtue of Article 1120(1)(b) of the NAFTA, to which Mexico is a signatory. At the time of writing Mexico remains a non-signatory to the ICSID Convention.

authorities as to which of them was in fact responsible for the permitting of hazardous waste facilities.[52] Metalclad had legitimately, and in good faith, relied on federal assurances about the legality of the construction and operation of the site. The absence of regulatory clarity, and uncertainty as to practice and procedure at the various levels of governance amounted to a lack of transparency. Given the strength of local opposition[53] it is perhaps understandable that the municipal authority so assiduously tried to prevent construction and operation of the plant. Nonetheless, the uncertainty unquestionably affected Metalclad's ability to make decisions about, and to realise, their investment. The fact that ultimately this uncertainty resulted in an arbitral decision which compensated foreign investors at the expense of local autonomy may be seen as unfortunate, but Metalclad's treatment *was* arguably unfair and inequitable treatment by the standards of international law, particularly as they had engaged extensively with domestic procedures in an attempt to resolve the issue before turning to ICSID.

However, aspects of the panel's comments on the Article 1110 infringement were much more controversial. Much of the decision appeared to follow logically from the Article 1105 finding, on the basis that such a degree of opacity in the regulatory and legal process was not only unfair and inequitable treatment, but on such a serious scale as to qualify also as a measure tantamount to expropriation. However, the panel went further and considered the state governor's decision to issue an Ecological Decree which encompassed the site as part of the Article 1110 analysis:

> … the Tribunal also identifies as a further ground for a finding of expropriation the Ecological Decree issued by the Governor of SLP on September 20, 1997. This Decree covers an area of 188,758 hectares within the "Real de Guadalcazar" that includes the landfill site, and created therein an ecological preserve. This Decree had the effect of barring forever the operation of the landfill.[54]
>
> …
>
> The Tribunal need not decide or consider the motivation or intent of the adoption of the Ecological Decree. Indeed, a finding of expropriation on the

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[52] *Metalclad Corporation v. The United Mexican States, supra* note 50, ¶¶ 78-101. The tribunal found that responsibility rested solely with the federal authorities and that the municipality's refusal to grant building permits on the basis of environmental considerations, rather than restricting their scrutiny to "appropriate construction considerations" (*Id.* at ¶ 86) amounted, in effect, to an *ultra vires* exercise of power. It could be argued of course, that "environmental impact considerations" *are* legitimate construction considerations when assessing physical construction or site defects. After all, the physical construction of a site itself has an impact on the environment and a full environmental impact assessment should take account of construction as well as subsequent operation of a landfill site. Furthermore, if an environmental impact assessment does not adequately analyse the suitability of the site itself (in terms of geological suitability, treatment of leachate to water and land, emissions to air and so forth) then how can the site itself be said to suitable, and hence free from defect. However, the Tribunal chose to construe these terms more narrowly and, unlike the author, had the benefit of hearing or reading both parties' expert evidence in full.

[53] *Id.* ¶ 91.

[54] *Id.* ¶ 109.

> basis of the Ecological Decree is not essential to the Tribunal's finding of a violation of NAFTA Article 1110. However, the Tribunal considers that the implementation of the Ecological Decree would, in and of itself, constitute an act tantamount to expropriation.[55]

This was to attract considerable informed criticism and adverse judicial treatment in the aftermath. Many commentators considered that the Tribunal - which was led by no less a figure than Professor Sir Elihu Lauterpacht, CBE, QC - had construed the term "indirect measures tantamount to expropriation" unacceptably widely and in such a way as to trespass on the legitimate exercise of state sovereignty in environmental matters. Professor Phillipe Sands has characterised the Tribunal as taking "a very broad approach to the definition of expropriation"[56] and has written elsewhere that such decisions represent a worrying and retrograde development in the requirement to balance the interests of investment with those of environmental protection.[57]

The decision received judicial scrutiny at the hands of Judge David F. Tysoe of the Supreme Court of British Columbia.[58] He reviewed the reasoning of the Tribunal and concluded that the *Metalclad* Tribunal *had* exceeded its jurisdiction when deciding whether the Mexican government had contravened NAFTA Article 1105 ostensibly by importing the concept of transparency into the text of the Article as one of the objectives of the NAFTA. In Tysoe J.'s view the international law concept of fair and equitable treatment does not incorporate the concept of transparency and the Tribunal exceeded its jurisdiction in importing it.[59] The question of transparency was thus beyond the scope of the submission to arbitration "because there are no transparency obligations contained in Chapter 11."[60] In relation to Article 1110, Tysoe J. considered that the Tribunal's Article 1105 analysis had "infected its analysis of Article 1110."[61] Thus since the decision on Article 1105 had improperly taken account of transparency and this was then used as the basis for deciding the Article 1110 issue, this too was beyond the scope of its jurisdiction for the same reason.

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55 *Id.* ¶ 111 (emphasis added).

56 Philippe Sands, Lawless World 133 (2005).

57 Philippe Sands, *Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law*, OECD Forum on International Investment (27-28th March, 2008) at footnotes 38-41 and associated text, *available at* http://www.oecd.org/investment/globalforum/40311090.pdf. Note that at footnote 38 Sands indicates that the Metalclad Tribunal decision had not been published at the time of his writing.

58 It was stated earlier that arbitration under the ICSID Additional Facility rules are not subject to Article 53(1) of the ICSID Convention (which forbids appeals against decision made under the ICSID Rules) and hence may be appealed in a suitable national court. Thus because the Metalclad arbitration had been held in Vancouver, the Supreme Court of British Columbia had jurisdiction to hear the appeal under the terms of British Columbia's International Commercial Arbitration Act, R.S.B.C. 1996 c. 233. *See The United Mexican States v. Metalclad Corporation & Attorney General of Canada & La Procureure Générale du Québec on Behalf of the Province of Québec - intervenors* [2001] BCSC 664.

59 *Id.* ¶¶ 67-76.

60 *Id.* ¶ 72.

61 *Id.* ¶ 78.

Turning to the question of whether the passing of the Eco-Decree amounted to a measure tantamount to expropriation, Tysoe, J. was not able to conclude that the Tribunal had been patently unreasonable in reaching its decision. However, he did conclude that the definition of expropriation used by the Tribunal was "sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority."[62] However, given that the definition used was a matter of law, the resulting conclusion was one with which Tysoe J. was "not entitled to interfere under the International CAA."[63]

The importance of the *Metalclad* decision lies partially in its demonstration of the power of arbitral decision-making vis-à-vis sovereign interests and in the potential of international trade law principles to influence the shape and form of local and national regulatory measures.[64] However, the subsequent use (or non-use) of the decision in other arbitral disputes serves also to illustrate the unpredictability and relative capriciousness of such decisions and the uncertainty that governments might face in designing and enforcing regulatory measures such that they do not fall foul of investor challenges or attempts to "chill" the regulatory process.

What then, is the legacy of the *Metalclad* decision on fair and equitable treatment and expropriation, and to what extent has it been followed subsequently by other tribunal panels? This is not such a straightforward question to answer for a number of reasons. Firstly, arbitral tribunals decide each case on the facts before them and the terms of the underlying agreement and hence the common law doctrine of *stare decisis* is not appropriate. Secondly, there is no requirement for ICSID arbitral awards to be published - and many are not, or are published as excerpts only.[65] Thus it is not possible in many cases to find out whether, or the extent to which, the *Metalclad* interpretation of "tantamount to expropriation" was relied upon. Thirdly, different investment agreements between states take different approaches to fundamental state-investor relations such as most-favoured nation treatment, fair and equitable treatment, expropriation and discrimination. Hence references to previous awards based on NAFTA will, at best, have persuasive authority, but may have none at all.

It is worth noting, however, that not long after the *Metalclad* decision was issued, the NAFTA rules were altered in respect of the meaning of fair and equitable treatment. The NAFTA Free Trade Commission adopted, on July 31, 2001, a Note of Interpretation entitled "Minimum Standard of Treatment in Accordance with International Law."[66] It states, *inter alia*, that the interpretation of "… the concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary

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62 *Id.* ¶ 99.

63 *Id.*

64 Though it should be noted in passing, in the interests of balance, that the tribunal's award of US$16.7m against Mexico represented only 18.5% of the original claim of US$90m Metalclad's projected profits were not awarded on the basis, *inter alia*, that the waste site had never operated as such.

65 Though in recent times there is a marked preference for full publication, probably in the interests of transparency and in an attempt to improve the public perception of the legitimacy of the decisions.

66 See *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award (Aug. 25, 2014) ¶9.3.

international law minimum standard of treatment of aliens." This change may or may not have been passed in response to the *Metalclad* decision but at any rate should have made such a broad interpretation less likely in the future, at least where NAFTA-based arbitrations are concerned.

And yet, barely three years after *Metalclad* arbitration, Mexico found itself back at ICSID facing similar claims of lack of fair and equitable treatment and expropriation relating to another hazardous waste landfill site - this time far to the north-west in the Municipality of Hermosillo, in the State of Sonora in Mexico.[67] This time the BIT between Spain and Mexico was the governing instrument and again it was dealt with under the ICSID Additional Facility rules. Notwithstanding the earlier criticism of *Metalclad*, the tribunal applied a similar analysis to that employed in *Metalclad* and reached essentially the same conclusions.[68]

The *Metalclad* decision arose again in *Waste Management Inc.*, yet another ICSID case involving Mexico.[69] This case also involved Article 1105(1) and Article 1110 claims against Mexico, again in the context of waste management, and again where local unrest played a part. The U.S. investor claimed that the failure of municipal authorities in Acapulco properly to cede a waste management concession amounted to "measures tantamount to expropriation." This had occurred in circumstances where local people had taken great exception to the imposition of new waste collection charges and the dismantling of existing systems (poorly regulated though they were) and had refused to cooperate - or pay. This resulted in the entire scheme becoming economically unviable.

The *Waste Management Inc.* Tribunal did refer to the *Metalclad* decision, and appeared to acquiesce in Justice Tysoe's characterisation of the interpretation of tantamount to expropriation as "extremely broad."[70] In the event, the *Waste Management Inc.* Tribunal did not need to engage with this interpretation as it considered that the waste concession had not been a "regulatory taking" (as in *Metalclad*) but had failed because it was economically unviable from the start. Thus the *Metalclad* issue could be evaded.

Expropriation also arose in the case of *Lucchetti* where a conservation order (Decree 258) was placed on an area including a pasta factory owned by an investor based in Chile.[71] A follow-up decree (Decree 259), aimed at implementing the first decree stated:

> IT IS HEREBY DECREED:
> Article 1.- The municipal operating license granted by Municipal Resolution No. 6856-98-MDCH to Lucchetti Perú S.A. for its industrial plant situated at an unnumbered location on Avenida Prolongación Defensores del Morro, 20.5 km along the Panamericana Sur highway, Chorrillos, for the manufacture and sale of pasta is hereby revoked.

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67 *Tecmed Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2003).

68 *Id.* ¶¶ 95-174; *Metalclad* is cited at ¶113 (footnote 125).

69 *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004).

70 *Id.* ¶¶ 153-4 & 159.

71 *Empresas Lucchetti S.A. v. Republic of Peru*, ICSID Case No. ARB/03/04 (2005).

> Article 2.- The industrial establishment referred to in the preceding article shall be closed and entirely removed; this shall be done within a maximum of twelve months from the day following the publication of this Decree.

Evidently this entirely "closed and … removed" the factory - a clearer example of expropriation would be difficult to imagine. However, given that it was for the purposes of environmental protection (i.e. in the public interest) and appeared non-discriminatory in the sense that all outlets in that area were similarly affected, it would have been interesting to see how the Tribunal would have approached it. In the event Lucchetti's claim failed on technical grounds[72] and the expropriation issue was never dealt with so we can only speculate on whether the *Metalclad* approach would have been invoked or not.

In 2012, the *Metalclad* decision was invoked against Venezuela in *Mobil Investment Canada Inc.*[73] This is referred to not only because of citation of *Metalclad* but also because one of the arbitrators was Professor Philippe Sands QC, who had previously roundly criticized the *Metalclad* decision.[74] Perhaps unsurprisingly therefore, the *Mobil* tribunal refused to follow the *Metalclad* lead in relation to NAFTA Article 1105(1) and in a rather terse paragraph pointed out that the *Metalclad* decision had been partially set aside by the Supreme Court of British Columbia and further that the Tribunal "is not aware of any subsequent decisions which have followed the approach taken by the *Metalclad* Tribunal."[75] It seems as if the fair and equitable treatment part of the *Metalclad* decision at least was by now considered unsound.

However, more recently still, the *Metalclad* decision was invoked in *Gold Reserve Inc.*[76] This is one of many cases[77] brought against Venezuela in the wake of the Chávez administration's endeavours to take back the country from foreign influence in the 2000s until his death in 2013.[78] The case involves the alleged failure of the Venezuelan authorities to honour gold mining concessions held by a Canadian parent company. It was not brought under the terms of NAFTA but instead under the 1998 BIT between the Government of Canada and the Government of Venezuela.

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72 The dispute between the Peruvian authorities and Lucchetti was considered to have started before the bilateral investment treaty between Chile and Peru came into force and hence did not fall within its terms. Article 6 of the Peru-Chile Bilateral Investment Treaty is concerned with expropriation in similar, though not identical, terms to NAFTA Article 1110, *Id.* ¶ 25.

73 *Mobil Investment Canada Inc. & Murphy Oil Corp. v. Venezuela*, ICSID Case No. ARB(AF)/07/4.

74 Philippe Sands, *supra* notes 56 & 57.

75 *Mobil Investment Canada Inc. & Murphy Oil Corp. v. Venezuela*, *supra* note 73, ¶ 140.

76 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* Case, ICSID No. ARB(AF)/09/1 (2014).

77 As of July 19, 2016, there are 24 pending cases against Venezuela at ICSID alone - despite its withdrawal from the ICSID Convention in 2012. It has already faced 16 previous (concluded) cases.

78 Nicolas Kozloff, Hugo Chávez: Oil, Politics and the Challenge to the US (2007). This is one of scores of texts on Chávez published since his election as Venezuelan President in 1999.

In a long and often difficult appraisal,[79] the Tribunal eventually turns to the question of fair and equitable treatment[80] and invokes the "transparency" analysis used in *Metalclad*.[81] The *Metalclad* approach was approved without any reservation and certainly no mention of Justice Tysoe's unfavourable review in the Supreme Court of British Columbia, nor the adjustment to the NAFTA interpretation of the fair and equitable treatment which occurred after the *Metalclad* decision, nor the comments of the panel members in *Mobil & Murphy.* This decision in particular demonstrates the uncertainty and volatility that can pervade arbitral decisions.

The *Gold Reserve* Tribunal also discussed the question of expropriation, and again invoked the *Metalclad* decision,[82] once again without any reservations expressed about the "broadness" of that interpretation. The tribunal went on to award damages to Gold Reserve Inc. in the amount of US$713,032,000.[83]

Venezuela was also on the receiving end of another huge expropriation award at the end of 2014 in *Venezuela Holdings B.V.*[84] Here a group of Dutch parent company investors were awarded in excess of US$1.6b as a result of a "lawful" expropriation by the Venezuelan government which was held not to have been adequately compensated in line with the terms of the Netherlands-Venezuela BIT of 1991.[85] This particular award makes no mention at all of the *Metalclad* decision.

All these decisions were the result of disputes which went all the way to full assessment of the merits of the parties' positions and at least each party's position was fully pleaded. However, there are instances where the threat of ISDS proceedings appear, at least on the face of it, to have resulted in a "chilling" of regulatory measures without the benefit of detailed argument. The use of threatened proceedings to influence the exercise of regulatory sovereignty has caused even more disquiet, not least because it is difficult, if not impossible, to assess the extent of its influence.

One of the starkest examples of this "use" of ISDS is the 1998 *Ethylcorp* decision.[86] Here Ethylcorp, a group of U.S. investors incorporated in Virginia, objected to the decision of the Canadian government to ban the import of methylcyclopentadienyl manganese tricarbonyl (MMT), a petroleum additive, on the grounds of public health protection.[87] This restriction was brought about by the passage of the Manganese-based Fuel Additives Act of 1997.[88] The Act proscribed

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79 Occupying some 242 pp.

80 *Metalclad Corporation v. The United Mexican States*, *supra* note 50, ¶¶ 537-615.

81 *Id.* ¶¶ 574 & 609.

82 *Id.* ¶ 635.

83 Though the original claim was for $1,735,124,200. *Id.* ¶ 5.

84 *Venezuela Holdings B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27 (2014).

85 Agreement on Encouragement and Reciprocal Protection of Investments (22 October 1991) between the Kingdom of the Netherlands and the Republic of Venezuela.

86 *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction 24 (June 1998), *available at* https://www.uncitral.org/transparency-registry/registry/data/can/ethyl_corporation.html.

87 Note however, that the production and use of MMT *within* Canada was not prohibited but this would have meant that Ethyl Corp would have had to have set up production facilities in Canada itself rather than relying on import of MMT.

88 Manganese-based Fuel Additives Act, S.C. 1997, c.11 (Can.).

the interstate trade in, or import of, MMT for commercial purposes unless in accordance with an authorisation. However section 5 of the Act specifically forbids the authorisation of MMT for the purposes of addition to petroleum. The effect of the Act, in the view of Ethylcorp, was to deprive it of its business, since their MMT was blended into more that 95% by volume of the petroleum sold in Canada.[89] Of course Ethylcorp were not alone in this in the sense that the Act banned the import and use of MMT as a petrol additive for *every* company operating in Canada. Hence there was no element of discriminatory practice. Nonetheless, Ethylcorp brought proceedings under the UNCITRAL rules alleging a breach of chapter 11 of the NAFTA, including an assertion that the passage of the Act contravened NAFTA rules on national treatment (Article 1102), performance requirements (Article 1106) and expropriation (Article 1110). In the decision on jurisdiction, delivered on June 24, 1998, the tribunal rejected the arguments of the Canadian government that (i) Ethylcorp had failed to observe procedural requirements related to timeliness; and, (ii) that the Act and statements relating to it, were not "measures", nor were they measures related to "investments" or "investors."[90] The tribunal went on to claim jurisdiction.

In the event, however, the merits of the claim were never addressed as the Canadian Government instead reached an out of court settlement with Ethylcorp, doubtless owing to lack of confidence that it could win on the merits in another arbitral forum. Though this response cannot be thought of as a classic regulatory chilling in that the provision was promulgated and remained in place after the challenge rather than preventing its genesis in the first place, it does illustrate that even where a public health measure is put in place for entirely *bona fide* public health reasons supported by sound science, the investor can nevertheless use the threat of arbitration to protect its investment. Further illustration of this tactic, albeit in a different context, can be observed in the campaign by Phillip Morris against plain packaging regulations in Uruguay and Australia.[91]

Thus there is plenty of precedent for the use of threats of arbitration to control regulation deemed to be economically threatening to an overseas investor. This gives rise to the question of whether regulatory measures adopted to protect public health or the environment in the European Union might potentially be open to challenge under the putative investment chapter of the TTIP by investors based in the U.S. Self-evidently the answer is yes by virtue of the mere existence of the investment chapter. However, there is an added nuance to challenges to environmental measures in the European Union since so many of them are based on the precautionary principle. It is contended that the different perceptions of this principle on both sides of the Atlantic presents an avenue of attack on regulatory measures in the European Union. Challenges to regulatory measures may be undertaken on the basis that the precautionary principle may be a disproportionate and non-scientific

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89 *Ethyl Corporation v. The Government of Canada*, UNCITRAL, Award on Jurisdiction (24 June 1998), at ¶5 *available at* https://www.uncitral.org/transparency-registry/registry/data/can/ethyl_corporation.html.

90 *Id.* Canada's arguments are at ¶¶ 42-45; the Tribunal's rejection of them at ¶¶ 50-96.

91 *Philip Morris Brands Sàrl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. Arb/10/7; *Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12.

response which results in regulation based on fear and irrationality not on sound science.[92] It is to this debate that we now turn.

IV. The Precautionary Principle - A Brief Background

The precautionary principle is, in essence, the idea that lack of scientific uncertainty about a potentially harmful phenomenon, product or process should not, of itself, be a barrier to the taking of precautionary measures. The origins of the principle are somewhat obscure but it is generally traced back to Swedish and German environmental policies (Vorsorgeprinzip) of the 1970s. It has also been said to have been highly influential at the London Dumping Conference of the International Maritime Organisation in 1972, which gave rise to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (MARPOL) which marked the beginning of the precautionary approach to the disposal of waste at sea.[93] Certainly by 1992 the precautionary approach was a significant element of international environmental policy and was prominent in the Declaration of the United Nations Conference on the Environment and Development, 1992 (Rio Conference):

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[94]

By 1998, the precautionary principle had become part of the legal order of the European Communities by virtue of the Treaty of Amsterdam 1997, which inserted a new Article 131(2) into the Treaty on European Union; essentially the same text is now incorporated in Article 191 of the Treaty on the Functioning of the European Union which states that:

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92 The precautionary principle has been described in the U.S. as a "paralyzing principle" (Cass R. Sunstein, *The Paralyzing Principle*, Regulation 32-37 (Winter 2002-2003)). Sunstein was later to write an entire text devoted to "debunking" the principles (Cass R. Sunstein, Laws of Fear: Beyond the Precautionary Principle (2005). However, criticism of the principle is not confined to the US; many prominent European commenters have also pointed out the irrationality and indeterminacy of the principle (*see* Lawrence Kogan & Lucas Bergkamp, *Trade, the Precautionary Principle, and Post-Modern Regulatory Process: Regulatory Convergence in the Transatlantic Trade and Investment Partnership* 4 Eur. J. Risk Reg. 495, 499ff. (2013).

93 Kevin Stairs & Peter Taylor, *NGOs and the Legal Protection of the Oceans: A Case Study, in* The International Politics of the Environment 110-41, 120ff. (Andrew Hurrell & Benedict Kingsbury eds., 1992).

94 United Nations, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I, Principle 15.

> Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.[95]

Unfortunately the principle itself is not further defined in the Treaty. Some clarification is contained within the official "Communication from the Commission on the precautionary principle" of 2000[96] which indicates that the principle should be engaged:

> … where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community.[97]

However, the Communication also points out that

> The precautionary principle should be considered within a structured approach to the analysis of risk which comprises three elements: risk assessment, risk management, risk communication.
> The precautionary principle is particularly relevant *to the management of risk*.
> The precautionary principle, which is essentially used by decision-makers in the management of risk, should not be confused with the element of caution that scientists apply in their assessment of scientific data.
> Recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty.
> The implementation of an approach based on the precautionary principle should start with a scientific evaluation, as complete as possible, and where possible, identifying at each stage the degree of scientific uncertainty.[98]

Thus the operation of the precautionary principle is envisaged as part of a wider risk assessment strategy where there is evidence that the risk exists, but the magnitude of that risk cannot be quantified with certainty. It is perhaps unfortunate that the term "sufficient certainty" in paragraph three of this extract receives no further elaboration particularly as it is in the response to the lack of sufficient certainty by policy and lawmakers that the controversy surrounding the precautionary principle inheres. The literature devoted to the general nature of the precautionary principle,

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95 Treaty on the Functioning of the European Union (Consolidated Version), *supra*, note 24, art. 191(2).

96 Communication From the Commission on the Precautionary Principle, Commission of the European Communities, COM(2000) 1 final *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0001&from=EN (last visited Oct. 29, 2016).

97 *Id.* ¶ 3.

98 *Id.* ¶ 4 (emphasis added).

the disagreement about its use, role and implementation across the Atlantic, and its role within trade law is voluminous[99] and the difference in transatlantic approaches to the principle is one of the sticking points in the negotiation of the TTIP itself.[100]

On the whole law- and policy-makers in the United States take a negative view of the precautionary principle[101] and this view has affected trade relations between the United States and the European Union in the past where fundamental differences have arisen in the response to unquantified risk. The United States (often joined by Canada, but also frequently supported by Australia, Brazil and New Zealand) has tended to prefer a cost-benefit approach to risk, taking the view that this is a more rational and scientific approach to risk management. The European Union, on the other hand takes a more precautionary approach based, as its foundational treaty requires, on the precautionary principle - a concept seen as irrational, post-enlightenment and risk averse by many in North America.[102] In crude terms

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99 *See* e.g. Cass R. Sunstein, *supra* note 92; Lawrence Kogan & Lucas Bergkamp, *supra* note 92*;* Roberto Andorno *The Precautionary Principle: A New Legal Standard for a Technological Age*, 1 J. Int'l Biotechnology L. 11, 11-12 (2004); Jacqueline Peel, The Precautionary Principle in Practice: Environmental Decision-Making And Scientific Uncertainty 1-24 (2005); Nicolas A. Ashford, *The Legacy Of The Precautionary Principle In U.S. Law: The Rise of Cost-Benefit Analysis and Risk Assessment as Undermining Factors in Health, Safety and Environmental Protection, in* Implementation the Precautionary Principle: Approaches from the Nordic Countries. the EU and the United States 352-78 (Nicolas de Sadeleer ed., 2007); Lawrence Kogan, *What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as U.S. Law,* 7 Santa Clara J. Int'l L. 23 (2009); Lucas Bergkamp, *Legal and Administrative Systems: Implications for Precautionary Regulation, in* The Reality of Precaution, Comparing Risk Regulation in the United States and Europe 434-79 (Jonathan B. Weiner, Michael D. Rogers, James K. Hammit, & Peter H. Sand eds., 2011); Elisa Vecchione, *Is It Possible to Provide Evidence of Insufficient Evidence? The Precautionary Principle at the WTO,* 13 Chi. J. Int'l L. 153 (2011); Elizabeth Fisher, *Transnational Risks and Multilevel Regulation: A Cross-Comparative Perspective Framing Risk Regulation: A Critical Reflection*, 47 Cornell Int'l L.J. 445 (2013). A search of the HeinOnline database for "The Precautionary Principle" yields 7,165 hits, more than 2000 of them in the last decade and 457 of them in the last two years alone.

100 *See* speech given by Celia Malmström, the EU Commissioner for Trade, to the Commissioner for Trade TACD Multi-Stakeholder Forum, Brussels, Jan. 26, 2016, http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154173.pdf.

101 It has been suggested that the term "precautionary approach"- widely preferred in the United States - reflects a preference, rather than a binding principle, John S. Applegate, *The Precautionary Preference: An American Perspective on the Precautionary Principle 6* Human & Ecological Risk Assessment 413 (2000). Note however, that the reality of this distinction in practice has been questioned; *see* Nicholas A Ashford, *supra* note 99, at 354; *see also* Joachim Zander, The Application of the Precautionary Approach in Practice 268 (2010).

102 The history of the approaches to precaution on each side of the Atlantic and a comprehensive review of the recent policies in the two trading blocs may be found in Lucas Bergkamp & Turner T. Smith, *Legal and Administrative Systems: Implications for Precautionary Regulation, in* The Reality of Precaution, Comparing Risk Regulation in the United States and Europe 434-79 (Jonathan B. Weiner et al., eds., 2011). A recent study of media coverage and commentary on the precautionary principle confirmed the more negative connotations associated with it in the USA, *see* Andrei Kirilenko et al., *Computer-Assisted Analysis of Public Discourse: A Case Study of the Precautionary Principle in the US and UK Press*, 46 Qual. Quant, 501 (2009).

these two approaches may be thought of as the innocent-until-proven-guilty and guilty-until-proven-innocent models respectively. This difference in views has underpinned the protracted trade disputes between North America and Europe over the licensing of genetically modified organisms[103] and the use of growth hormones in beef.[104] However, despite the commonly asserted difference in approaches between North America and Europe, which has to some extent been perpetuated above, it is necessary to bear in mind that the situation is far more complex than a simple divergence of opinion across the Atlantic. Bergkamp and Smith's comprehensive analysis of the approach to precaution between the United States and the European Union is at pains to point out that both jurisdictions have embraced, and continue to embrace, precautionary regulation,[105] that the extent of the precaution taken is highly dependent on the issue under discussion,[106] and that each jurisdiction is at different stages of development in terms of its sophistication. However, they conclude that Europe, at least in 2013, remained the less sophisticated jurisdiction:

> We regard the current EU penchant for indiscriminate use of the precautionary principle - in place of factual support or structured analysis of why it is "worth it" to society to act in the face of uncertainty - as probably a passing phase, reflecting the current lack of sophistication by the European public, national politicians, and judges in making rational risk choices, coupled with aggressive, opportunistic special pleading to take advantage of the current situation by environmental NGOs and some sections of domestic EU industry and agriculture.[107]

Of course a European may justifiably express some scepticism of this conclusion in the face of U.S. attitudes to the uncertainty relating, for example, to climate change among certain influential members of the U.S. polity who ignore the science altogether in favour of leftist conspiracy theory.[108]

Whatever the realities of implementation, the difficulties with the precautionary principle as a concept are not scientific in origin. There is general consensus and

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103 *See* World Trade Organisation, Disputes nos. DS291, DS292 and DS293, *available at* https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jun. 20, 2016).

104 *Id*. Disputes no. DS26 (1996-2009) and no. DS48 (1996-2011). For a European practitioner's view on the importance of maintaining food standards in the context of this dispute and the potential effect of TTIP, *see* Helen Dillon, *Where's the Beef?* 109 Law Society Gazette 16, https://www.lawsociety.ie/Documents/Gazette/Gazette%202015/updated-july2015.pdf (last visited Jun. 20, 2016).

105 Lucas Bergkamp & Turner T. Smith, *supra* note 102, at 434-38.

106 *Id.* at 439 citing Jonathan B. Weiner & Michael D. Rogers, *Comparing Precaution in the United States and Europe,* 5 J. Risk Res. 317 (2002) *and* Jonathan B. Weiner, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems,* 13 Duke J. Comp. Int'l L. 207 (2003).

107 Lucas Bergkamp & Turner T. Smith, *supra* note 102, at 440.

108 *See e.g.* Jean-Daniel Collomb, *The Ideology of Climate Change Denial in the United States,* 9 Eur. J. Am. Stud. (2014), http://ejas.revues.org/10305. *See also, Republicans' Leading Climate Change Denier Tells the Pope to Butt Out of Climate Change Debate,* The Guardian, Thurs, 11 June 2015, *available at* https://www.theguardian.com/environment/2015/jun/11/james-inhofe-republican-climate-denier-pope-francis.

mutual respect between U.S. and European scientists in relation to the scientific method itself, and hence in relation to the degree of uncertainty associated with a particular phenomenon, product or process. Disagreement emerges in relation to the most appropriate *response* to the uncertainty. A cost-benefit analysis approach places a higher premium on scientific rationality and regulation should only be imposed where a "significant risk" exists. The preference for this paradigm in the United States has been traced to Supreme Court precedent in the 1980s which "helped to ensure America's economic and technological advancement and competitiveness during the past several decades",[109] and to the subsequent influence of the Reagan administration (ably led by the Speaker of the House Newt Gingrich) whose chief concern was reducing regulatory burden as part of the "Contract with America" and hence embraced cost-benefit analysis because it tends to generate a higher threshold for the imposition of regulation.[110] The precautionary paradigm embraced in Europe, on the other hand, is said to have its origins in post-enlightenment European philosophies, particularly those of France and Germany[111] and to embody ethical and equitable principles derived from Western notions of morality and deontology.[112]

Hence disagreement over approaches to precaution are disagreements over doctrinal interpretation rather than over science or law as such. It is this that makes regulations based on the precautionary principle peculiarly vulnerable to attack in arbitral proceedings, since arbitrators are asked to rule, not so much on the quality of the science underpinning a regulation or even the act of regulation itself (though this is sometimes challenged), but rather the *rationality* of the regulatory response to that science. An investor might invite a tribunal to find that a regulatory response is not based on sound science, or is too cautious to be justifiable given the lack of sufficient scientific certainty. As such, it may amount to a lack of fair and equitable treatment, or a measure tantamount to expropriation. Challenges on these grounds under the proposed TTIP are plausible, and the next section uses a hypothetical challenge based on a current EU restriction to analyse the possibilities of success.

V. The Neonicotinoids Restrictions in the European Union and How They Might Fare under the Proposed TTIP Investment Protection Provisions

An illustrative example of the operation of the precautionary principle in the European Union is to be found in regulations that implement the current partial restriction of the use of a class of chemicals known as the neonicotinoid insecticides (hereinafter neonics). Developed in the 1980s, principally by the chemical companies Bayer, Syngenta and Sumitomo Chemical, the neonics are a class of

[109] Lawrence Kogan & Lucas Bergkamp, s*upra* note 92*,* at 497, citing *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 639 (1980).

[110] Nicholas A. Ashford, *supra* note 99, at 356ff.

[111] Lawrence Kogan & Lucas Bergkamp, *supra* note 92, at 499.

[112] UNESCO/COMEST, The Precautionary Principle 17ff (United Nations Educational, Scientific and Cultural Organisation 2005).

systemic insecticides (taken up by all parts of the plants to which they are applied), which attack the central nervous systems of pest insects which feed on the plants with fatal effect, but with none of the environmental persistence or high mammalian toxicity associated with the previous pyrethrin, pyrethroid, organophosphate and organochlorine alternatives.[113] The background to the imposition of the current restrictions on the use of these chemicals has been fully described elsewhere[114] and only a brief summary is necessary here.

Initially, Council Directive 91/444/EEC[115] (concerning the placing of plant protection products on the market) made provision for substances to be added to Annex 1 of that directive which listed "Active Substances Authorized for Incorporation in Plant Protection Products." Subsequent secondary legislation added a number of neonics to this Annex thereby permitting their use in plant products in the European Union.[116] However, following accidental releases of these chemicals which resulted in the deaths of bee colonies, the use of the neonics clothianidin, thiamethoxam, imidacloprid and fipronil were subjected to additional risk assessment requirements.[117] Subsequent regulatory amendments placed still further restrictions, specifically on the use of three of the more commonly used neonics, clothianidin, thiamethoxam and imidacloprid, as foliar treatments, as soil additives and in seed dressing.[118]

These restrictions were justified on the basis of a report, commissioned by the European Commission,[119] by the European Food Safety Authority which reviewed the evidence on the effect of neonics on bee colonies.[120] The evidence suggested that although the normal use of these pesticides was not lethal to bees, there was some evidence that neonics residues have the effect of interfering with the bees' navigation systems, thereby disorientating them and preventing them from returning to their

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113 *See* United States Agency for Toxic Substances and Disease Registry, https://www.atsdr.cdc.gov/phs/phs.asp?id=785&tid=153 (pyrethrins and pyrethroids), http://www.atsdr.cdc.gov/substances/toxchemicallisting.asp?sysid=39 (organophosphates) and http://www.atsdr.cdc.gov/PHS/PHS.asp?id=353&tid=62 (organochlorines) (last visited 20 June 2016).

114 Alberto Allemano, *The Science, Law and Policy of Nicotinoids and Bees: A New Test Case for the Precautionary Principle*, 4 Eur. J. Risk Reg. 191 (2013); Emma Downing, Bees and Neonicotinoids, House of Commons Library Briefing Paper No. 06656, (Dec. 3, 2015); Evan Jensen, *Banning Neonicotinoids: Ban First, Ask Questions Later*, 5 Seattle J. Envtl. L. 47 (2015).

115 Council Directive 91/444/EEC, 1991 O.J. (L 230), 1.

116 Commission Directive 2006/45/EC, 2006 O.J. (L 130), 27; Commission Directive 2007/6/EC, 2007 O.J. (L 43), 13; Commission Directive 2008/116/EC, 2008 O.J. (L 337), 86.

117 Commission Directive 2010/12/EU, 2010 O.J. (L 65), 27.

118 Directive 91/444/EEC was repealed and replaced by EU Regulation (EC) No. 1107/2009 (2009 O.J. (L 309), 1), which in turn was implemented by EU Regulation (EC) No. 540/2011 (2011 O.J. (L 153), 1), the effect of which was to place further restrictions on the use of neonics. Finally EU Regulation (EC) No. 485/2013 (2013 O.J. (L 139), 12) took restrictions still further. For greater detail *see* Emma Downing, *supra* note 114, at 10.

119 Question No. EFSA-Q-2012-00556, approved on 31 May 2012.

120 European Food Safety Authority, *Statement on the Findings in Recent Studies Investigating Sub-lethal Effects in Bees of Some Neonicotinoids in Consideration of the Uses Currently Authorised in Europe,* 10 EFSA J. 2752 (2012).

colonies or from indicating the sources of food to the remainder of the colony even were they able to return. The European Food Safety Authority recommended that further evidence was required in order to establish the magnitude of the risk.[121] On this basis the Commission, taking the precautionary approach required by Article 191 of the Treaty on the Functioning of the European Union, and explicitly referred to in EU Regulation (EC) No 1107/2009, recommended restrictions on the use of neonics.

These recommendations were viewed with some equivocation in the member states of the European Union[122] and the arable farming community has protested that the restrictions on the application of neonics are significantly adversely affecting their business.[123] In 2015 the National Farmers' Union successfully applied to the UK Government for an emergency lifting of the ban in three eastern counties of England, a move which was unsuccessfully challenged by Friends of the Earth.[124] Perhaps unsurprisingly the chemical industry has viewed these restrictions as being an overreaction based on flawed field studies.[125]

The central regulation which introduced these restrictions, EU Regulation (EC) No. 1107/2009, is explicitly based on the precautionary principle.[126] Article 1(4) states:

> The provisions of this Regulation are underpinned by the precautionary principle in order to ensure that active substances or products placed on the market do not adversely affect human or animal health or the environment. In particular, Member States shall not be prevented from applying the precautionary principle where there is scientific uncertainty as to the risks

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121 *Id.* at 1 (Abstract) "Further data would be necessary before drawing a definite conclusion on the behavioural effects regarding sub-lethal exposure of foragers exposed to actual doses of neonicotinoids".

122 At the March 2013 meeting of the Standing Committee of the Food Chain and Animal Health - the body with responsibility for advising the Commission on plant product safety - 27 representatives of the member states failed to reach the qualified majority vote required to recommend the restrictive proposal put before them. Thirteen countries voted in favour of the proposal, nine against, and five abstentions. A similar split occurred in a subsequent appeal. Owing to this failure, the Commission was then able to put forward its own proposal. For a more detailed discussion of the process *see* Emma Downing *supra* note 114, at 10-12.

123 *See Neonicotinoid Ban Continues to Devastate OSR Crop*, National Farmers Union, Press Release, http://www.nfuonline.com/misc/press-centre/press-releases/neonicotinoid-ban-continues-to-devastate-osr-crop (last visited Jun. 20, 2016); *see also* Charles Scott & Paul Bilsborrow, An interim impact assessment of the neonicotinoid seed treatment ban on oilseed rape production in England: A report for Rural Business Research (Rural Business Research publications, undated), *available at* http://fbspartnership.co.uk/index.php?id=1530 (last visited Jun. 20, 2016). It was estimated that these restrictions cost farmers in 2015, in England alone, £2.8m in lost crops owing to cabbage flea beetle infestation, *id.* at 8.

124 *R. on the Application of Friends of the Earth Limited v. Secretary of State for the Environment, Food and Rural Affairs v. National Farmers Union* [2015] EWHC 3283 (Admin).

125 Emma Downing, *supra* note 114, at 7.

126 *See* EU Regulation (EC) No. 1107/2009, 2009 O.J. (L 309), 1, Preamble clause (8), arts. 1(4) and 13(2).

> with regard to human or animal health or the environment posed by the plant protection products to be authorised in their territory.

The question is whether - should the TTIP come into being in anything like its current form - Bayer, Syngenta or Sumitomo could seek to challenge the restriction under the terms of the TTIP draft investment protection section[127] on the basis that the restrictions represent a failure to accord fair and equitable treatment or that the restrictions represent an expropriation of property.

A. Establishing Standing: Investors, Investments and Covered Investments

Clearly the first requirement is that the said corporations are investors as defined in the TTIP. The current version of the TTIP draft investment chapter published by the EU Commission defines the term "investor" as "a natural person or a juridical person of a Party that seeks to make, is making or has already made an investment in the territory of the other Party."[128] Certainly the corporations would meet this requirement since all have offices in the United States.[129] There is certainly no requirement that the nationality of the investor be defined by reference to the domicile of the parent company, though the terms of the investment chapter in the governing treaty would be relevant and could, conceivably, contain such a requirement. However, the chances of such a restrictive trade requirement successfully becoming part of a final investment text are very slim and highly unlikely to be included in the final text of the TTIP. No such requirement appears in the TPP, the CETA or any of the treaties with which the author is familiar. The TPP defines an "investor of a Party [to be] a Party, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of another Party."[130] CETA - likely to be more representative of the final text of

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127 See *infra* note 128 for further explanation of this document.

128 TTIP, Draft Chapter on Trade in Services, Investment and E-Commerce, art. 1-1(3)(q), *available at* http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153669.pdf (last visited Jun. 20, 2016). Note that this draft chapter is incomplete in respect of the Investment Protection provisions to be included in Section 2 and that the current version contains a placeholder at p.10 for this section. The draft investment protection section has been released as a separate document by the European Commission (http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf). For clarity these two documents are henceforth referred to as the "TTIP draft investment chapter" and the "TTIP draft investment protection section" respectively.

129 Syngenta is a Swiss parent company but has regional offices in Durham and Greensboro, North Carolina, as well as in Minnesota and Nebraska, United States. Similarly, Bayer, though a German parent company, has a U.S. office in Pittsburgh, Pennsylvania. In fact, Bayer's U.S. presence may be set to become even bigger with rumours of a takeover bid for the Monsanto Corporation. If permitted by the U.S. authorities this would give Bayer an estimated 40% share of the agricultural chemicals and biotech market in the U.S. alone (BBC Radio Four, Today Programme, 0620h, Wed. Sep. 7, 2016). The Sumitomo Corporation is a Japanese parent company, but the Sumitomo Corporation of the Americas has offices all over the US, including New York, Illinois, Colorado, Minnesota, Texas, California, Oregon and Washington D.C.

130 Trans-Pacific Partnership, *supra*, note 10, art. 9.1.

TTIP given that the European Union is a party - is more prescriptive and defines an investor as:

> **…** a Party, a natural person or an enterprise of a Party, other than a branch or a representative office, that seeks to make, is making or has made an investment in the territory of the other Party;
> For the purposes of this definition, an *enterprise of a Party* is:
> (a) an enterprise that is constituted or organised under the laws of that Party and has substantial business activities in the territory of that Party; or
> (b) an enterprise that is constituted or organised under the laws of that Party and is directly or indirectly owned or controlled by a natural person of that Party or by an enterprise mentioned under paragraph (a)[131]

In general arbitral panels have taken a generous view of relationships between subsidiary and parent companies in establishing the existence of "substantial business activities"[132] and it is unlikely that the corporations would have any difficulty in establishing their status as U.S. investors for the purposes of the TTIP.

It would then need to be established that the licensing and marketing of neonics in the European Union is a covered investment.

A "covered investment" is "an investment which is owned, directly or indirectly, or controlled, directly or indirectly, by investors of one Party in the territory of the other Party made in accordance with applicable laws …"[133] The fact that the imposition of the neonics restrictions would obviously predate the TTIP (should it ever be signed and ratified) would not be a barrier since the definition of "covered investment" includes an investment "whether made before or after the entry into force of this Agreement."[134] Thus the definition of a covered investment would be retrospective and cover all the contentious trade disputes extant at the time of the signing of TTIP (not only the neonics dispute but other, more long-standing ones such as the beef hormones and GMOs disputes).[135]

An "investment" is defined in the TTIP draft investment protection section as:

> … every kind of asset which has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of

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131 Comprehensive Economic and Trade Agreement, *supra,* note 38, art 8.1. (emphasis in original).

132 *See e.g. Waste Management Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004). This was decided under NAFTA art. 1113(2) which requires that an investor establish "… substantial business activities in the territory of the Party under whose law it is constituted or organized." The tribunal stated at ¶ 80 that "There is no hint of any concern that investments are held through companies of non-NAFTA States, if the *beneficial ownership* at relevant times is with a NAFTA investor" (emphasis added). This fairly low threshold for Party investor status was further bolstered at ¶ 83 where the tribunal held that "… there is no trace of a requirement that the investment itself have the nationality of that Party either at the time it was acquired or at the time the conduct complained of occurs."

133 TTIP, draft investment protection section, *supra* note 128, art. (x1), p. 1.

134 *Id.*

135 *Supra* notes 103 & 104.

> capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
> a) an enterprise;
> b) shares, stocks and other forms of equity participation in an enterprise;
> c) bonds, debentures and other debt instruments of an enterprise;
> d) a loan to an enterprise;
> e) any other kinds of interest in an enterprise;
> f) an interest arising from:
> i) a concession conferred pursuant to domestic law or under a contract, including to search for, cultivate, extract or exploit natural resources,
> ii) a turnkey, construction, production, or revenue-sharing contract, or
> iii) other similar contracts;
> g) intellectual property rights;
> h) any other moveable property, tangible or intangible, or immovable property and related rights;
> i) claims to money or claims to performance under a contract;
>
> For greater certainty, 'claims to money' does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party, domestic financing of such contracts, or any related order, judgment, or arbitral award.
>
> Returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their qualification as investments.[136]

It is submitted that the corporations would have little difficulty in establishing ownership or control of investments in Europe under many of these headings (which are in any case not exhaustive) by virtue of their supply and licensing of insecticides in the European Union. In any event it has been noted elsewhere that "there has been a tendency to extend the meaning of investment in treaties."[137]

Article 1 of the TTIP draft investment protection section sets the jurisdictional scope of the section relating to investment protection as including "(i) covered investments, and (ii) investors of a Party in respect of a covered investment as regards any treatment that may affect the operation of such investment."[138] Interpretation of the term "any treatment that may affect … investment" by a court or tribunal would probably be undertaken by reference to principles of international investment law, where a measure (such as the neonics restriction) imposed by a government must have a "legally significant connection" to an investor.[139] This

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136 TTIP draft investment protection section, *supra* note 128, art. (x2), p.1.

137 Muthucumaraswamy Sornarajah, International Law on Foreign Investment, 16 (3d ed., 2010).

138 TTIP draft investment protection section, *supra* note 128, art. 1, p. 3.

139 *See e.g. Bilcon v. The Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 240 (Mar. 17, 2015).

requirement derives largely from the interpretation of Article 1101 of the NAFTA[140] and is said to have arisen to limit claims to principal investors only and to prevent ancillary claims by suppliers, subcontractors and so forth.[141] Arguably, however, the draft TTIP criteria of "any treatment" by a host Party is far wider than the equivalents in NAFTA, CETA and TPP which relate to "measures … adopted or maintained"[142] and it is submitted that the corporations would have little difficulty in establishing the requisite legal significance since the restrictions imposed by the EU Commission are aimed *specifically* at neonicotinoid pesticides, Further, it would be open to the corporations to request that a tribunal view their submissions *de novo* on the basis that previous arbitral decisions have stated that a case-by-case analysis of whether measures (or, presumably, "treatments") have legal significance for the investors is appropriate.[143]

Having established standing it would then be necessary for the corporations to establish that the EU Regulations restricting the use of neonics in some way contravenes the investment protection measures guaranteed by Chapter II, section 2 of the TTIP. This section contains provisions relating to investor treatment and protection. Previous arbitration decisions suggest that a challenge to the neonics restrictions are most likely to succeed under the fair and equitable treatment and expropriation provisions.

B. Fair and Equitable Treatment

Fair and equitable treatment provisions in the TTIP draft investment protection section appear at Article 3, paragraph 2 and state that:

> A Party breaches the obligation of fair and equitable treatment … where a measure or a series of measures constitutes:
> (a) denial of justice in criminal, civil or administrative proceedings; or
> (b) fundamental breach of due process, including a fundamental breach of transparency and obstacles to effective access to justice, in judicial and administrative proceedings; or
> (c) manifest arbitrariness; or
> (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or

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[140] Which sets the scope of the investment chapter of NAFTA as limited to "measures adopted or maintained by a Party *relating to*: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party …" [emphasis added]. Article 8.2. (1) of the CETA and Article 9.2 of the TPP both set an almost identical scope to that in Article 1101 of the NAFTA. It is suggested that the phrase "any treatment that may affect the operation of [investors/investments]" in the draft TTIP investment chapter is equivalent to "measures adopted or maintained … relating to [investors/investments] " in NAFTA, CETA and TPP.

[141] *Id.* citing *Methanex Corporation v. United States of America,* UNCITRAL, First Partial Award, ¶ 147 (Aug. 7, 2002).

[142] For extensive discussion of the notion of "measures … adopted or maintained" in the context of NAFTA, Article 1101 *see Ethyl Corporation v. The Government of Canada, supra* note 86, ¶¶ 65-69.

[143] *Bilcon v. The Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 240 (Mar. 17, 2015).

> (e) harassment, coercion, abuse of power or similar bad faith conduct; or
> (f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.[144]

Paragraph 4 further extends the provision:

> When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated.[145]

The first point to note about this provision is that, unlike the equivalent provision in the NAFTA,[146] it makes no reference to international law. Hence, unlike the numerous NAFTA decisions involving fair and equitable treatment which have been constrained to treat it as an element of the minimum standard of treatment doctrine in international trade law,[147] the fair and equitable treatment standard in the current version of TTIP may represent "an *independent* treaty standard that has a distinct and separate meaning from the minimum standard of treatment."[148] The question is whether that distinct and separate meaning could be interpreted by a tribunal as imposing higher standards of treatment on host parties than required under international law.

It is possible that the corporations could argue, based on the uncertainty of the evidence that led to the imposition of the neonics restrictions, that the imposition amounts to manifest arbitrariness.[149] Admittedly this would be difficult if solely reliant on demonstrating that the restrictions were capriciously imposed, though counsel for the corporations may get a little further if they attempted to equate arbitrariness with inconsistency, unpredictability and irrationality, thereby appealing to the vast body of opinion that suggests that adherence to the precautionary

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144 TTIP draft investment protection section, *supra* note 128, art. 3, p. 4.

145 *Id.*

146 The NAFTA states that: Each Party shall accord to investments of investors of another Party treatment *in accordance with international law*, including fair and equitable treatment and full protection and security [North American Free Trade Agreement, *supra* note 9, art. 1105(1)] (emphasis added). The significance of this reference to international law for the interpretation of Article 1105(1) (which was at the heart of the *Metalclad* decision, *supra* note 50) has been extensively discussed by Patrick Dumberry, *The Meaning of the Fair and Equitable Treatment Standard under NAFTA Article 1105 in Light of the General Rules of Treaty Interpretation,* 16 Int. A.L.R. 121 (2010).

147 *See Bilcon v. The Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 427ff (Mar. 17, 2015). Here the tribunal reviews the international law on minimum standards of treatment and how the concept of fair and equitable treatment fits within it. The *Waste Management* tribunal decision in particular, *supra* note 69, figures large in its analysis.

148 Partick Dumberry, *supra* note 146, at 121. (emphasis in original).

149 Arbitrary: 1. Dependent on will or pleasure … 2. Based on mere opinion or preference as opposed to the real nature of things; capricious, unpredictable, inconsistent. The New Shorter Oxford English Dictionary, 107 (Lesley Brown, ed., vol. 1 A-M, 1993).

principle is indeed irrational, unpredictable, anti-scientific and, thus, arbitrary. This argument could be further bolstered by the "legitimate expectation" provision in Article 3, paragraph 4 if it could be argued that the initial inclusion of neonics in Annex 1 of Directive 91/444/EEC and then EU Regulation (EC) No. 1107/2009 amounted to a "specific representation", which the subsequent restrictions - based as they were on the precautionary principle - "frustrated."[150] In the *Bilcon v. Canada* arbitration, the Delaware-based investors successfully persuaded the tribunal that a panel charged with assessing the potential environmental effects of a quarrying operation on cetaceans in the adjacent ocean, had overemphasised "community core values" to the detriment of its statutory duty to conduct "a 'likely significant effects after mitigation' analysis to the whole range of potential project effects" as required by Canadian law.[151] This amounted to a "problematic" and "unique" approach, which, when combined with the inducement to invest, fell below the minimum standard of treatment that the investor was entitled to expect and amounted to a frustration of their expectation *vis-à-vis* their investment.[152] It is suggested that the decision of the EU Commission to propose its own restrictions on the use of neonics, against the background of the failure of the Standing Committee of the Food Chain and Animal Health to reach the required qualified majority, and the equivocation about the quality of the evidence available by the European Food Standards Agency, could also be characterised as a failure to provide fair and equitable treatment. The crucial difference of course between this and the *Bilcon* scenario is that the Commission could point out that their decision was based on the EU legal requirement to operate according to the precautionary principle and to "err on the side of safety." The counter to that argument is to point to the inherent unpredictability of the implementation of the precautionary principle which could lead to different but equally plausible expectations on both sides as to the most appropriate regulatory response. It is suggested that in the event of intercession by an arbitral tribunal it is by no means certain whose expectation would carry the argument. The tribunal would be asked, in effect, to engage in a proportionality assessment, but without necessarily having to conform to the usual boundaries of that public law principle. In short, the outcome of such an argument is a long way short of a foregone conclusion.

C. Expropriation

So far as is relevant for present purposes, Article 5 of the TTIP draft investment protection section makes the following provision:

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150 *See Bilcon v. The Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 444 (Mar. 17, 2015). The tribunal examines the nature of the conduct required, *inter alia,* to frustrate a legitimate expectation, and concludes that "… there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour." The [*Waste Management*] formulation also recognises the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that *injustice in either procedures or outcomes* can constitute a breach.

151 *Id.* ¶¶ 450-52.

152 *Id.* ¶¶ 446-54.

> Neither Party shall nationalize or expropriate a covered investment either directly or indirectly through measures having an effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') except:
> (a) for a public purpose;
> (b) under due process of law;
> (c) in a non-discriminatory manner; and
> (d) against payment of prompt, adequate and effective compensation.[153]

This text is supplemented by Annex 1 - which expands on the interpretation of article 5 - and includes a definition of direct and indirect expropriation,[154] as well as indicating that, in determining whether a measure is an indirect appropriation, account is to be taken of the economic impact, duration and character of the measure.[155] Most significant for this discussion is the provision that:

> For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as the protection of public health, safety, *environment* or public morals, social or consumer protection or promotion and protection of cultural diversity do not constitute indirect expropriations.[156]

The regulations restricting the use of neonics comply with the criteria in paragraphs (a) to (c) of Article 5, but since (presumably) the corporations have not been compensated in respect of the restrictions on neonics, then the measures could amount to an expropriation of the corporations' investments under Article 5(d). Since they are clearly not a direct expropriation - not involving "[a] formal transfer of title or outright seizure"[157] - then they can only amount to an indirect expropriation as "substantially depriv[ing] the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure."[158]

However, since these measures have clearly been "designed and applied to … the protection of [the] environment," then they should be safe from attack as indirect expropriation measures, in reliance on Annex 1, paragraph (3) unless it could be shown that the restrictions are "so severe in light of [their] purpose that [they appear] manifestly excessive." This is potentially the avenue by which the precautionary basis of the measures could be attacked by the investor corporations. Again, the paucity of the evidence of cause and effect between the normal use of neonics and the effect on bee geolocation could be used to argue that the regulatory response is manifestly excessive and hence tantamount to an indirect expropriation.

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153 TTIP draft investment protection section, *supra* note 128, art. 5.
154 *Id.* annex 1, ¶ 1.
155 *Id.* ¶ 2.
156 *Id.* ¶ 3 (emphasis added).
157 *Id.* annex 1, ¶ 1(a).
158 *Id.* annex 1, ¶ 1(b).

In the *Bilcon* case - one of the few arbitral cases where the precautionary principle was at issue - the investors argued that the environmental assessment panel had: used "a distorted precautionary principle"[159]; "an improperly expansive precautionary principle"[160]; of "appl[ying] a patently incorrect definition [of the precautionary principle]."[161] Paradoxically though, the investors here were arguing that the panel had demanded too high a level of scientific certainty "to prove that the project would not cause any environmental damage, rather than recognising that uncertainty may be inevitable [and] cannot paralyze a project."[162] In other words the investors' view of the precautionary principle was that scientific uncertainty should not stand in the way of *granting* permission for an activity - a reversal of the conventional application of the principle, certainly as it would be applied in the European Union. However the tribunal itself chose not to address this issue directly and the words "precautionary principle" appear nowhere - not even in allusory terms - in the justification for their final decision.[163] This avoidance of the issue is not explained but it would not be surprising if the arbitrators chose to evade the issue altogether - given its indeterminacy - where other, less contentious grounds for the decision existed.

Before leaving the *Bilcon* case, it would be remiss not to refer to the tribunal's extensive discussion of the role of "human concerns"[164] (which includes environmental effects) and the need to avoid "regulatory chill" in its reasoning.[165] The tribunal reminded "consumers" of their decision of:

> … the Tribunal's view that under NAFTA, lawmakers in Canada and the other NAFTA parties can set environmental standards as demanding and broad as they wish and can vest in various administrative bodies whatever mandates they wish. Errors, even substantial errors, in applying national laws do not generally, let alone automatically, rise to the level of international responsibility vis-à-vis foreign investors. The trigger for international responsibility in this particular case was the very specific set of facts that were presented, tested and established through an extensive litigation process.

This view - particularly the first sentence - were it to become universal among arbitrators (of which, of course, there is no guarantee given the absence of the doctrine of *stare decisis* from tribunal decisions), should be of some comfort to those concerned with environmental protection and regulatory chill. The difficulty, however, in applying this approach the context of the precautionary principle lies in the very indeterminacy of the concept in international law. Despite the Tribunal's words, it is likely that investors in future disputes will still be able to attack precautionary decisions on the basis of "distortion", "improper expansive[ness]" and "patent incorrect[ness]" in the same way as the investors in *Bilcon* itself, and hence such decisions may still rise to the level of "international responsibility" and thereby

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159 *Bilcon v. The Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶ 201 (Mar. 17, 2015).
160 *Id.* ¶¶ 214 & 372.
161 *Id.* ¶ 380.
162 *Id.* ¶ 500.
163 *Id.* ¶¶ 685-731.
164 *Id.* ¶ 736.
165 *Id.* ¶¶ 737ff.

threaten the environmental sovereignty of host states. Clearly, the *Bilcon* tribunal's words above have not deterred the investors in the *Lone Pine* arbitration[166] - still ongoing at the time of writing - who have accused the government of Quebec of:

> the arbitrary, capricious, and illegal revocation of the Enterprise's valuable right to mine for oil and gas under the St. Lawrence River by the Government of Quebec without due process, without compensation, and with no cognizable public purpose.[167]

This was in response to Quebec's imposition of a moratorium on fracking - a precautionary measure with many counterparts in Europe.

D. The Environment Chapter in the TTIP

The final draft of the environment chapter of the TTIP is not yet available,[168] so it is not yet possible to ascertain the extent to which precautionary measures may be offered protection. Thus far, no specific protection of the precautionary principle has been included in any of the draft texts which have been released. There is provision for the precautionary principle - though not under that name - in the CETA, which is the only other "North American" free trade agreement which the European Union has entered into thus far.[169] There are two specific chapters in the CETA related to environmental protection - Chapter 24 (Trade and the Environment) and Chapter 25 (Trade and Sustainable Development). Under Article 24.8.2:

> The Parties acknowledge that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[170]

This apparent protection for the precautionary principle suggests a model of precaution much closer to the North American cost-benefit approach[171] than the EU notion of precaution which underpins the neonics restrictions. The requirements for either "serious" or "irreversible" damage closely reflects the text of Principle 15 of the Rio Declaration,[172] with no apparent concession to the more precautionary approach commonly referenced in European law.[173] Should the same text appear in the TTIP (assuming the negotiations do reach a conclusion), it is suggested that they would not necessarily protect the Commission's regulatory precautions on neonics

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166 *Lone Pine Resources Inc. v. The Government of Canada,* UNCITRAL, Notice of Arbitration, Sept. 6, 2013, *available at* http://www.italaw.com/cases/1606.

167 *Id.* ¶ 11.

168 Strictly speaking a draft is available (http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153923.pdf) entitled Trade and Sustainable Development. However, there is not yet a "Trade and Environment" Chapter similar to the equivalents in the CETA and TPP.

169 Some references to "precaution" do appear in the early 1600 pages of the agreement, but these are exclusively related to intellectual property protection in chapter 20.

170 Comprehensive Economic and Trade Agreement, *supra,* note 38, art. 24.8.2.

171 *See supra* notes 101 to 107 and associated text.

172 United Nations, *supra* note 94.

173 Communication from the Commission, *supra* note 96.

since it is eminently possible to argue that the threat posed by neonics - based on the available evidence - is neither serious nor irreversible.

E. Influence of the EU Commission's Proposed Independent Arbitral Tribunal

One of the most controversial aspects of the TTIP negotiations over the investment chapter is the perception that unaccountable arbitrators in investment-state disputes will be in a position to dictate to sovereign states over matters which have traditionally been considered the sole preserve of national regulatory authorities or legislators. To address this concern the European Commission has issued - as part of the draft investment services document - proposals for the setting up of an independent arbitral tribunal and appeal tribunal for Europe.[174] These proposals are closely modelled on the WTO Appellate body and it is hoped[175] that this will address the criticisms raised in the past,[176] the "fundamental lack of trust"[177] in arbitral tribunal decisions, and in particular the vexed questions of lack of legal training,[178] independence,[179] the lack of avenues for appeal,[180] and the lack of transparency.[181]

However, whilst these measures (in the perhaps unlikely event that they are accepted by the United States) will doubtless improve the quality and legitimacy of arbitral decisions, it is questionable whether they would affect an assessment of the precautionary principle in any substantive sense. The tribunal will still be an *investment arbitration* tribunal rather than a court of general jurisdiction and, as such, will be principally bound by the TTIP text. Despite its more "legitimate" credentials the new tribunal will still be required to straddle the uncomfortable divide between private and public law imperatives (in a way that is *not* required of the WTO panels on which it is modelled) and make compromises between them - in short, no different to the exercise undertaken by existing ICSID and UNCITRAL tribunals.

As already discussed, what is known of the TTIP text already offers ample potential for challenges to regulations based on the precautionary principle. This potential, it is suggested, will not be materially affected by the make-up or procedures of the tribunal panel itself.

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174 TTIP draft investment protection section, *supra* note 128, arts. 9-30.

175 *See Commission proposes new Investment Court System for TTIP and Other EU Trade and Investment Negotiations*, European Commission press release of Sept. 16, 2015, IP 15/5651.

176 Mojtaba Dani & Afshin Akhtar-Khavari, *The Uncertainty of Legal Doctrine in Indirect Expropriation Cases and the Legitimacy Problems of Investment Arbitration*, 22 Widener L. Rev. 1, 3 (2016).

177 *Supra* note 175 *per* Celia Wallström, EU Trade Commissioner.

178 TTIP draft investment protection section, *supra* note 128, art. 9.

179 *Id.* arts. 9 & 11.

180 *Id.* arts. 10 & 29.

181 *Id.* art. 18.

VI. Conclusion

As this paper was being completed, the TTIP negotiations entered their 15th round[182] against the backdrop of recent demonstrations in Germany against both TTIP and CETA.[183] The EU Commission will no doubt be even more conscious of the need to reassure European citizens that TTIP will not undermine national sovereignty - a message that has assumed even greater importance since the citizens of the United Kingdom voted in favour of "Brexit" in a referendum in July 2016. The "Leave" campaign in Britain made much of the need to "regain sovereignty" from the European Union,[184] so that questions of national sovereignty are now, more than ever at the forefront of politicians' minds in the EU.

Where environmental sovereignty is concerned the text of the TTIP includes, at first sight, quite strongly worded provisions to permit nation states to maintain and enhance environmental protection. However, very similar provisions to these appear in other investment and trade agreements but they have not necessarily prevented investors from seeking compensation for the loss of their investment (or the value of it) as a result of local, regional or national measures designed to protect the environment or public health. Such claims have invariably been based on the fair and equitable treatment principle and/or on the basis that the measures represent measures tantamount to (indirect) exropriation. It is also the case that such claims do not necessarily need to reach the merits stage in order to bring about the desired effect as illustrated in the *Ethyl Corp* decision discussed above.

The current text of the TTIP does not suggest that it is likely to be significantly more resilient to such claims than many of its forbears. In fact, given that so much of the regulation in environmental matters and public health in the European Union is based on a version of the precautionary principle which is far more "precautionary" than envisaged in principle 15 of the Rio Declaration, investor claims which seek to attack its rationality are probably more likely.

Of course the final version of the TTIP may contain explicit protection for the precautionary principle, but, if this merely repeats the provision in CETA, then it is unlikely to prevent claims based on equivocal scientific evidence such as the restrictions currently in place for neonicotinoid pesticides. Moreover, the provision of a bespoke tribunal and appeal system within TTIP may not necessarily make claims founded on the irrationality of regulatory responses to the precautionary principle any less plausible or any more likely to fail.

Investment protection agreements have the potential to enhance environmental protection if they encourage greater transparency of regulation by the host state so that the investor is certain about the regulatory environment into which they are entering and know the risks. However, the approach of investment tribunal panels themselves needs to change in order to take a broader view of purposes

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182 *EU and US Trade Negotiators Seek to Get TTIP Talks back on Track*, The guardian, Fri, Sept. 30, 2016, https://www.theguardian.com/business/2016/sep/30/ttip-eu-and-us-trade-negotiators-seek-to-get-talks-back-on-track.

183 *Protests in Germany Against Transatlantic TTIP and CETA Trade Deals*, BBC News online, Sept. 17, 2016, http://www.bbc.co.uk/news/world-europe-37396796.

184 Though admittedly this was mostly in the context of the rather narrow question of the freedom of movement of persons.

of arbitration in an era of climate change, loss of biodiversity and the need to preserve ecosystem services. It can no longer be appropriate merely to consider the private property rights of investors as the *primary* consideration. The public interest in environmental quality and the need to adapt to environmental pressures by sovereign authorities must play a greater part. In the long run this is in the interests of investors also. However, it is the elected sovereign authorities who must be permitted the final word in how this is brought about rather than corporate entities who primary purpose is the generation of profit.

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Dispute Settlement Mechanisms in U.S. FTAs with Korea, Panama, Peru and Colombia: Basic Designs, Key Characteristics And Implications

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ABSTRACT

The United States concluded free trade agreements (FTAs) with Korea, Peru, Panama and Colombia in late 2000s. Since the four FTAs were negotiated and concluded largely contemporaneously, key traits and characteristics of the agreements are similarly formulated. In light of this, dispute settlement mechanisms (state-to-state dispute settlement proceedings, investor-state dispute settlement proceedings, and Joint Committees) of the four FTAs also share commonalities. At the same time, new ideas and suggestions are explored in the four FTAs. While issues and disputes under the four FTAs have arguably not been ripe for the constitution of dispute settlement proceedings under the FTAs at the moment, sooner or later they are likely to end up in the dockets of the respective proceedings. The key elements of the four FTAs' dispute settlement mechanisms are also adopted in other FTAs that the United States have concluded afterwards including most recently the Trans-Pacific Partnership, since these elements are reflective of the general scheme of the United States in their FTAs. What remains to be seen is how the general scheme of dispute settlement proceedings can be applied and implemented in actual settings when the FTAs produce increasing numbers of disputes in the future. In particular, marked disparity in human and financial resources between the United States and the four FTA's parties may bring about disparate impacts and consequences among contracting parties. Continued attention needs to be paid to the development concerning implementation of the four FTAs, in particular their dispute settlement proceedings.

CONTENTS

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I. Introduction

The United States' free trade agreements (FTAs) with Korea,[1] Peru,[2] Colombia[3] and Panama[4] were negotiated and concluded roughly around the same time in late 2000s and early 2010s. While specific terms and conditions of these agreements all vary, the frameworks used share commonalities. With respect to bilateral dispute settlement mechanisms (DSMs), the four free trade agreements also share many things in common. There are three types of different dispute settlement mechanisms that these four agreements commonly adopt. The first one is the State-to-State Dispute Settlement (SSDS) mechanism to address disputes between the state parties arising from the application of the agreements, which largely follows the basic template of the World Trade Organization (WTO) DSM in a shortened version. The second type is the Investor-State Dispute Settlement (ISDS) mechanism, a special dispute settlement mechanism to deal with investment disputes brought by investors of one contracting parties against the governments of the other contracting parties. Lastly, the four free trade agreements also include Joint Committees and sub-committees of various types to discuss issues of mutual interest, one of which is to address and resolve differences between the contracting parties in a non-judicial manner.

This essay aims to present an overview of these three types of dispute settlement mechanisms included in the four free trade agreements of the United States. The mechanisms of the four agreements arguably present the template of the U.S. FTAs when it comes to dispute settlement proceedings of free trade agreements. The same template also appears in the most recent free trade agreements that the United States have negotiated such as the Trans-Pacific Partnership (TPP),[5] a mega-FTA among 12 states along the Pacific Rim spearheaded by the United States. The three types of dispute settlement mechanisms are addressed respectively below.

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1 The U.S.-Korea Free Trade Agreement was agreed upon on April 30, 2007 and went into effect on March 15, 2012. For the chronological history of the negotiations and conclusion, *see* Ministry of Foreign Affairs, Republic of Korea*, FTA Status of Korea: Korea-U.S. FTA, available at* http://www.mofat.go.kr/ENG/policy/fta/status/effect/us/index.jsp?menu=m_20_80_10&tabmenu=t_2&submenu=s_8 (last visited Jun. 10, 2014).

2 The U.S.-Peru Trade Promotion Agreement was agreed upon on April 12, 2006 and went into effect on Feb. 1, 2009. *See* Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2010*, at 219 (2010).

3 The U.S.-Colombia Trade Promotion Agreement was agreed upon on November 22, 2006 and went into effect on May 15, 2012. *See* Office of the United States Trade Representative (USTR) website *available at* https://ustr.gov/trade-agreements/free-trade-agreements/colombia-tpa (last visited Jul. 8, 2016).

4 The U.S.-Panama Trade Promotion Agreement was agreed upon on June 28, 2007 and went into effect on October 31, 2012. *See* Office of the United States Trade Representative (USTR) website *available at* https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa (last visited Jul. 8, 2016).

5 The Trans-Pacific Partnership was signed by 12 participating states on February 4, 2016. It has yet to secure ratifications from the legislature of respective countries before it goes into effect. *See* Office of the United States Trade Representative (USTR) website *available at* https://ustr.gov/tpp (last visited Jul. 8, 2016).

II. State-to-State Dispute Settlement Mechanism

At the global level, the SSDS of free trade agreements has rarely been utilized. For example, there have been only five panel reports for U.S.-Canada FTA (based on Chapter 18) and only three for North American Free Trade Agreement (NAFTA) (based on Chapter 20) for the past 20-plus years.[6] The situation of SSDS in other free trade agreements is not much different. The low utilization of the FTAs' SSDS has been arguably caused by many different reasons. One of the reasons seems to be the lack or absence of secretariat support in the FTA front concerning the operation of the dispute settlement mechanism while the WTO DSM enjoys reliable logistical support from well-organized staff members. Thus, the states have found the FTAs' SSDS more difficult to invoke due to all the logistical hurdles. The situation may change as recent free trade agreements introduce new issues that do not exist in the WTO Agreements and thus any dispute involving these issues is bound to come to the docket of the FTAs' SSDS for any legal challenge. But at this point the FTAs' SSDS is still an option used only in exceptional situations.

In any event, SSDS of the free trade agreements concluded by many states largely follows the WTO's DSM as codified in the Dispute Settlement Understanding, which is arguably the most successful and robust international dispute settlement mechanism at the moment. The case number at the WTO DSM docket has now reached 507 just in 21years since its inception in 1995.[7] The high utilization rate vouches for the reliance and trust of states for the WTO DSM. The dispute settlement proceeding has been widely regarded as one of the signature achievements of the WTO, while there exist some areas and issues in the Dispute Settlement Understanding that require further adjustment and reform. It is fair to state, therefore, that the WTO's DSM has its own strengths and limitations despite its notable success.

There are also some key differences between the WTO's DSM and the FTA's SSDS. For instance, the FTA's DSM does not have an appellate mechanism as the WTO's DSM does. Nor does it have such a detailed text to oversee and regulate dispute settlement proceeding as the Dispute Settlement Understanding of the WTO. Much of the operation of the FTA's SSDS is left to the discretion and consensus of the two contracting parties in the future. These general characteristics of FTA's SSDS equally apply to the four agreements concluded by the United States, discussed in this essay.

As much as FTAs' SSDS follows the basic features of the WTO's DSM, the strengths and limitations of the latter similarly appear in the context of the former. At the same time, new experiments are taking place in recent free trade agreements to address some of the problems of the existing WTO's DSM in an innovative manner - such as adopting a special dispute settlement proceeding to deal with non-tariff barrier disputes.[8] These new attempts, however, are not found in the four

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6 *See* NAFTA Secretariat website *available at* http://www.nafta-sec-alena.org/en/DecisionsAndReports.aspx?x=312 (last visited Jun. 6, 2016).

7 *See* World Trade Organization, Chronological List of Disputes Cases *available at* https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Jul. 8, 2016).

8 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, annex 14-A.

agreements that the United States concluded. It can be said that the U.S. FTAs adopt a rather conventional approach when it comes to dispute settlement proceedings.

With this in mind, the SSDS of the four free trade agreements have the following characteristics. First, any recommendation or ruling by a dispute settlement panel applies only in a *prospective* manner.[9] Second, these four agreements all adopt a system of so-called "self-contained regime."[10] In other words, a dispute settlement panel established under these four free trade agreements is not permitted to turn to other international treaties or agreements or even to the WTO Agreements for governing law. Third, the four agreements do not adopt an appellate review mechanism[11] and as a result the total time required for the whole procedure is almost halved compared to that of the WTO's DSM, which usually requires 3-5 years from consultation to implementation when all steps are employed.[12] Fourth, as the WTO's DSM is administered and supervised by the Dispute Settlement Body, a multilateral body represented by the heads of delegations of Member states, it is "Joint Committees" that conduct such roles for the SSDS of the four free trade agreements.[13] Fifth, more than anything else, the final objective of the SSDS of the four free trade agreements is to bring the measure at issue into conformity with the agreement at issue.[14] As a consequence, as in Articles 21.3 and 21.5 of the WTO's Dispute Settlement Understanding, these four agreements include procedures to determine "reasonable period of time" for implementation by a losing party and to deal with any possible compliance dispute.[15] Therefore, a losing party is supposed

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9 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.4; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 21.2; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 21.2; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 20.2.

10 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.10.2; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 21.10.2; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 21.10.2; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 20.10.2.

11 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.12.1; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 21.15.1; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 21.15.1; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 20.14.1.

12 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, arts. 22.8, 22.9.1, 22.9.2, 22.11.1, 22.11.4, and 22.12.1; U.S.-Peru Trade Promotion Agreement, *supra* note 2, arts. 21.5.1, 21.5.4, 21.6.1, 21.9.1, 21.13.3, 21.13.5, 21.14.1, and 21.15.1; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, arts. 21.5.1, 21.5.4, 21.6.1, 21.9.1, 21.13.3, 21.13.5, 21.14.1, and 21.15.1; U.S.-Panama Trade Promotion Agreement, *supra* note 4, arts. 20.5.1, 20.5.4, 20.6.1, 20.9.1, 20.12.3, 20.12.4, 20.13.1, and 20.14.1.

13 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.2.2(d); U.S.-Peru Trade Promotion Agreement, *supra* note 2, art.20.1.2(c); U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 20.1.2(c); U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 19.1.2(c).

14 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.12.2; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 21.15.2; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 21.15.2; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 20.14.2.

15 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.13.1; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 21.16.1; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 21.16.1; U.S.-Panama Trade Promotion Agreement, *supra* note 4, arts. 20.14.3 and 20.15.1.

to withdraw or modify the challenged measure within the "reasonable period of time", or otherwise be subject to retaliation by a prevailing party.[16]

One peculiar aspect of the remedy scheme of the four free trade agreements is the possibility of a losing party's offering to pay a fine to the prevailing party in lieu of bringing the measure at issue into conformity with the agreement.[17] This option, in practice, does not exist in the WTO's DSM.[18] Alternatively, the losing party may also decide to contribute to a fund that may be used to assist the losing party in implementing the decision of the panel to the extent such implementation requires financial resources over the years.[19] Nor does the "fund" formula have its counterpart in the WTO's DSM. These reflect the four FTAs' effort to introduce more practical SSDS.

In particular, these four free trade agreements were directly affected by the bipartisan agreement on trade policy between the U.S. Congress and the U.S. administration reached in May 2007.[20] The U.S. Congress demanded inclusion of new issues in U.S. FTAs that can ensure the protection of U.S. interest as a condition for the extension of the Trade Promotion Authority.[21] Core issues to be newly included are those relating to labor and environment.[22] As a result, dispute settlement mechanisms came to be applied to labor and environmental obligations of the agreements as well.[23]

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16 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.13.2; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 21.16.2; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 21.16.2; U.S.-Panama Trade Promotion Agreement, *supra* note 4, arts. 20.14.3 and 20.15.2.

17 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.13.5; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 21.16.6; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 21.16.6; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 20.15.6.

18 *See* WTO's Dispute Settlement Understanding, art. 21.1.

19 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.13.6; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 21.16.7; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 21.16.7; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 20.15.7.

20 *See* U.S. Congress House Ways & Means Committee, *Summary of the May 10 Agreement*, *available at* http://waysandmeans.house.gov/Media/pdf/110/05%2014%2007/05%2014%2007.pdf; Jeanne G. Grimmett, *Dispute Settlement Under the U.S.-Peru Trade Promotion Agreement: An Overview*, Congressional Research Service (Aug. 12, 2011), at summary.

21 *See* Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA-2015) P.L. 114-26; Ian F. Fergusson & Richard S. Beth, *Trade Promotion Authority (TPA): Frequently Asked Questions*, CRS Report (Jul. 2, 2015).

22 *See* Fergusson & Beth, *supra* note 21, 12-13; Mary Jane Bolle & Ian F. Fergusson, *Worker Rights Provisions in Free Trade Agreements (FTAs)*, CRS Report IF10046 (June 18, 2015); ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, *available at* http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm (last visited Jul. 8, 2016); Richard K. Lattanzio & Ian F. Fergusson, *Environmental Provisions in Free Trade Agreements (FTAs)*, CRS Report IF10166 (Jun. 18, 2015).

23 *See* Fergusson & Beth, *supra* note 21, at 13; Bolle & Fergusson, *supra* note 22, at 2; Lattanzio & Fergusson, *supra* note 22, at 2; M. Angeles Villarreal, *Proposed U.S.-Colombia Free Trade Agreement: Background and Issues*, CRS Report RL34470; William H. Cooper, *The Proposed U.S.-South Korea Free Trade Agreement (KORUS FTA): Provisions*

Once a dispute settlement proceeding is completed, a prevailing party may impose trade sanctions on a losing party for any failure to abide by its terms.[24] Given the importance of the U.S. market for Korea, Peru, Colombia and Panama, any trade sanction by the United States could be critical for the four countries. On the other hand, trade sanction by any of the four states against the United States is likely to be less critical, albeit painful for directly related industries. As of the time of writing, no dispute has been lodged at the SSDS relating to the four free trade agreements. It will be only a matter of time, however, before cases are brought to the SSDS of the four agreements, considering the wide range of trade issues between the United States and the four trading partners.[25]

III. Investor State Arbitration Mechanism

Investment arbitration proceedings - the ISDS - are another type of dispute settlement mechanism that appears in the four free trade agreements. This is a mechanism that introduces investment arbitration for disputes initiated by an investor against the government of a host state. Unlike SSDS, this particular mechanism has attracted a great deal of attention from both the general public and opinion leaders of the five countries at issue. As a matter of fact, sensitivity associated with the ISDS proceedings of the four free trade agreements is not confined to these agreements. Rather this phenomenon is a reflection of the global trend whereby (i) the level of attention on investment arbitration has been increasing continuously and rapidly in many countries; and (ii) the legal complexities and political sensitivities associated with investment arbitration have given both foreign investors and sovereign states acute difficulties in resolving controversial international disputes. In a sense, it has become a 'hot potato' for many governments, but at the same time it has become a fixture of a free trade agreement. As such, the four agreements also incorporate ISDS proceedings. On balance, they adopt a rather standard format of ISDS proceedings while the specific elements of the proceedings slightly vary among the four free trade agreements. These differences are relatively minor and logistical in nature.

When an investment dispute cannot be resolved through consultation and negotiation, the claimant may submit the dispute to arbitration on its own behalf or on behalf of an enterprise that the claimant owns or controls, directly or indirectly. All four free trade agreements require the notice of intent submitted to the respondent at least 90 days prior to submitting any claim to arbitration.[26] An arbitration tribunal

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and Implications, CRS Report RL34330; J. F. Hornbeck, *The Proposed U.S.-Panama Free Trade Agreement*, CRS Report RL32540.

24 *Id.*

25 In 2011, the United States and Peru had a dispute concerning the Peru's alleged failure to recognize collective bargaining rights for its workers, and the possibility of bringing an SSDS procedure was contemplated by the United States. *See* Jeanne G. Grimmett, Dispute Settlement under the U.S.-Peru Trade Promotion Agreement: An Overview, Congressional Research Service (Aug. 12, 2011), at summary.

26 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.16.2; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 10.16.2; U.S.-Colombia Trade Promotion Agree-

consists of three arbitrators unless agreed otherwise by disputing parties.[27] Each disputing party appoints one arbitrator, and the third, selected by their mutual agreement, becomes the presiding arbitrator.[28]

The four free trade agreements also adopt robust transparency provisions reflecting a recent trend of international investment arbitration spearheaded by United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules[29] and Transparency Convention.[30] In principle, all documents submitted in the course of the proceeding should be open to public inspection subject to the exception of confidential information.[31] Hearings should also be made available to the public, except any portion of the hearing dealing with the confidential information.[32] A disputing party, namely a foreign investor or a respondent government, has the authority to determine which information qualifies as confidential information.[33] These transparency clauses in the four agreements are reflective of the U.S. position to enhance transparency in investment arbitrations.[34]

In terms of awards of arbitration, the four free trade agreements prohibit an investment arbitration tribunal from providing punitive damages to a claimant.[35] Nor do they allow imposition of specific action on the part of a respondent government

ment, *supra* note 3, art. 10.16.2; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.16.2.

27 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.19.1; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 10.19.1; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.19.1; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.19.1.

28 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.19.1; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 10.19.1; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.19.1; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.19.1.

29 *See* UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html (last visited Jul. 8, 2016).

30 *See* UN Convention on Transparency in Treaty-based Investor-State Arbitration, *available at* https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf (last visited Jul. 8, 2016).

31 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, arts. 11.21.1 and 11.21.3; U.S.-Peru Trade Promotion Agreement, *supra* note 2, arts. 10.21.1 and 10.21.3; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, arts. 10.21.1 and 10.21.3; U.S.-Panama Trade Promotion Agreement, *supra* note 4, arts. 10.21.1 and 10.21.3.

32 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.21.2; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art.10.21.2; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.21.2; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.21.2.

33 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.21.4; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 10.21.4; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.21.4; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.21.4.

34 Shayerah Ilias Akhtar & Martin A. Weiss, *U.S. International Investment Agreements: Issues for Congress*, CRS Report R43052 (April 29, 2013) at 11-15.

35 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.26.4; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 10.26.3; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.26.3; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.26.3.

such as withdrawal of a measure.[36] This limitation complies with the general trend of bilateral investment treaties (BITs) and FTAs. All four U.S. FTAs require the enforcement of the award in the domestic territory of each party.[37]

Another noteworthy feature of the four U.S. FTAs is the enhanced authority of the Joint Committees. When an issue arises during an investment arbitration that requires interpretation of an important provision of the investment chapter of the free trade agreement, a responding party or the government of a claimant (investor)'s nationality can refer the issue to the Joint Committee for interpretation.[38] Once the Joint Committee issues an interpretation, that interpretation is binding on the investment arbitration tribunal.[39] This is a unique feature that ensures the authority of the state parties to control investment arbitration tribunals when key issues are at stake. It should be noted, however, that the decision making process of the Joint Committee is based on consensus of the state parties.[40] In other words, if the two state parties have divergent views on a particular provision of the free trade agreement or an issue relating to the provision, it may be difficult to secure consensus, which means that a binding interpretation may be elusive in practice. In any event, the enhanced authority of the Joint Committee represents an attempt to safeguard the authority of state parties with respect to the interpretation of key provisions of the agreement.

Concerning the conduct of investment arbitration, the Korea-U.S. FTA includes unique provisions regarding official languages and location of arbitration. Unlike the other three free trade agreements where official languages of arbitration are not specifically mentioned, the Korea-U.S. FTA has a provision that recognizes both English and Korean as official languages.[41] The absence of reference to official language in the U.S. FTAs with Colombia, Peru and Panama is understandable on the basis that English is almost always the language of international investment arbitration. Due to recognition of Korean as an official language in ISDS proceedings, future arbitration could hopefully become less costly and burdensome for Korea by relying upon and submitting documents in Korean original when

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36 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.26.1; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art.10.26.1; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.26.1; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.26.1.

37 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.26.8; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art.10.26.7; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.26.7; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.26.7.

38 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.2.3 (d); U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 20.1.3(c); U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 20.1.3(c); U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 19.1.3(c).

39 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.22.3; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art.10.22.3; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.22.3; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.22.3.

40 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.2.7; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 20.1.6; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 20.1.6; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 19.1.5.

41 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.20.3.

Korea becomes a respondent state. But, given that arbitrators and experts are more familiar and feel comfortable with English, it is still too early to tell whether conducting any arbitration in Korean or allowing Korea to proceed in Korean in a particular proceeding can be feasible in practice. Korea's sensitivity to ISDS proceedings is also reflected in the fact that arbitrations involving Korean government's measures are supposed to take place in Korea where there is proximity to witnesses and evidence.[42] Similar provisions are not found in U.S. FTAs with other three countries.

When it comes to ISDS proceedings, the United States has placed emphasis on the possible introduction of an appellate mechanism. This is an interesting development, not paralleled in SSDS proceedings where an appellate mechanism might equally be contemplated. It can be said that the United States has been pushing for the introduction of an appellate mechanism for investment arbitration, as noted most notably in the TPP.[43] Such being the case, the four free trade agreements include provisions that anticipate the introduction of appellate mechanism and the adjustment of the treaty texts once the appellate system is adopted.[44] They refer to possibilities of both a multilateral appellate mechanism and bilateral appellate mechanisms.[45] Likewise, the 2012 U.S. Model BIT also envisions the ultimate introduction of an appellate mechanism, although the text has no details as yet.[46]

The four FTAs' effort to positively consider an appellate mechanism is largely in line with the global effort to introduce the mechanism in investment arbitration. If anything, the fact that investment arbitration is conducted according to a bilateral treaty and on a one-time basis has, by its nature, caused and facilitated fragmentation of arbitral awards over the years. This phenomenon has reached the point where clear jurisprudence and reliable guidelines are sometimes lacking for governments negotiating and applying BITs and FTAs. It is against this backdrop that discussions on appeals in international investment arbitration are taking place. Introducing an appeal mechanism should help to alleviate or address some concerns raised by participants in these proceedings. But, at the same time, it should be borne in mind that an appellate mechanism, if not properly introduced or managed, may run the risk of fuelling further concerns and imposing additional burdens on the disputing parties. So the question is not necessarily whether an appellate system is necessary for the global community. Rather, the real question is what kind of an appellate mechanism is appropriate for investment arbitrations.

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42 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.20.2.

43 *See* The Trans-Pacific Partnership, art. 9.23.11.

44 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.20.12; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 10.20.10; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.20.10; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.20.10.

45 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 11.20.11 (b); U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 10.20.9 (b); U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.20.9 (b); U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.20.9 (b).

46 *See* art. 28, at ¶ 10 of the 2012 U.S. Model BIT.

As the four U.S. FTAs do not provide details of an appellate mechanism, it is difficult to predict what specific features of appellate facilities these five countries have in mind. So far, they have only established the basic principles that an appellate mechanism is worthwhile and that they will continue to discuss them when a proper opportunity arises.

IV. Joint Committees

The third dispute settlement mechanism contained in the four U.S. FTAs is the Joint Committees. The Joint Committee is a consultative body composed of high ranking officials of the contracting parties. This is a body that can issue a 'binding interpretation' on the specific terms of the free trade agreement, at the request of either the contracting parties or the tribunal. As the interpretation issued by the Joint Committee binds the tribunal, this seems to be an effective way of exerting control over the investment arbitration proceeding on the part of the contracting parties. This mechanism will certainly provide peace of mind for the states.

By way of example, the Korea-U.S. FTA establishes a Joint Committee in Article 22.2 of the Agreement. Compared with the other three agreements, the U.S. FTA with Korea has detailed provisions on the role of the Joint Committee. In short, the provision sets out two categories of authority of the Joint Committee, one directive (using the term "shall") and the other permissive (using the term "may"). The provision stipulates in pertinent part that:

> 1. The Parties hereby establish a Joint Committee comprising officials of each Party, which shall be co-chaired by the United States Trade Representative and the Minister for Trade of Korea, or their respective designees.
> 2. The Joint Committee shall:
> …
> (d) seek to resolve disputes that may arise regarding the interpretation or application of this Agreement; …
> 3. The Joint Committee may:
> …
> (d) *issue interpretations of the provisions of this Agreement*, including as provided in Articles 11.22 (Governing Law) and 11.23 (Interpretation of Annexes).

This Joint Committee is tasked with two important mandates. The first one is the authority to make a binding decision on the appropriateness of the designation by one party as protected information so as to avoid the disclosure obligation. Article 11.21 (Transparency of Arbitral Proceedings) provides in pertinent part that:

> 4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
> …
> (e) At the request of a disputing Party, the Joint Committee shall consider issuing a decision in writing regarding a determination by the tribunal

> that information claimed to be protected was not properly designated. If the Joint Committee issues a decision within 60 days of such a request, it shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Joint Committee does not issue a decision within 60 days, the tribunal's determination shall remain in effect only if the non-disputing Party submits a written statement to the Joint Committee within that period that it agrees with the tribunal's determination.

At the same time, the Joint Committee is authorized to issue an interpretation of the provisions in the investment chapter that will bind reviewing investment tribunals. In the governing law provision of Article 11.22, the Agreement provides:

> 3. A decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 22.2.3(d) (Joint Committee) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

As the above provision shows, the Joint Committee makes important decisions that directly affect the administration of dispute settlement proceedings of free trade agreements. In particular, it is specifically stipulated that an interpretation of the Joint Committee binds the tribunal. Furthermore, the way it is stated indicates that the Joint Committee may even override any decision of the tribunal insofar as there is conflict between its own interpretation and the tribunal's decision or award. The other three agreements also include provisions that respective Joint Committees can issue binding interpretations.[47] An interpretation can be requested by either a contracting party or by a reviewing tribunal.[48]

The Joint Committees also deal with administrative issues relating to dispute settlement proceedings. For instance, apart from the U.S.-Panama FTA, other three U.S. FTAs oblige the Joint Committee to manage the remuneration and expenses to be paid to panelists.[49] They also monitor the implementation of the rulings and recommendations of the panel. They also authorize trade sanctions in the case of non-implementation.[50]

The four U.S. FTAs insist on consensus of the parties for every decision of the Joint Committees and other bodies established under the agreements, unless agreed

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47 *See* U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 10.22.3; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 10.22.3; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 10.22.3.

48 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, arts. 11.23.1 and 22.4; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 10.23.1 and 21.2; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, arts. 10.23.1 and 21.2; U.S.-Panama Trade Promotion Agreement, *supra* note 4, arts. 10.23.1 and 20.2.

49 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.2.2 (e); U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 20.1.2 (e); U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 20.1.2 (e).

50 *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.2.3 (f); U.S.-Peru Trade Promotion Agreement, *supra* note 2, art.20.1.3 (f); U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 20.1.3 (f); U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 19.1.3 (e).

upon otherwise.[51] This consensus requirement could make the operation of the Joint Committees somewhat tricky when the views of the contracting parties do not converge. If the contracting parties fail to agree upon a particular interpretation at the Joint Committee, this may delay or even derail on-going investment arbitration. Should the parties agree to present a 'compromised' interpretation which may be even more confusing than the treaty terms, the chances are that more burdens will be imposed on the investment tribunal. It will be interesting to watch how the four free trade agreements administer their respective Joint Committees.

At the same time, this new attempt of four free trade agreements also raises new questions, both in terms of policy and legal aspects. First, with respect to the policy aspect, the new system may end up restraining the otherwise legitimate authority of the adjudicative body. A concern is that the Joint Committee may issue a compromised interpretation which is not supported by the "ordinary meaning" principle as clarified by the *1969 Vienna Convention on the Law of Treaties* (Vienna Convention). An argument can then be made about whether this will further 'politicize' the investment arbitration proceedings. As to the legal aspect, the scope and meaning of "binding interpretation'' are not entirely clear. For instance, controversies may arise as to whether the Joint Committee can simply issue interpretation of the words contained in the text based on ordinary meaning or whether it can also purport to pronounce interpretation of the terms that already carry certain legal implications in and of themselves in the investment agreement context - such as the terms "investor" or "investment" - which may ultimately dispose of the legal claims at issue. Needless to say, any interpretation of treaty terms is subject to the general rules of treaty interpretation as pronounced in the Vienna Convention. In that respect, the same rules of interpretation apply to both categories of interpretation. Nonetheless, interpretation in the latter category is arguably directly related to resolution of key legal issues of investment disputes. Disposition of these legal issues should be left to adjudicators, namely tribunal, and arguably would not be amenable to *ex post facto* decisions of the contracting parties. The first category of interpretation, on the other hand, can be regarded as clarification or elaboration by contracting parties, which may indeed help arbitrators and tribunal in a dispute. This is another task left to the further elaboration of Joint Committee's operation by the five contracting parties in the future.

V. Assessment and Challenges

A. Overall Assessment of the Dispute Settlement Mechanisms of the Four U.S. FTAs

Review of the dispute settlement mechanism of the U.S. FTAs with Korea, Peru, Colombia and Panama highlights the importance of the mechanism in the

[51] *See* U.S.-Korea Free Trade Agreement, *supra* note 1, art. 22.2.7; U.S.-Peru Trade Promotion Agreement, *supra* note 2, art. 20.1.6; U.S.-Colombia Trade Promotion Agreement, *supra* note 3, art. 20.1.6; U.S.-Panama Trade Promotion Agreement, *supra* note 4, art. 19.1.5.

architecture and scheme of the free trade agreements. It is supposed to operate as a main pillar for the implementation of the respective agreements. The SSDS proceedings of the four agreements have adopted the basic template of the WTO's DSM, except the appellate proceedings. The timeframe for the entire proceeding has been reduced almost by half compared to that of the WTO's DSM, which may incentivize the utilization of the proceeding in the long run. But at least in the initial stage, it is not likely that these FTAs' SSDS proceeding is somehow invoked in the near future. In any event, except for Korea, the other three countries have not had a dispute with the United States that has proceeded to the WTO's DSM. It can be argued, therefore, that the prospect of invocation of the FTAs' SSDS by these three countries is relatively low unless an acute FTA-specific dispute arises between them and the United States. Korea, however, has already had as many as 10 disputes with the United States and dissatisfaction with Korea's implementation of U.S.-Korea FTA has been increasing incrementally, so that there is potentially a greater likelihood that the U.S.-Korea FTA's SSDS proceeding will be invoked in the near future.

The ISDS proceedings of the four free trade agreements largely follow the general scheme of the proceedings adopted in the BITs and investment chapters of other FTAs. It can be said that the four agreements have included more detailed provisions for investment arbitration reflecting concerns of the parties who will stand to face arbitration as respondents. These additional provisions are supposed to safeguard the interest of the host states' governments by clarifying or imposing requirements to be satisfied by foreign investors to invoke the ISDS proceedings. Notwithstanding these additions and clarifications, the basic framework of investment arbitration either under International Centre for Settlement of Investment Disputes or UNCITRAL rules remains intact. This would mean that the concerns over the ISDS proceedings stemming from fears of possible erosion of a state's regulatory authority still apply to the ISDS proceedings of the four agreements.

Joint Committees of the four free trade agreements are also supposed to play an important role in the administration of the agreements. These committees are non-binding consultative bodies, but offer a forum to discuss and resolve disputes arising from the free trade agreements. At the same time, the committees are tasked with organizing, administering and monitoring dispute settlement proceedings initiated under the FTAs' SSDS mechanism. Furthermore, Joint Committees can issue interpretation of the texts of the agreements which are binding on panels of SSDS and arbitration tribunals of ISDS. In short, Joint Committees can play an important role either in settling disputes directly or in facilitating the settlement of disputes under the free trade agreements. There are also sub-committees in charge of respective sectors of trade issues of the agreements such as goods, services, and intellectual property rights.

So, the four free trade agreements adopt dispute settlement mechanisms that can deal with various disputes arising from the implementation of the trade agreements. As the implementation of these agreements is still in an early stage, it seems to be too early to evaluate the performance of the mechanisms in general or respective proceedings in particular. But at least it can be said that a framework has been put in place to deal with a variety of disputes between the state parties.

B. Peculiar Challenges for the Four Free Trade Agreements

There are challenges facing the state parties of the four free trade agreements when it comes to the dispute settlement mechanism. Of course, there are challenges pertaining to the fundamental nature of the dispute settlement mechanism, which appear in all mechanisms, such as the issue of forum shopping, cross-over between trade disputes and investment disputes, and fragmentation of dispute settlement proceedings. Attempts are being made to address these fundamental challenges in various fora and agreements. Setting aside these fundamental issues inherent to the mechanisms of recent free trade agreements, there are peculiar issues that apply to the four agreements specifically.

Most notably, there is marked discrepancy between the United States on the one hand and the other four trading partners on the other hand. Thus, when it comes to the utilization of or participation in the dispute settlement mechanisms of the free trade agreements, burdens to fall on the state parties may arguably be disproportionate in a significant manner. Neutral texts notwithstanding, the huge discrepancy in resources would place the United States in a better position to participate in the dispute settlement mechanisms either as a complainant or a respondent compared to the other four countries. Among the four countries, perhaps Korea can be distinguished from Peru, Panama or Colombia. But the gap in resources and manpower between Korea and the United States is still conspicuous.

1. Burden from Legal Aspects

The four free trade agreements purport to introduce new provisions that do not necessarily appear in the WTO Agreements. Tariff reduction or elimination is often cited as the key element of a free trade agreement, but from the systemic perspective this is a relatively easy and straightforward process. It is mainly about calculation of the amount to be reduced or eliminated and how to find a compromising point between the two countries. It is the new issues and new norms introduced in a free trade agreement that have a far reaching impact on state parties. Laws and regulations should be amended or introduced, and practices and policies changed or adjusted. Such amendments or changes take time, even if there is willingness on the part of the state parties of a trade agreement.

In this respect, attention needs to be drawn to the fact that the four free trade agreements attempt to introduce new rules and norms in various sectors. By way of example, the four agreements have independent chapters on environment, labor and investment which are not dealt within the WTO Agreements.[52] To the extent these new rules require changes in the existing laws and regulatory systems of the contracting parties, a new set of obligations are imposed on these states. As these new rules do not have precedents in the WTO regime, reliable guidelines are not available at least in the early stage of the implementation. As with any other

[52] *See* U.S.-Korea Free Trade Agreement, *supra* note 1, chs. 20 (Environment), 19 (Labor), and 11 (Investment); U.S.-Peru Trade Promotion Agreement, *supra* note 2, chs. 18 (Environment), 17 (Labor), and 10 (Investment); U.S.-Colombia Trade Promotion Agreement, *supra* note 3, chs. 18 (Environment), 17 (Labor), and 10 (Investment); U.S.-Panama Trade Promotion Agreement, *supra* note 4, chs. 17 (Environment), 16 (Labor), and 10 (Investment).

new norms in a treaty, it is not entirely clear what the new provisions mean and how they should be interpreted. Clarification and elaboration usually come as a result of discussions, consultations and sometimes disputes between the parties. Sometimes, even if a party to a free trade agreement is willing to implement a provision to the letter as soon as possible with swift adoption of implementing legislation, it takes time to change deeply rooted, existing practices. Less than optimal implementation, for whatever reason, tends to frustrate the other party to an agreement. The frustration may lead to initiation of official dispute settlement proceedings under the dispute settlement mechanisms of free trade agreements. In short, the advent of new rules and new norms make it more likely that disputes between the parties arise and mechanisms are ultimately invoked.

Needless to say, the introduction of new rules imposes the same obligations on both parties to a free trade agreement. The texts are neutral and the parties are subject to the same texts. So, both parties assume new burdens as a result of the conclusion of a free trade agreement. But the actual burden on parties to a free trade agreement arising from the new rules could vary. This is particularly the case when the two parties show a stark gap in terms of economic development and the situations in the market. New issues usually reflect ideas and suggestions formulated in developed states. All things being equal, developed states would find provisions introducing the new rules more familiar and comfortable than their developing-state counterparts. National legislations and schemes to address the new issues have already been adopted or can be adopted relatively easily.

That is not necessarily the case for developing states. As such, when it comes to the four U.S. FTAs, the introduction of new rules and norms in these free trade agreements poses a disproportionate challenge to the four contracting parties of the agreements. In particular, Peru, Colombia and Panama are developing states that would have difficulties in dealing with new requirements and technicalities arising from the new rules and norms. This *de facto* disparity in FTAs' implementation needs to be taken into consideration in reflecting dispute settlement mechanism of the four agreements.

2. Burden from Logistical Aspects

As each free trade agreement has its own dispute settlement mechanism, the number of mechanisms that one state should deal with increases commensurate with the number of agreements. As participation in the dispute settlement mechanism entails significant human and financial resources, the overall logistical burden for a government entangled in the web of free trade agreements can be sometimes substantial. Such logistical burden can be disproportionately large for developing states that have limited human and financial resources. United States' four FTA's partners would face similar difficulties albeit the specific burden may vary.

Assuming the current situation of dormancy is maintained in the FTA's DSM, the logistical burden for developing states would not be materialized. Once the situation changes, however, developing states are likely to find themselves in a difficult situation of dealing with multiple dispute settlement proceedings in a limited timeframe. Again, both parties to a free trade agreement would face an increased burden, but it is developing states that would face a higher logistical burden. The four FTA's partners of the United States would experience a similar phenomenon.

The four free trade agreements adopt a conventional definition of a "measure" to be challenged at the dispute settlement mechanisms. The definition of a "measure" is so broad that it may capture a wide range of governmental action and inaction of a state.[53] As long as there is a "measure" falling under the free trade agreement at issue, a dispute settlement proceeding can be initiated.[54] Consequently, it is not surprising and in fact merely a matter of time that a governmental measure is brought to an FTA's DSM when circumstances so require. Once the initial stage is over and the four U.S. FTAs are brought to a full implementation mode, dispute settlement mechanisms are expected to be mobilized in full swing. WTO's DSM will be utilized continuously, but in addition, FTAs' DSMs will have to be invoked as well so as to address new issues that do not appear in the WTO Agreements in which case only FTAs' DSMs can offer viable fora.

In other words, in the near future, four FTA partners of the United States will have to deal with multiple dispute settlement mechanisms - both WTO's DSM and various mechanisms in their respective free trade agreements with the United States. This would mean that these partners would have to deal with a thinly stretched workforce with limited resources. As much as dispute settlement mechanisms take an important position in the free trade agreements, these four countries' utilization of free trade agreements might be limited accordingly.

VI. Concluding Thoughts

The United States concluded free trade agreements with Korea, Peru, Panama and Colombia in late 2000s and brought these agreements into force in late 2000s or early 2010s. Diverse reasons spanning over economic rationale and geopolitical considerations have prompted the U.S. government to push ahead with these preferential trade agreements with these four countries. Since the four agreements were negotiated and concluded largely contemporaneously, key traits and characteristics of the agreements are similarly formulated. In light of this, the dispute settlement mechanisms of the four agreements also share commonalities. Needless to say, there are state-specific variations in the four agreements, but they are generally minor adjustments rather than fundamental differences.

In summary, SSDS proceedings, ISDS proceedings and Joint Committees are the three main schemes for addressing disputes arising from the implementation of

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[53] The term "measure" is defined by the WTO Appellate Body in *US - Corrosion-Resistant Steel Sunset Review* where it stated that: "In principle, *any* act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings" (emphasis added). Measures that can be subject to WTO dispute settlement can include, not only acts applying a law in a specific situation, but also "acts setting forth rules or norms that are intended to have general and prospective application ... instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance." This definition is also accepted by the four free trade agreements discussed in this chapter.

[54] *See* art. 1.1 of the WTO's Dispute Settlement Understanding. For a free trade agreement, *see, e.g.*, art. 22.4 of the U.S.-Korea Free Trade Agreement, *supra* note 1.

the four free trade agreements. SSDS proceedings are supposed to deal with alleged violation of provisions of free trade agreements, following the general contours of the WTO's DSM, although in a shortened timeframe and except for an appellate mechanism. ISDS proceedings are going to deal with investment arbitration that is receiving increasing attention globally these days due to the sensitivity relating to the regulatory authority of a government. Some new ideas are included in the four free trade agreements to address the concern of the respondent governments, but they are generally minor and logistical. Joint Committees are non-binding consultative bodies that also play an important role in settling bilateral disputes. As detailed provisions of dispute settlement proceedings are introduced in the four free trade agreements, they are ready to be utilized by state parties to the agreements. Issues under the free trade agreements have arguably not been ripe for the constitution of dispute settlement mechanisms under the agreements at the moment, but sooner or later they are likely to end up in the dockets of the mechanisms.

The key elements of the four FTAs' DSM are also adopted in other free trade agreements that the United States have concluded afterwards including most recently the TPP, since these elements are reflective of the general scheme of the United States in their free trade agreements. The TPP, a 12-state mega-FTA signed in February 2016, adopts dispute settlement mechanisms that are similar, in all material respects, to the four agreements with Korea, Peru, Colombia and Panama.

What remains to be seen is how the general scheme of dispute settlement mechanisms can be applied and implemented in actual settings when the free trade agreements produce increasing disputes. In particular, the marked disparity in human and financial resources between the United States and the four FTA's parties may impose disproportionate burdens on the latter in utilizing and participating in the new mechanisms of the agreements. WTO's DSM may have seen a similar phenomenon, but the advent of multiple mechanisms in addition to the WTO's DSM may arguable exacerbate the inherent limitations of developing states even further. Continued attention needs to be paid to the development concerning implementation of the four free trade agreements.

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Regulatory Coherence and Standardization Mechanisms in the Trans-Pacific Partnership

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ABSTRACT

This article posits a new taxonomy and framework for assessing regulatory coherence in the new generation of mega-regional, cross-cutting free trade agreements. Using the Trans-Pacific Partnership as the primary example, this article situates the rise of regulatory coherence within the current trade landscape, provides clear definitions of regulatory coherence, and argues that the real engine of regulatory coherence lies in the work of international standard setting organizations. This work has been little examined in the current literature. The article provides a detailed examination of the mechanics by which the Trans-Pacific Partnership promotes regulatory standardization and concludes with some normative implications and calls for future research.

CONTENTS

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I. Introduction

A dramatic shift has occurred in the field of international trade law. Governments and trade negotiators have been hard at work in crafting a new generation of broad spectrum economic treaties, often working either in secret or with minimum input from the public, interested non-governmental organizations (NGOs) and civil society.[1] Both the European Union (EU)-United States (U.S.) Transatlantic Trade and Investment Partnership[2] (TTIP) and the multi-lateral Trans-Pacific Partnership[3] (TPP) among the United States and eleven Pacific Rim countries are both examples of the new generation of trade treaties. These 21st Century trade treaties[4] not only reduce tariffs (to zero under the TPP) and non-tariff barriers, including behind-the-border technical barriers to trade, but also encompass ambitious cross-cutting issues like regulatory coherence, intellectual property, and global supply chain management plus non-trade issues like transparency and anti-corruption. Due to their ambitious scope, these trade agreements have been dubbed Mega-Regional Free Trade Agreements.[5] Not only do the TTIP and TPP have expansive scope going well beyond the coverage of traditional trade treaties, but they have been the subject of widespread criticism, particularly regarding the cloak of secrecy over the negotiations process. The TPP in particular has received much criticism, and its passage in the United States Congress[6] may

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1 *See, e.g.,* Marija Bartl & Elaine Fahey, *A Post National Marketplace: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)*, in Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US legal Orders 210 (Elaine Fahey & Deirdre Curtin eds., 2015); Marika Armanovica & Roberto Bendini, European Parliament: Directorate-General for External Policies, *Civil Society's Concerns about Transatlantic Trade and Investment Partnership* (Oct. 14 2014), *available at* http://www.europarl.europa.eu/RegDataletudes/IDAN/2014/536404/EXPOIDA(2014)536404EN.pdf; *Trans-Pacific Partnership (TPP): More Job Offshoring, Lower Wages and Unsafe Food Imports*, Public Citizen, *available at* http://www.citizen.org/TPP (last visited May 11, 2016).

2 Transatlantic Trade and Investment Partnership, currently being negotiated by the United States and European Union, no definitive or complete text available. However, some of the European Commission's negotiation texts are *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230 (last visited May 10, 2016).

3 Trans-Pacific Partnership, signed on Oct. 5, 2015 by Brunei, Chile, New Zealand, Singapore, Australia, Canada, Japan, Malaysia, Mexico, Peru, United States, and Vietnam. Not yet entered into force. Full text of treaty *available at* http://tpp.mfat.govt.nz/text (last visited May 10, 2016) and https://ustr.gov/sites/default/files/TPP-Final-Text-Regulatory-Coherence.pdf (last visited May 13, 2016).

4 Claude Barfield, *The Trans-Pacific Partnership: A Model for Twenty-First-Century Trade Agreements?*, International Economic Outlook, Washington D.C.: American Enterprise Institute for Public Policy Research, 2011, *available at* https://www.aei.org/publication/the-trans-pacific-partnership (last visited May 11, 2016).

5 Reeve T. Bull, Neysun A. Mahboubi, Richard B. Stewart & Jonathan B. Wiener, *New Approaches to International Regulatory Cooperation: The Challenge of TTIP, TPP, and Mega-Regional Trade Agreements*, 78(4) Law & Contemp. Probs. 1, 2 (2015).

6 Prominent democrats like Hilary Clinton, Bernie Sanders and Elizabeth Warren oppose the TPP. *See* Jason Easley, *Hilary Clinton Sides with Elizabeth Warren and Bernie Sanders against Obama Trade Agenda*, PoliticusUSA (Jun. 15, 2015), *available at*

be in jeopardy due, in part, to the lack of transparency in the process as well as the open opposition of President Donald Trump who recently withdrew the U.S. signature from the TPP.[7] During the seven years of negotiations, no drafts or texts of the TPP were made available openly to the public, although some chapters were leaked early. So secretive was the process that WikiLeaks leaked confidential drafts, such as the environmental chapter.[8] Even after the TPP was signed on October 5, 2015,[9] no complete draft of the agreement was made public until November 5, 2015. While the lack of transparency in the negotiations has received a lot of attention in the popular press and academia, there is another aspect that has received little attention, but is of equal, and perhaps greater lasting concern: the challenges posed by the hardening of "soft law" standardization and harmonization provisions throughout the TPP.

This article tackles the problem of such hardening in three distinct ways. First, as a way to broadly define the current trade landscape, I argue that the rise of regulatory harmonization rules enforced by stronger global administrative law mechanisms enables the new generation of trade treaties to be "shape-shifters," switching between benchmark (or effort/aspirational) and resolution (or benchmark/enforceable) within the same treaty regime. This phenomenon is important because it undermines our traditional understandings of hard law versus soft law, and also blurs the distinction between public law and private law. Second, I define regulatory coherence and trace its development in recent American bilateral free trade agreements, showing that it has found its most ambitious expression in the new mega-regional agreements. Third, I use the TPP as a case-study to show that reliance on international standard setting organizations is now common-place, and moreover, a powerful mechanism for regulatory harmonization. Even if the TPP does not enter into force, its structure and content will shape future trade deals so that the mechanisms studied in this article still merit attention. Lastly, I explore some normative implications of these trends, highlighting important questions for future research.

This article proceeds in five parts. Section II situates the article in the current debate on the proper role of multilateral efforts in international trade law, defines some key terms, and traces the history of U.S. bilateral free trade agreements' approach to regulatory coherence. Section III discusses the growing power of international standard setting organizations and demonstrates how they can impact the nature of trade norms in the new generation of trade treaties. Section IV provides a detailed analysis of the different mechanisms embedded in the TPP with respect to regulatory coherence, harmonization, and standardization. Section V highlights implications and identifies areas for future research. Section VI concludes.

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http://www.politicususa.com/2015/06/15/hillary-clinton-sides-elizabeth-warren-bernie-sanders-obama-trade-agenda.html.

7 Jana Kasperkevic, *TPP or not TPP? What's the Trans-Pacific Partnership and Should We Support It??* The Guardian, Oct. 5, 2015, *available at* http://www.theguardian.com/business/2015/oct/05/tpp-or-not-tpp-whats-the-trans-pacific-partnership-and-should-we-support-it.

8 *Secret Trans-Pacific Partnership Agreement (TPP) - Environmental Chapter* (Press Release), WikiLeaks, Jan. 14, 2014.

9 The TPP is still subject to legal review and domestic ratification processes.

II. A New Generation of Trade Treaties

A. Critiques of Multi-lateral Legal Regimes

Traditional treaty-making has come under assault in recent years, both in the popular press and in the academic literature. In the international environmental law arena, disappointment with the lack of results from international climate conferences in Durban, South Africa[10] (the successor to Kyoto)[11] has led the New York Times to opine that such conferences are futile and ineffective.[12] Trade treaties have also come under attack, with frustrations running high in particular during the long years of the stalemate in the World Trade Organization's Doha round of negotiations.[13]

In the academic literature, critiques of the multilateral trading regime have come in numerous forms. For purposes of this article, it suffices to summarize the main critiques. The critiques fall broadly into three categories: pragmatic, privatization, and liberal theory. Pragmatist critiques tend to fault multilateral treaty negotiations are too cumbersome, long, and inefficient. For example, Professors Sungjoon Cho and Claire R. Kelly have argued that extensive lobbying slows treaty negotiations,[14] negotiators are loath to curtail their flexibility by making meaningful commitments,[15] and treaties are often concluded with numerous reservations and exceptions that hamstring their effectiveness.[16] A second set of scholars, like Professors Kenneth Abbott and Duncan Snidal, exemplifies the privatization critique of traditional treaty regimes. Abbott and Snidal criticize the "persistent regulatory inadequacies" of treaty-centric "Old Governance" and favor voluntary, private networks as more effective and more likely to fill regulatory gaps.[17]

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10 *See* Geoffrey Lean, *Climate Change Conference: Durban Deal Gives the World a Chance*, Telegraph, Dec. 12, 2011, *available at* http://www.telegraph.co.uk/earth/environment/climatechange/8950144/Climate-change-conference-Durban-deal-gives-the-world-a-chance.html (discussing a "third consecutive all-night session" and noting that the conference ended thirty-six hours late). *See also* United Nations Framework Convention on Climate Change, Durban Climate Change Conference - Nov./Dec. 2011, *available at* http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php (celebrating progress at Durban as a "breakthrough on the international community's response to climate change").

11 *See* United Nations Framework Convention on Climate Change, Kyoto Protocol (2012), *available at* http://unfccc.int/kyoto_protocol/items/2830.php.

12 *See* Editorial, *Beyond Durban*, N.Y. Times, Dec. 17, 2011 at A24 [hereinafter Editorial, N.Y. Times] (opining that large multilateral conferences are not the place to search for solutions to climate change).

13 *See* Phoenix X.F. Cai, *Between Intensive Care and the Crematorium: Using the Standard of Review to Restore Balance to the WTO*, 15 Tulane J. Int'l & Comp. L. 465 (2007).

14 Sungjoon Cho & Claire R. Kelly, *Promises and Perils of New Global Governance: A Case of the G20*, 12 Chi. J. Int'l L. 491, 497 (2012) (collecting literature on multilateral treaty failures and identifying why treaties are ineffective at coordinating global financial regulations and advocating for regulatory networks supervised by the G20).

15 *See id.* at 498.

16 *See id.* at 497.

17 *See* Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 Vand. J. Transnat'l L. 501, 510 (2009) (describing and advocating a transnationally linked and voluntarily promulgated system of regulatory norms); *see also* Robert V. Percival, *Global*

Yet other scholars, like Professor Anne-Marie Slaughter, advance the argument, central to liberal theory, that one of the "most important and effective" means of global governance is not top-down international treaty law but "direct regulation of private actors ... with deliberate transnational or global intent."[18] Each of the pragmatic, privatization, and liberal theory critiques is powerful on its own and together, they have opened the door for a new generation of treaties to emerge. Whether these broad, 21st century trade agreements succeed in tackling persistent technical barriers to trade depends largely on how well they fulfill the promise of regulatory coherence. As commentator Thomas Bollyky has explained, technical barriers are particularly problematic in a globalized economy because "[u]nclear, excessive, or duplicative regulatory requirements can impede new global production. In unbundled global supply chains, intermediate services and parts crisscross borders multiple times. As the number of countries and transactions multiply, so do the costs of inefficient and divergent regulations."[19] The next section defines what is meant by regulatory coherence and traces its evolution in modern U.S. bilateral free trade agreements to its current form in the TPP.

B. Regulatory Coherence as a core concept in 21st Century Trade Treaties

The concept of regulatory coherence, while much bandied about, is difficult to define. Regulatory coherence is often used very generically, encompassing a huge continuum of activities, ranging from, on the one hand, uncoordinated regulatory activities with some information sharing (or transparency) mechanisms to fully uniform regulatory homogeneity, fully harmonized regulations (or a single global administrative law), on the other hand. Others take the approach that regulatory coherence is primarily concerned with the procedural aspects of good regulatory practices. The TPP's regulatory coherence chapter takes this approach:

> Regulatory coherence refers to the use of good regulatory practices in the process of planning, designing, issuing, implementing, and reviewing regulatory measures in order to facilitate achievement of domestic policy objectives, and in efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment.[20]

Law and the Environment, 86 Wash. L. Rev. 579, 582, 633-34 (2011) (recommending a focus on "global law," which encompasses various governmental and nongovernmental methods of enhancing the transparency of multinational corporate acts).

18 *See* Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 Am. Soc'y Int'l L. Proc. 240, 245-46 (2000) (applauding the rise of transnational regulatory networks and "private regimes" arising from corporate codes of conduct" as a more democratic form of global governance); *see also* Jose E. Alvarez, *Interliberal Law: Comment*, 94 Am. Soc'y Int'l L. Proc. 249, 251 (2000) (characterizing as a central assumption of liberal theory the proposal "that the future of effective international regulation lies not with traditional treaties ... but with transnational networks of government regulators").

19 Thomas J. Bollyky, *Better Regulation for Freer Trade, Council on Foreign Relations*, Jun. 2012, Policy Innovation Memorandum 22, *available at* http://www.cfr.org/trade/better-regulation-freer-trade/p28508.

20 *See* TPP, *supra* note 3, art. 25.2.

The TPP approach reflects the growing consensus among leading bodies in the regulatory reform movement, such as the Asia-Pacific Economic Cooperation Committee (APEC), to which all TPP member states are party, and the Organisation for Economic Co-operation and Development (OECD) to focus on good regulatory practices. Both APEC and OECD have spear-headed efforts to define good regulatory practices.[21] The OECD's approach is illustrative:

> Good regulation should: (i) serve clearly identified policy goals, and be effective in achieving those goals; (ii) have a sound legal and empirical basis; (iii) produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account; (iv) minimise costs and market distortions; (v) promote innovation through market incentives and goal-based approaches; (vi) be clear, simple, and practical for users; (vii) be consistent with other regulations and policies; and (viii) be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.[22]

A key component of the OECD's good regulatory practices metrics is the Regulatory Impact Assessment, defined as a "process of systematically identifying and assessing the expected effects of regulatory proposals, using a consistent analytical method."[23] The OECD advocates cost/benefit and similar analyses for proposed regulations and emphasizes the need for evidence-based decision-making, particularly in the fields of public safety, public health, and environmental protection.[24] These principles have been part of the U.S. regulatory toolbox for some time, and the TPP extends their reach to other member states.[25]

This article uses the term "regulatory coherence" to refer broadly to all the procedural mechanisms related to good regulatory practices, following the approach of the TPP and the OECD. Thus, regulatory coherence sweeps in all components of good regulatory practices as well as the use of regulatory impact assessments as a specific tool of good regulatory practice.

However, it is also necessary to define regulatory cooperation, regulatory harmonization, and regulatory standardization, all terms that are either not defined or ill-defined in the existing literature, or confused with regulatory coherence. I use *regulatory cooperation* to refer to exercises in transparency, such as notification requirements, public hearings, publication of proposed regulations in plain language and/or a website, information exchanges with other regulators, notifying other governments of proposed regulations, timely notice of changes to regulations,

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21 *See, e.g.,* OECD, APEC-OECD Integrated Checklist on Regulatory Reform (OECD Publishing, 2008), *available at* https://www.oecd.org/regreform/34989455.pdf.

22 OECD, OECD Guiding Principles for Regulatory Quality and Performance 3 (OECD Publishing, 2005), *available at* http://www.oecd.org/fr/reformereg/34976533.pdf.

23 OECD, Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA) (OECD Publishing, 2008), *available at* https://www.oecd.org/gov/regulatory-policy/44789472.pdf.

24 Council of the OECD, Recommendation of the Council on Regulatory Policy and Governance 4 (OECD Publishing, 2012), *available at* http://www.oecd.org/governance/regulatory-policy/49990817.pdf.

25 *See, e.g.,* Improving Regulation and Regulatory Review, Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

and such like measures.[26] *Regulatory harmonization*, on the other hand, entail much deeper forms of integration. It does not mean that all jurisdictions must adopt the same or substantially similar regulations, which would not be appropriate. However, as used in this article, regulatory harmonization refers to all the different mechanisms that can be used to reduce *substantive* differences or divergences across regulatory jurisdictions. Regulatory harmonization efforts can take many forms, including recognition of another country's regulations as equivalent, mutual recognition of tests and certifications (called conformity assessments), adoption and recognition of international standards, adoption of joint regulations through a single integrated regulatory body, or adoption of a global administrative law. Currently, there are few examples of a joint regulator[27] and the prospects for a global regulatory law are probably quite distant.[28] However, recognition of another country regulations, mutual recognition of conformity testing and certifications, and recognition of international standards are ubiquitous examples of harmonization. The TPP contains numerous examples of all of these methods.[29]

Lastly, I use *regulatory standardization* to refer to the process of adopting or recognizing of international codes of standards, including private codes of conduct, regardless of the mechanism used to do so. Thus, for example, if the United States adopts an international standard as part of a domestic regulation or if the United States is required to recognize an international standard that has been adopted by the World Trade Organization's Committee on Technical Barriers to Trade, both would be examples of standardization. Thus, for purposes of this article, standardization is a possible pathway to harmonization, which deals with substantive norms, while regulatory coherence deals with procedural safeguards ensuring good regulatory practices. For ease of reference, the following table summarizes the key terms as used in this article:

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[26] I use "regulatory cooperation" as equivalent to transparency measures, and therefore as fairly shallow integration, in order to highlight the fact that cooperation is not the same as regulator harmonization. In this regard, I differ from many commentators who seem to use the terms cooperation and harmonization as loosely synonymous. *See, e.g.*, Bernard M. Hoekman & Petros C. Mavroidis, *Regulatory Spillovers and the Trading System: From Coherence to Cooperation*, 2-3, E15 Initiative, ICTSD and World Economic Forum, Apr. 2015, *available at* http://e15initiative.org/wp-content/uploads/2015/04/E15-Regulatory-OP-Hoekman-and-Mavroidis-FINAL.pdf (defining regulatory cooperation as measures that may reduce regulatory differences between jurisdictions and distinguishing between shallow and deep cooperation measures.) In Hoekman and Mavroidis's framework, what I call cooperation would be their shallow cooperation and what they call deep cooperation would be what I call harmonization.

[27] The leading example is the joint Food Standards Australia and New Zealand (FSANZ) created in 1995, *see generally,* http://www.foodstandards.gov.au/Pages/default.aspx (last visited May 12, 2016).

[28] *But see generally,* Benedict Kingsbury, Nico Kirsh & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 Law & Contemp. Probs. 15 (2005) (assessing the normative case for and against promotion of a unified field of global administrative law).

[29] *See infra* section IV.

Term	Brief Definition	Focus
Regulatory **Coherence**	Good regulatory practices	Procedural
Regulatory **Cooperation**	Transparency and outreach	Procedural
Regulatory **Harmonization**	Reduction of divergences	Substantive
Regulatory **Standardization**	A means to reduce divergences through adoption of international codes or standards	Substantive

C. U.S. Regulatory Coherence Efforts and the Emergence of Regulatory Coherence as a Policy Goal

1. U.S. Bilateral Free Trade Agreements

Recent U.S. bilateral free trade agreements (other than U.S.-Korea) have largely taken a two-pronged approach to regulatory coherence: (1) a World Trade Organization (WTO) driven strategy based on incorporation of WTO disciplines, including any interpretations and recommendations of the WTO Committee on Technical Barriers to Trade and (2) a focus on regulatory cooperation and transparency, including a coordination chapter or committee to oversee such cooperation. This two-pronged approach, without the addition of any substantive harmonization efforts, characterizes the U.S. bilateral free trade agreements with Australia (2005), Bahrain (2006), Chile (2004), Columbia (2012), Morocco (2006), and Peru (2009). All of these bilateral agreements contain a chapter on technical barriers on trade that are substantially similar to each other, if not identical. With respect to regulatory coherence efforts, they tend to use soft, hortatory language such as "the parties shall intensity their joint work"[30] or "the parties shall give positive consideration to accepting as equivalent technical regulations."[31]

These agreements do contain detailed provisions aimed at one key aspect of regulatory harmonization - the broad range of mechanisms for recognition of conformity assessments, which facilitates international trade by ensuring that exporters need to have their products tested and certified for conformity with regulations only once. The language from the U.S.-Peru Free Trade Agreement is typical and illustrative:

> Article 7.4: Conformity Assessment
>
> 1. The Parties recognize that a broad range of mechanisms exists to facilitate the acceptance in a Party's territory of the results of conformity assessment procedures conducted in another Party's territory. For example:

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[30] *See, e.g.,* U.S.-Columbia Free Trade Agreement, entered into force May 15, 2012, art. 7.3, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text (last visited May 13, 2016).

[31] *See, e.g.,* U.S.-Australia Free Trade Agreement, entered into force Jan. 1, 2005, art. 8.5.1, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta/final-text (last visited May 13, 2016).

> (a) the importing Party may rely on a supplier's declaration of conformity;
> (b) a conformity assessment body located in the territory of a Party may enter into a voluntary arrangement with a conformity assessment body located in the territory of another Party to accept the results of each other's assessment procedures;
> (c) a Party may agree with another Party to accept the results of conformity assessment procedures that bodies located in the other Party's territory conduct with respect to specific technical regulations;
> (d) a Party may adopt accreditation procedures for qualifying conformity assessment bodies located in the territory of another Party;
> (e) a Party may designate conformity assessment bodies located in the territory of another Party; and
> (f) a Party may recognize the results of conformity assessment procedures conducted in the territory of another Party.
>
> The Parties shall intensify their exchange of information on these and other similar mechanisms.[32]

The treaty continues by requiring each party, upon request, to explain the reasons for not recognizing conformity assessments[33] or for refusing to negotiate on mutual recognition agreements[34] and to give the other party's assessments bodies national treatment (no less favorable or non-discriminatory treatment).[35]

The recent generation of free trade agreements also contain similar approaches to standardization. All of them contain the identical provision that:

> In determining whether an international standard, guide, or recommendation within the meaning of Articles 2 and 5 and Annex 3 of the TBT Agreement exists, each Party shall apply the principles set out in Decisions and Recommendations adopted by the Committee since 1 January 1995, G/TBT/1/Rev.8, 23 May 2002, Section IX (Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement), issued by the WTO Committee on Technical Barriers to Trade.[36]

However, the U.S.-Australia Free Trade Agreement goes one step further by requiring that "[e]ach Party shall use relevant international standards to the extent provided in Article 2.4 of the Technical Barriers to Trade (TBT) Agreement, as a basis for its technical regulations."[37] It also requires the U.S. and Australia to

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[32] U.S.-Peru Free Trade Agreement, entered into force Feb. 1, 2009, art. 7.4.1, *available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file555_9514.pdf (last visited May 13, 2016).

[33] *Id.* art. 7.4.2.

[34] *Id.* art. 7.4.4.

[35] *Id.* art. 7.4.3.

[36] *See, e.g.,* U.S.-Morocco Free Trade Agreement, entered into force Jan. 1, 2006, art. 7.3, *available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/morocco/asset_upload_file803_3833.pdf (last visited May 13, 2016).

[37] *See* U.S.-Australia Free Trade Agreement, *supra* note 31, art. 8.4.1.

"consult and exchange views"[38] on regulations under discussion in international or regional standard setting organizations.

The Korea-U.S. Free Trade Agreement adds on a few more layers of regulatory coherence obligations. It lays the foundation for the approach adopted in the mega-regionals like the TTIP and the TPP. The Korea-U.S. Free Trade Agreement contains all the characteristics described above (without the two additional provisions on international standards in the U.S.-Australia Free Trade Agreement) and adds on a few worth noting. First, it introduces more specific requirements related to transparency, in both its section on technical barriers to trade and a separate Chapter 21 on Transparency.[39] For example, there are provisions calling for regulations to be published in advance,[40] with an allowance of at least 60 days for comment from the other party,[41] an opportunity for public comment,[42] and notification of any technical standards that comply with international standards.[43] More significantly, the Korea-U.S. Free Trade Agreement introduces for the first time a separate annex on automotive standards and technical regulations.[44] This sectoral, industry-specific approach, with binding substantive annexes on technical standards, would be expanded on and used heavily in the TPP. Appearing on stage for the first time, it requires Korea and the U.S. to "cooperate bilaterally, including in the World Forum for Harmonization of Vehicle Regulations of the United Nations Economic Commission for Europe (WP.29) to harmonize standards for motor vehicle environmental performance and safety."[45] It also adds a substantive requirement that "technical regulations related to motor vehicles shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking into account of the risks non-fulfillment would create."[46] In addition, the treaty establishes an Automotive Working Group to monitor compliance, and vests it with the power to conduct post-implementation review of the Automotive Annex.[47] Lastly, the Korea-U.S. Free Trade Agreement explicitly defines good regulatory practice, adopting verbatim the OECD definition.[48]

The approach of recent U.S. free trade agreements to regulatory coherence may be summarized into two phases. The first phase builds on existing WTO commitments, especially based on the TBT agreement, but adds a number of transparency and cooperation mechanisms. The second phase, seen first in the U.S.-Australia Free Trade Agreement, but reaching a more mature expression in Korea-U.S., increasingly focuses on regulatory good practice, particularly on pushing adoption and recognition of international standards. The Korea-U.S. agreement goes even further by explicitly adopting harmonization of international

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38 *Id.* art. 8.4.3.

39 U.S.-Korea Free Trade Agreement, entered into force Mar. 15, 2012, ch. 21, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text (last visited May 13, 2016).

40 *Id.* art. 7.6.3.

41 *Id.* art. 7.6.3.

42 *Id.*

43 *Id.* art. 7.6.6.

44 *Id.* art. 9.7.

45 *Id.* art. 9.7.1.

46 *Id.,* art. 9.7.2.

47 *Id.* Annex 9-B, arts. 2, 3, 4, and 5.

48 *Id.* art. 9.10, *see also, supra* note 22.

standards in automotive emissions and safety as a goal. In the Korea-U.S. Free Trade Agreement, we witness a combination of 1) establishment of new substantive standards, 2) use of industry specific annexes and 3) post implementation review mechanisms as an enforcement tool.

2. Regulatory Cooperation Councils

In addition to free trade agreements, the U.S. has pursued regulatory coherence through bilateral efforts with Canada and Mexico, its NAFTA partners, although seemingly not under the direct aegis of NAFTA. The U.S.-Mexico and U.S.-Canada Regulatory Cooperation Councils are both examples of bilateral cooperation efforts among domestic regulators to facilitate regulatory cooperation. The U.S.-Canada Regulatory Cooperation Council was established in February 2011, and launched a joint action plan in December 2011 adopting 29 initiatives to foster new approaches to regulatory cooperation. In 2014, it released another joint action plan detailing lessons learned from the 29 laboratories of inter-agency cooperation.[49] The U.S.-Canada Regulatory Cooperation Council's future work will focus on 1) department level regulatory partnerships, 2) department to department commitments and work plans, and 3) cross-cutting issues in bilateral regulatory cooperation. The efforts of the council seem to be well-received.[50] The U.S.-Mexico High-level Regulatory Cooperation Council is similar to the U.S.-Canada one. It was established in 2010 and released a work plan in February 2012 outlining activities in seven sectors: food, transportation, nanotechnology, e-health, oil and gas, and conformity assessment.[51] The parties filed a progress report on their work in August 2013[52] and future efforts seem to be focused on getting stakeholder input. While these bilateral cooperative efforts are undoubtedly important for opening and continuing dialogue and information exchange among domestic regulatory actors in each country, it is difficult at this point to assess how much has been accomplished.

3. Executive Order 13609

Yet another example of recent U.S. efforts to domestically encourage regulatory cooperation with trading partners is President Obama's Executive Order 13609, ordering executive-branch agencies to avoid unnecessary divergences between U.S. regulations and those of major trading partners.[53] The order's goal is to increase regulatory efficiency and simplification in the international arena, calling on agencies and to reduce redundant and unnecessary regulations and

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49 *See generally,* http://www.trade.gov/rcc/documents/RCC_Joint_Forward_Plan.pdf (last visited May 13, 2016).

50 Cheryl Bolen, *If U.S.-Canada Cooperation is a Good Idea, Why Aren't More Federal Agencies Doing It?*, Bloomberg BNA Daily Rep. for Executives (Oct. 17, 2014), *available at* http://www.bna.com/uscanada-cooperation-good-n17179897089 (last visited May 13, 2016).

51 United States-Mexico High-Level Regulatory Cooperation Council Work Plan, *available at* https://www.whitehouse.gov/sites/default/files/omb/oira/irc/united-states-mexico-high-level-regulatory-cooperation-council-work-plan.pdf (last visited May 13, 2016).

52 *See generally,* http://trade.gov/hlrcc (last visited May 13, 2016).

53 Exec. Order No. 13609, 77 Fed. Reg. 26,413 §3 (May 1, 2012).

develop strategies and practices across the federal bureaucracy designed to enhance international regulatory cooperation. Executive Order 13609 is laudable and important as a means of signaling, at the highest level, the importance of regulatory cooperation. It communicates clearly to federal regulators that they would "receive credit for economic savings achieved through eliminating unnecessary regulatory divergences,"[54] thereby creating a clear incentive for them to invest efforts in regulatory cooperation efforts. Nonetheless, Executive Order 13609 falls short in two significant ways. It lacks any enforcement mechanisms.[55] Second, it does not define clearly which regulations are likely to have "a significant international impact."[56] There are a number of possible approaches to take, such as, among others, all rules dealing with major trading partners, rules involving the largest amounts of foreign direct investment, rules involving goods or services contributing significantly to U.S. imports or exports, or all rules that the United States notifies to the WTO's Technical Barriers to Trade Committee. Using the latter approach, one commentator estimates that of the over 3500 rules the United States issues every year, approximately an average of 20% likely has a significant impact on international trade and investment.[57] Nonetheless, each regulatory agency must undertake its own subjective qualitative assessment to determine which of its rules are subject to Executive Order 13609,[58] and this can lead to uneven implementation.

4. Concerns with the Regulatory Coherence Measures of Mega-Regional Free Trade Agreements

Regulatory coherence has also taken center stage in both the TTIP and TPP negotiations. The specific approach of the TPP will be discussed in greater detail below in Section IV. Here, I will briefly sketch out some of the most salient concerns swirling in the academic literature around the rise of mega-regionals and their incorporation of regulatory coherence provisions. Many scholars worry that the horizontal, cross-cutting regulatory chapters will undermine democratic input and regulatory autonomy.[59] A related worry is the fear that comprehensive mega-regional free trade agreements will lead to governance problems such that they should include strong constitutional, participatory, and deliberative democratic

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54 *See* Bull, Mahboubi, Stewart and Wiener, *supra* note 5 at 21.

55 *See supra* note 53.

56 Daniel Perez, *Identifying Regulations Affecting International Trade and Investment: Better Classification Could Improve Regulatory Cooperation* 102, in US-EU Regulatory Cooperation: Lessons & Opportunities, Apr. 2016 Draft Report of the Regulatory Studies Center, The George Washington University, *available at* https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/US-EU_report_GWRSC.pdf (last visited May 13, 2016).

57 *Id.* at 102-07.

58 *Id.* at 102.

59 *See,* e.g., Alberto Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences*, 18 J. Int'l Econ. L. 625 (2015); Jane Kelsey, *Preliminary Analysis of the Draft TPP Chapter on Domestic Coherence*, Citizens Trade Campaign, *available at* http://www.citizenstrade.org/ctc/wp-content/uploads/2011/10/TransPacific_RegCoherence-Memo.pdf (last visited May 11, 2016).

protections.[60] Other scholars focus on institutional design issues in promoting regulatory convergence and cooperation. [61] Still others worry about conflicts between mega-regional trade agreements and the WTO, focusing particularly on the risk of regulatory gains not being extended to countries outside the mega-regional agreements.[62] A related strand considers the strong role international organizations have traditionally played in the field of regulatory cooperation and how such organizations will contribute under new trade agreements.[63] Still others highlight the benefits of laboratories of regulatory experimentation and urge caution in striving for uniformity of regulations.[64] Some commentators, less optimistically, raise the specter of "race to the bottom" regulations and the hardening of less than adequate rules into norms.[65] On the other hand, others welcome the attention drawn to regulatory processes for providing opportunities for institutional and procedural improvement in these processes.[66] This is by no means a comprehensive list of the concerns around regulatory coherence, but it provides a useful bird's eye view of the field and of the intensity of interest it has fostered. It is also worth noting that the current literature does not raise any concerns specific to the use of international standards as a method of regulatory harmonization.[67]

III. Trends Worth Watching

Two characteristics of the new generation of treaties bear examination for purposes of this article.[68] Both affect regulatory coherence in ways that have not been

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60 *See, e.g.,* Ernst-Ulrich Petersmann, *Transformative Transatlantic Free Trade Agreements without the Rights and Remedies of Citizens?* 18 J. Int'l Econ. L. 579 (2015).

61 *See, e.g.,* Debra P. Steger, *The Importance of Institutions for Regulatory Cooperation in Comprehensive Economic and Trade Agreements: The Canada- EU CETA*, 39 Legal Issues of Econ. Integration 1 (2011).

62 *See, e.g.,* Robert Howse, *Regulatory Cooperation, Regional Trade Agreements, and World Trade Law: Conflict or Complementarity?*, 78 Law & Contemp. Probs. 137 (2015).

63 *See, e.g.,* Jeffrey L. Dunoff, *Mapping A Hidden World of International Regulatory Cooperation,* 78 Law & Contemp. Probs. 267 (2015).

64 Jonathan B. Wiener and Alberto Alemanno, *The Future of International Regulatory Cooperation: TTIP as a Learning Process Towards a Global Policy Laboratory*, 78 Law & Contemp. Probs. 103 (2015).

65 *See, e.g.,* Filippo Fontanelli, *ISO and Codex Standards and International Trade Law: What Gets Said is Not What's Heard*, 60 Int'l & Comp. L. Q. 895 (2011) (arguing that standards are being used inappropriately as a ceiling rather an as a floor for regulation).

66 *See, e.g.,* Dan Ciuriak & Harsha Vardhana Singh, *Mega-Regionals and the Regulation of Trade: Implications for Industrial Policy*, 6-9, *available at* http://ssrn.com/abstract=2460501 (last visited May 13, 2016).

67 In fact, most commentators seem to view standardization positively. *See, e.g.,* James Bacchus, Clough Center Lecture, *A Common Gauge: Harmonization and International Law*, 37 B. C. Int'l & Comp. L. Rev. 1 (2014), K. William Watson & Sallie James, *Regulatory Protectionism: A Hidden Threat to Free Trade*, 723 Cato Inst. Pol'y Analysis 1, 3 (2013) (arguing that agencies should consider whether proposed rules are more trade restrictive than necessary to meet regulatory goals).

68 It is beyond the scope of this article to fully explore all the normative, theoretical, and practical implications, so I focus only on the two that are most salient for purposes of my argument.

closely studied in the literature to date. The first is increasing participation by non-governmental entities, including multinational corporations, NGOS, industry groups and representatives, and other private entities in treaty negotiations. This first trend is a direct response to both the privatization and liberal theory (democratic deficit) critiques. The second trend centers around the influence and power of international standard setting organizations, like the International Organization of Standardization, who now wield the power to shape the nature of treaty obligations.

A. Private Entity Participation in International Organizations and International Treaty Negotiations

Private entities began to obtain rights to participate in international organizations that were previously open only to state participation starting in the late 1990s. For example, the WTO dramatically changed its procedure after its Appellate Body ruled that WTO member could select "whomever they wished to represent them, from the government or outside."[69] Not only did this confirm the use of private firm representation for WTO dispute settlement cases, the WTO then began to accept submissions and amicus curiae briefs from non-state actors.[70] Soon environmental groups asked to submit amicus briefs for pending cases, and once the WTO agreed, industry groups and industry advocates for multinational corporations quickly jumped on the band-wagon.[71] The European Court of Human Rights has also granted access to non-state entities.[72] By 2001, approximately two hundred of the non-state actors with consultative status with the UN are business or industry associations.[73] In international treaty negotiations, corporations or their industry-related associations are also starting to exert greater direct influence. They are not only lobbying their national governments to ensure favorable outcomes in treaty conventions,[74] but they are actively shaping the discourse. It is not uncommon now for corporate representatives to be present in the negotiating room.[75] The U.S. solicited input from diverse stakeholder groups throughout the TPP negotiation

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69 *See* Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U. J. Int'l L. & Pol. 527, 544-47 (2001).

70 *Id.* at 544-45.

71 *Id.* at 545-46.

72 *Id.* at 546-47.

73 Stephen Tully, Corporations and International Lawmaking 7 (2007).

74 *See, e.g.*, John H. Cushman Jr., *Intense Lobbying Against Global Warming Treaty*, N.Y. Times, Dec. 7, 1997 at 28 (describing lobbying by "powerful business interests" against the climate change accord), *see also* Kasperkevic, *supra* note 7 (detailing the donations corporate members of the US Business Coalition for TPP made to U.S. Senate Campaigns during Senate debate on fast track approval authority for the TPP).

75 *See* Sands, *supra* note 69 at 547 ("[I]t is quite normal nowadays ... for the negotiating room to be half filled with representatives of industry and NGOs, for governments to find themselves sitting alongside British Petroleum and Friends of the Earth."); *see also* Tully, *supra* note 73 at 175-76 (describing participation by non-state actors at treaty conventions and noting that at one convention "the U.S. delegation met with national industries four times over two weeks and hosted a bilateral event with the host government together with local firms").

process, holding direct stakeholder engagement events and lectures,[76] as well as receiving written reports from numerous industry-specific advisory committees.[77] While NGOs also lobby and participate in treaty conventions, they are generally positively perceived as providing a powerful voice for the powerless and thereby enhancing the democratic process of openness and full participation.[78] However, the public is more suspicious of the motives[79] of corporate actors who in practice "create or shape the content, interpretation, efficacy, or enforcement of legal regimes."[80] Corporate actors influence treaty negotiations through efforts such as "lobby governments, frame issues in economic terms, submit proposals, distribute position papers, organize side events and raise issues for deliberation."[81] The influence of corporate actors in this context is problematic in several respects. Corporate actors are not accountable to the public in the same way state actors should be.[82] This leads to concerns that trade treaties benefit largely multinational corporations at the expense of the public at large. The inequality critique has animated the anti-globalization social movement for decades,[83] and still continues to provoke popular protests against trade treaties.[84] Some commentators also criticize

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76 *Direct Stakeholder Engagement,* Off. of the U.S. Trade Rep., *available at* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/direct-stakholder-engagement (last visited May 12, 2016).

77 *Advisory Committee Reports on the Trans-Pacific Partnership,* Off. of the U.S. Trade Rep., *available at* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/advisory-group-reports-TPP (last visited May 12, 2016).

78 Sigfrido Burgos Caceres, *NGOs, IGOs, and International Law: Gaining Credibility and Legitimacy Through Lobbying and Results*, 13 Geo. J. Int'l Aff. 79, 81 (2012) (demonstrating that well-organized political lobbying by NGOs can result in state-NGO alliances, such as the Landmines Convention and the International Criminal Court); Sophie Smyth, *NGO's and Legitimacy in International Development,* 61 U. Kan. L. Rev. 377, 382 (2012-2013) (arguing that NGO's contributions to international institutions turns not on legitimacy but on perceptions of effectiveness).

79 For critiques that shifting regulatory decision-making to transnational bodies enables well-organized economic interests to exert power and influence in "laundering" their preferred policies, *see, e.g.,* Barry Steinhardt, *Problem of Policy Laundering*, American Civil Liberties Union (Aug. 13, 2004), *available at* http://26konferencja.giodo.gov.pl/data/resources/SteinhardtB_paper.pdf; *see also* Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stan. L. Rev. 595, 629 (2007).

80 Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 Harv. Int'l L.J. 411 at 412 (2005) (examining significant private business roles in global governance); *see also* Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 Colum. J. Transnat'l L. 389, 392-95 (2005) (noting that "in an ideal world" governments might - on the prompting of civil society groups - issue more stringent regulations to control the behavior of multinational corporations, but in the real world civil society groups often do not press for more stringent regulations; moreover, some governments are "unwilling or unable" effectively to constrain multinational corporations through regulation).

81 *See* Tully, *supra* note 73 at 165.

82 Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 Wash. L. Rev. 747, 749 (2014).

83 *The New Trade War*, Economist (Dec. 2, 1999).

84 *See, e.g.*, Thousands Protests TPPA around the Country, Yahoo News New Zealand, Aug. 16, 2015, Zach Carter, *Bernie Sanders' Brutal Letter on Obama's Trade Pact Fore-*

the TPP on the basis that it inappropriately addresses subject matters not related to trade.[85] Moreover, corporate actors have a strong incentive to persuade treaty negotiators to enshrine pre-existing norms in private regulatory networks that they have already espoused. I will address specific examples of this phenomenon in the context of the TPP in Section IV below. For now, it suffices to observe that, often, the norms in these private, largely voluntary regulatory networks are administered by international standard setting organizations, thereby creating a self-enforcing, hermetically sealed system in which corporate actors play a decisive role.

B. The Increasing Power of International Standard Setting Organizations

Private governance takes many forms. Professors Abbott and Snidal refer to the broad network of mechanisms - many of which are voluntary - in which corporate actors directly inform and create industry association standards, corporate social responsibility best practices, and transparency initiatives collectively as "Transnational New Governance."[86] The transnational new governance model is responsible for establishing norms for business conduct in a wide range of activities, from fair trade certification[87] to labor standards in the apparel industry[88] to investment banking norms for international project finance transactions.[89] These norms, which often start out as non-binding and voluntary in nature, can morph or harden into binding and enforceable norms over time. For example, fair trade certification regimes are voluntary in principle, but in practice they may accrue a compulsory market effect if they become widely accepted by both the industry concerned and by consumers. Fair trade coffee so dominates the brewed coffee market that the certification is virtually compulsory.[90] Interestingly, in the transnational new governance model, both governments and civil society assist in

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shadows 2016 Democratic Clash, The Huffington Post, Jan. 5, 2015; *see also* Paola Casale, *Everyone but the U.S. is Protesting the TPP, Why?*, Economy in Crisis, *available at* http://economyincrisis.org/content/everyone-but-the-u-s-is-protesting-the-tpp-why (last visited May 10, 2016).

85 Kelsey, *see supra* note 59.

86 *See* Abbott & Snidal, *supra* note 17 at 508-10.

87 *See* Abbott & Snidal, *supra* note 17 at 518, (discussing the Fairtrade Labeling Organization, an umbrella for national fair trade programs, as a collaborative effort between NGOs and firms); *see also* Margaret Levi & April Linton, *Fair Trade: A Cup at a Time?*, 31 Pol. & Soc'y 407, 414 (2003) ("Interlocking [government] relationships and interests with agribusiness make it unlikely that governments in coffee-producing countries will voluntarily regulate the coffee industry in ways that benefit small growers and workers").

88 *See* Alexis M. Herman, Sec'y of Labor, Remarks at the Marymount University Academic Search for Sweatshop Solutions (May 30, 1997), *available at* http://www.dol.gov/oasam/programs/history/herman/speeches/sp970603.htm (explaining that the U.S. Department of Labor convened a broad range of apparel industry stakeholders as the Apparel Industry Partnership, thereby setting the initial framework for regulatory standard setting in the apparel sector).

89 *See* Andrew Hardenbrook, *The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility*, 40 Vand. J. Transnat'l L. 197, 200-01 (2007).

90 *See* Levi & Linton, *supra* note 87 at 419 (noting that "at least five European governments … subsidize NGO efforts to promote Fair Trade coffee").

this process of norm hardening. States do so by facilitating information sharing among industry groups, assisting with standard setting, threatening to regulate, or granting or withholding legal licenses.[91] NGOs contribute by publicizing private industry standards through compelling public relations campaigns, engaging in transnational litigation, boycotts, social media initiatives, and other means to enlist public support for and enforcement of better industry practices.[92]

Yet another aspect of the transnational new governance model is the role played by private standard setting organizations like the International Organization for Standardization or ISO.[93] ISO claims on its website to be "an independent, non-governmental membership organization and the world's largest developer of voluntary International Standards."[94] It consists of 162 members and is operated by a Central Secretariat based in Geneva.[95] ISO is not a public organization; its members must pay a fee to join.[96] ISO members are not delegates of national governments, but may be government officials or operate under a government mandate.[97] Other members hail from the private sector, and often represent national partnerships of industry groups and associations.[98] Since its founding in 1947, ISO has established

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91 *See* David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 Berkeley J. Int'l L. 334, 334-35 (2011) (explaining the factors that motivate private industry to undertake corporate responsibility ventures); *see also* Neil Gunningham, *Corporate Environmental Responsibility: Law and the Limits of Voluntarism*, *in* The New Corporate Accountability: Corporate Social Responsibility and the Law 476-500 (Doreen McBarnet et al. eds., 2007) (introducing the concept of varied "licenses to operate" that inspire and motivate corporate social responsibility ventures).

92 *See, e.g.,* Joanne Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57 Am. J. Comp. L. 897, 920-28, 940 (2009) (showing how NGOs took a role in the transnational spread of the REACH regulations by publicizing industry use of dangerous chemicals); Sarah Dadush, *Profiting in (Red): The Need for Transparency in Cause-Related Marketing*, N.Y.U. J. Int'l L. & Pol. (2010) (arguing that many caused-based marketing organizations lack transparency); *see also* Gunningham, *supra* note 91 at 488-89 (explaining how industry CSR ventures are responsive to public reputation factors); David B. Hunter, *The Implications of Climate Change Litigation: Litigation for International Environmental Law-Making*, in Adjudicating Climate Change: State, National, and International Approaches 357, 357-74 (William C.G. Burns & Hari M. Osofsky eds., 2009) (proposing that transnational litigation is a meaningful strategy to prompt public awareness and private accountability for climate change even if the litigation is ultimately unsuccessful); Scheffer & Kaeb, *supra* note 91, at 335 (noting that reputational pressures contribute to development of CSR regimes).

93 The International Organization for Standardization (ISO) was formed in 1946 in order to "facilitate the international coordination and unification of industrial standards." Discover ISO: ISO's Origins, ISO, http://www.iso.org/iso/about/discover-iso_isos-origins.htm.

94 *About,* International Organization for Standardization, http://www.iso.org/iso/home/about.htm (last visited May 10, 2016).

95 *Id.*

96 *About Governance,* International Organization for Standardization, *supra* note 94.

97 *Membership Manual,* International Organization for Standardization, *supra* note 94.

98 *Id.*

over 20,500 standards, covering virtually every industry.[99] ISO does not establish standards for the electronic engineering and telecommunications industries, but collaborates with the two other international standards development agencies that work in these fields.[100] In recent years, ISO has expanded its scope and adopted standards relating to environmental protection and climate change (the ISO 14000 series[101]) and social responsibility and sustainable development (the ISO 26000 series[102]) launched in 2010. ISO's primary mission is the adoption of voluntary standards, leaving domestic implementation or incorporation of these standards to member countries. In practice, ISO standards are implemented directly by firms, who purchase ISO standards and engage in some form of certification (self or third-party) in order to signal quality to their customers.[103] As a result, ISO standards have achieved widespread market penetration, thanks in large part to its diffuse certification system, which relies heavily on self-certifications.[104] When a free trade treaty contains provisions on mutual recognition of conformity assessments (as the TPP does) and define them to include ISO certifications (as the TPP effectively does also), then the treaty contributes exponentially to ISO's market penetration.

Firms and consumers rely on ISO standards to send signals about quality. However, ISO explicitly sees its mandate as extending beyond improving quality through the adoption of uniform industrial standards: ISO's second mission is to facilitate international trade. In this sphere, ISO's importance to international trade took an exponential leap in 1995 after the WTO incorporated ISO standards into the regulatory framework of the TBT Agreement.[105] Similarly, the standards promulgated by the Codex Alimentarius Commission were incorporated into the Sanitary and Phyto-Sanitary Agreement (SPS).[106] WTO endorsement and adoption gave these private, voluntary standards the force of law, and the subject has

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99 *About,* International Organization for Standardization, *supra* note 94.

100 *About Governance,* International Organization for Standardization, *supra* note 94.

101 *Management Standards*, International Organization for Standardization, *supra* note 94; *see also,* J. Clapp, *The Privatization of Global Environmental Governance: ISO 14000 and the Developing World*, 4 Global Governance 295 (1998).

102 *Store,* International Organization for Standardization, *supra* note 94; *see also*, Diller, *infra* note 110 for a detailed account of the history and adoption of the ISO 26000 series.

103 ISO standards are not available to the public, but may only be purchased by interested firms and parties for a fee. The author conducted a quick review of approximately 150 standards across eight different industrial sectors and found that the fees for each standard range from 16 to 198 Swiss Francs, with most falling into the 38 to 88 Swiss Francs range. *See* International Organization for Standardization, *supra* note 94.

104 *See* D. A. Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. Envir. Affairs L. Rev. 79, 85 (2009) (showing that certification for the ISO 14000 Environmental series are predominantly self-certifications despite the fact that the standards are written to be auditable and certifiable).

105 Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, opened for signature Apr. 15, 1994, entered into force Jan. 1, 1995, *available at* https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (last visited May 10, 2016).

106 Sanitary and Phyto-Sanitary Agreement, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, opened for signature Apr. 15, 1994, entered into force Jan. 1, 1995, *available at* https://www.wto.org/english/tratop_e/sps_e/sps_e.htm (last visited May 10, 2016).

received a lot of scholarly attention.[107] Some scholars applaud the usefulness of these standards in assisting the WTO's efforts to combat regulatory protectionism[108] and other forms of disguised restrictions on trade. For example, James Bacchus, a former member of the WTO Appellate Body, believes that the WTO should lean in more and actively assist to develop, promulgate and enforce the standards in the TBT and SPS Agreements, arguing that the resulting global "common gauge" or standardization would "lower costs and increase efficiency, productivity, quality, reliability, and diversity of products."[109] Others worry about the lack of transparency in the development of such standards and seek to encourage more deliberate coordination between existing international governance structures and private standardization regimes.[110]

It is, however, abundantly clear that international standards are both here to stay and will continue to lie in the "very center of the trade debate."[111] Both the United States and the European Union have publically emphasized that the TTIP will yield great economic benefits resulting from mutual recognition and harmonization of standards.[112] Similarly, the TPP has explicitly incorporated the WTO's TBT Agreement as well as its adoption of standards set by organizations

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107 *See, e.g.,* Henrik Horn and Joseph H.H. Weiler, *European Communities - Trade Description of Sardines: Textualism and Its Discontent in* The American Law Institute Report 2002, 251, 260 (H. Horn & Petros C. Mavroidis eds., 2005); M. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation and the Codex Alimentarius*, 81 N.Y. U. L. Rev. 766, 786-789 (2006); Y. Bonzon, *Institutionalizing Public Participation in WTO Decision Making: Some Conceptual Hurdles and Avenues,* 11 J. Int'l Econ. L. 751, 775ff (2008); J. Scott, *International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO*, 15 Eur. J. Int'l L. 307, 310 (2004); Robert Howse, *A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and International Standards, in* Constitutionalism, Multilevel Trade Governance and Social Regulation 383, 391 (C. Joerges & Ernst U. Petersmanm eds., 2006). *C.f. see* Filippo Fontanelli, *ISO and Codex Standards and International Trade Law: What Gets Said Is Not What's Heard*, 60 Int'l & Comp. L.Q. 895 (2011) (questioning the hardening of ISO and Codex standards and arguing that the standards serve different purposes once incorporated into the WTO structure).

108 Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. Chi. L. Rev. 1, 1 (1999) (defining regulatory protectionism as intentional non-tariff barriers created by domestic regulations).

109 *See* Bacchus, *supra* note 67 at 1, 10-11 (2014).

110 *See, e.g.,* Janelle M. Diller, *Private Standardization in Public International Lawmaking*, 33 Mich. J. Int'l L. 481 (2011-2012) (examining the development of ISO Standard 26000 on Social Responsibility and proposing a set of best practices for improved coordination, openness and transparency).

111 *See* Bacchus, *supra note 109*, at 10 ("For standards are no longer at the periphery of the trade debate; with the continuing evolution of a fully global economy connected by the endless intricacies of global value chains, and with the concurrent rise of "regulatory protectionism," standards are now at the very center of the trade debate").

112 Michael Froman, Ambassador, U.S. Trade Rep., Remarks at the No Labels Business Leaders Forum (Sept. 17, 2014), https://ustr.gov/about-us/policy-offices/press-office/speeches/2014/September/Remarks-by-Ambassador-Froman-at-No-Labels-Business-Leaders-Forum; Karel De Gucht, E.U. Trade Commissioner, The Transatlantic Trade and Investment Partnership: Where Do We Stand on the Hottest Topics in the Current Debate? (Jan. 22, 2014), http://trade.ec.europa.eu/doclib/docs/2014/january/tradoc_152075.pdf.

like ISO and its partners in the telecommunications and electronic equipment industries.[113] The new generation of trade treaties all emphasize reducing regional divergences in standards through regulatory mutual recognition, information-sharing, and harmonization. While the economic effects anticipated through these efforts at regulatory coherence are likely to be significant, and indeed worthwhile, they may also have some unintended consequences.

C. Trade Treaties as Shape-Shifters

International agreements exhibit great heterogeneity. Some are binding, others are expressly non-binding. Some are robustly enforced and monitored with complex dispute settlement mechanisms. Others completely lack sanctions or compliance structures. Some require deep policy changes in terms of domestic implementation. Others merely set forth frameworks for creating new agreements. Still others do little more than enshrine the status quo. Despite the great variety of international treaties, it is possible to characterize the great majority of international treaties by considering four characteristics. I use the following four axis taxonomy based on a highly simplified, but still extremely useful, system derived from the work of Professor Kal Raustiala, who provides a much more detailed and nuanced conceptual framework for analyzing the architecture of treaties based on both form and substance characteristics.[114] However, this much simplified taxonomy allows us to see very clearly the core traits of the new generation of trade treaties, and to isolate the effects of international standards on these core traits.

Let's consider a simple four quadrant framework divided along (1) the vertical axis of Benchmark/Deep or Effort/Shallow treaties with either deep, substantive standards or shallow ones and (2) the horizontal axis of Resolution/Contract or Persuasion/Pledge treaties with either legally binding form containing enforceable contract-like provisions on one extreme and non-legally binding pledges designed to nudge or influence behavior (persuade states or private firms to change their behavior) and the other extreme. Treaties fall into four quadrants and plotting a treaty along the continuum offered by the two axis allows one to accommodate a great variety of treaties. This taxonomy also borrows from Melissa Durkee's work analyzing the characteristics of persuasion treaties in the international environmental law arena, and from her work I derive the resolution/persuasion dichotomy.[115] The system may be graphically depicted as follows:

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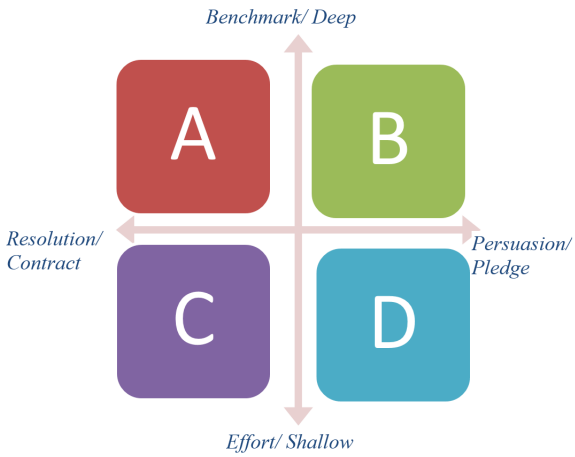
[113] *See* TPP, *supra* note 3, chapter 8 (Technical Barriers to Trade), arts. 8.1, 8.4, 8.8, and 8.9.

[114] Kal Raustiala, *Form and Substance in International Agreements*, 99 Am. J. Int'l L. 581 (2005).

[115] Melissa Durkee, *Persuasion Treaties*, 99 Va. L. Rev. 63 (2013).



Treaties may be plotted along the spaces provided by the four lettered quadrants provided by the two axis. To take a few examples, the WTO TBT and SPS Agreements would likely fall somewhere in Quadrant A, as they consist of binding substantive norms backed by a formal dispute settlement system. The WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is likely to fall in Quadrant C because it consists of a mix of shallow substantive pledges (functioning as floors for protection of intellectual property rights) but with the backing of a dispute settlement system. On the other side, the Montreal Protocol is an example of a Quadrant B agreement as it calls for states to eliminate ozone depleting substances at a specific rate, although without robust enforcement. The United Nations Framework Convention on Climate Change with its shallow commitments would fit into Quadrant D. Some treaties may, of course, be hybrids, and would have to be plotted in multiple quadrants to best reflect the nature of different substantive provisions.

Classification of treaties, extremely useful in itself, is however, not the primary focus of this article. What interests me is the possibility that treaties may change character, or shift their shape, with time. With the overlay of international standardization efforts, a treaty that starts out in Quadrant B, may move over into Quadrant A due to the introduction and adoption of new international standards. This type of exogenous transformation, originating in activities outside the framework of the treaty, and in private organizations, has fascinating implications. A closer examination of the TBT and Regulatory Coherence chapters illustrates some of the complexities and raises new questions for further research. These issues are explored in greater detail in the next section.

IV. The Trans-Pacific Partnership and Harmonization of Standards

A. Regulatory Coherence

The Trans-Pacific Partnership provides an excellent case study to see the how international standards are transforming the very nature of international trade law. This account will focus on aspects of the TPP related to the interplay between the

Chapters on Regulatory Coherence (Chapter 25) and Technical Barriers to Trade (Chapter 8).

The preamble of the TPP articulates the general purpose of the treaty:

> [… to] establish a comprehensive regional agreement that promotes economic integration to liberalise trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth;[116]

In addition, the parties to the TPP affirm, among other goals, that the treaty builds upon existing WTO rights and obligations,[117] and is aimed at establishing "a predictable legal and commercial framework for trade and investment through mutually advantageous rules."[118] In addition, the preamble refers to the goal of promoting "transparency, good governance and rule of law, and eliminate bribery and corruption in trade and investment."[119] While the language used here is typical of multi-lateral free trade treaties of similar scope, the TPP goes further than its predecessors in the prevalence of measures and obligations designed to enforce regulatory standardization and harmonization. For the first time in the history of American free trade agreements, the TPP devotes an entire separate chapter (Chapter 25) to regulatory coherence,[120] which super-imposes a thick layer of additional procedural and substantive obligations on TPP parties on top of the norms laid out in the subject-specific chapters of the treaty. The novelty of the approach is highlighted in the U.S. Trade Representative's new dedicated website to the TPP,[121] which sets out the full text of the signed treaty along with plain-language explanation advocating the TPP. The paragraph describing the new features of the Regulatory Coherence Chapter reads:

> TPP is the first U.S. Free Trade Agreement (FTA) to include a chapter on regulatory coherence, reflecting a growing appreciation of the relevance of this issue to international trade and investment. As in the United States, we expect these commitments to promote "good regulatory practice" principles in the regulatory development process, including coordination among regulators, opportunities for stakeholder input, and fact-based regulatory decisions that will serve to eliminate the prospect of overlapping and inconsistent regulatory requirements or regulations being developed unfairly and without

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116 TPP, *supra* note 3, Preamble.

117 *Id.* Preamble, 3rd paragraph.

118 *Id.* Preamble, 7th paragraph.

119 *Id.* Preamble, page 2.

120 *Id.,* ch. 25, Regulatory Coherence, art. 25.2: (General Provisions) defines regulatory coherence as follows: "regulatory coherence refers to the use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures in order to facilitate achievement of domestic policy objectives, and in efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment."

121 *See Trans-Pacific Partnership*, Office of the United States Trade Representative, *https*://ustr.gov/tpp/ (last visited May 14, 2016).

> a sound basis, including so as to benefit a particular stakeholder. Nothing in the chapter will affect the U.S. or other TPP Parties' right to regulate in the public interest, nor will anything in it require changes to U.S. regulations or U.S. regulatory procedures."[122]

As a piece of advocacy writing, it is not surprising that the description strikes a balance between exhorting the new feature of a separate Regulatory Coherence Chapter while at the same time emphasizing U.S. regulatory autonomy and "no effect" on U.S. regulations or regulatory procedures. However, the "no effects" claim is not warranted. In fact, the Regulatory Coherence chapter does introduce robust new obligations, many of which are framed as procedural safeguards that will, over time, change U.S. regulatory procedures and possibly substantive regulations as well.

While the TPP is voluminous, running to thousands of pages, the Regulatory Coherence Chapter is a slim nine pages, with only eleven sub-sections. It is an easy read, and at first glance, seems disarmingly non-ambitious in scope. It has only five key elements. First, it establishes domestic coordination and review processes to ensure no duplication and conflict among regulations.[123] Second, it urges TPP parties to implement good regulatory practices, including reliance on regulatory impact assessments based on an examination of the need for the regulation, examination of feasible alternatives, cost and benefit analysis, and up to date scientific, technical, economic or other relevant information.[124] Third, it sets up a Committee on Regulatory Coherence composed of TPP government officials, tasked with overseeing the implementation of the chapter. The Committee must met within one year of the date of the entry into force of the TPP[125] and at least once every five years.[126] In structure and scope, the committee is virtually identical to similar committees established under the U.S.-Korea, U.S.-Peru, U.S.-Chile and U.S.-Columbia Free Trade Agreements. Fourth, the Regulatory Coherence Chapter contains numerous cooperation mechanisms for the treaty parties to coordinate regulatory activities, including information sharing, training programs, and information exchanges among regulators.[127] Fifth and last, the chapter is exempt from the dispute settlement mechanism of the TPP established by Chapter 28, which creates a two-step consultation/good offices plus a definitive panel report by three trade experts reminiscent of the first two stages of WTO dispute settlement procedures.[128]

The Regulatory Coherence Chapter also contains many new initiatives aimed at transparency and public participation. For example, Article 25:2 (2) (d) requires parties to "take into account input from interested persons in the development of regulatory measures." The term "interested persons" is not defined, and thus may be broadly

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122 *Available at Regulatory Coherence*, Office of the United States Trade Representative, https://medium.com/the-trans-pacific-partnership/regulatory-coherence-6672076-f307a#.r09lu8ima (last visited May 11, 2016).

123 *See* TPP, *supra* note 3, art. 25.4.

124 *Id*. art. 25.5.

125 *Id*. art. 25.5 (6).

126 *Id*. art. 25.5 (7).

127 *Id*. art. 25.7.

128 *Id*. art. 25.11.

interpreted to include individuals, firms, corporate actors, NGOS, consumer advocacy groups, private standard-setting agencies, industry groups and even lobbying groups, regardless of geographic location. It is unprecedented for an economic treaty to mandate that governments take into consideration the submissions and views of such a diverse group of interested parties. It is also interesting to compare the language of Article 25:8 (Engagement with Interested Persons) with the language of Article 25:2. Article 25.8 requires the Committee on Regulatory Coherence (established by Article 25:6)[129] to "establish appropriate mechanisms to provide continuing opportunities for *interested persons of the Parties* to provide input on matters relevant to enhancing regulatory coherence."[130] Thus, the Committee on Regulatory Coherence, composed of government officials of the treaty parties, is required to heed input from "interested persons of the Parties" (presumably government and regulatory officials) while domestic governments need to take into account the views of all "interested persons" without regard to official status or national origin.

The TPP's regulatory coherence chapter also introduces a complex network of rules related to coordination, review processes, cooperation, and implementation of core good regulatory practices. These measures include, *inter alia*, improved interagency coordination (including the establishing of a central regulatory coordination agency by each member)[131] to minimize regulatory redundancies;[132] the establishment of regulatory impact assessment procedures in conformity with existing relevant scientific, technical or economic information;[133] information exchanges,[134] and coordination and agenda-setting by the Committee on Regulatory Coherence, which has the mandate to conduct reviews every five years to update recommendations on good regulatory practices.[135]

Numerous provisions in the TPP are aimed at increasing transparency by making available to the public information about regulatory measures, changes to such measures, and review and comment procedures. For example, Article 25:4 of the Regulatory Coherence Chapter exhorts each "Party should generally produce documents that include descriptions of those processes or mechanisms and that can be made available to the public."[136] The Chapter on Technical Barriers on Trade similarly contains numerous transparency measures, including the electronic publication, preferably either on the WTO website or another website, all proposals for new technical regulations, amendments or assessment procedures.[137]

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129 *Id.* art. 25:6 (Committee on Regulatory Coherence).

130 *Id.* art. 25:8 (Engagement with Interested Persons) (emphasis added).

131 *Id.* art. 25:4 (Coordination and Review Processes or Mechanisms), sec. 1.

132 *Id.* art. 25:4 (Coordination and Review Processes or Mechanisms), sec. 2(b).

133 *Id.* art. 25:5 (Implementation of Core Good Regulatory Practices).

134 *Id.* art. 25:5 (Cooperation), sec. 1(a).

135 *Id.* art. 25:6 (Committee on Regulatory Coherence), sec. 7.

136 *Id.* art. 25:4, sec. 2.

137 *Id.* ch. 8.7 (Transparency), 4*ter*, requires that "Each Party shall publish, preferably by electronic means, in a single official journal or website all proposals for new technical regulations and conformity assessment procedures and proposals for amendments to existing technical regulations and conformity assessment procedures, and all new final technical regulations and conformity assessment procedures and final amendments to existing technical regulations and conformity assessment procedures, of central government bodies, that a Party is required to notify or publish under the TBT Agreement or this Chapter, and that may have a significant effect on trade."

Thus, one can fairly summarize that the new Regulatory Coherence Chapter of the TPP focuses on regulatory practice and procedure, and not on substantive harmonization of regulations. Given the great diversity among TPP members on culture, legal traditions, and level of economic development, it is not surprising that negotiators failed to push for substantive harmonization. Indeed, many commentators anticipated the procedural approach.[138] However, one cannot dismiss the TPP as weak on pushing the substantive regulatory harmonization agenda.[139] Indeed, a very different picture emerges when one reads the Regulatory Coherence Chapter in conjunction with the TBT chapter and carefully consider how each informs and shapes the other. While some commentators have argued that the TPP's Regulatory Coherence lacks teeth due to the lack of dispute settlement enforcement or for the failure to impose sector-specific disciplines on regulatory barriers,[140] I argue that these critiques miss the point. The TPP's Regulatory Coherence Chapter is significant because it creates a systemic governance framework to ensure and deliver continuing improvements to the quality of regulations. It does so not by adopting any ground-breading substantive new rules on specific regulatory subjects, but by weaving a thick web of procedures that can used to deliver ongoing regulatory improvements. These procedures, when coupled with the mechanisms enforcing standardization of regulations, can and will advance regulatory harmonization. The next section illustrates how the substantive goal of regulatory harmonization may be pursued through a clear pathway laid out by the TBT obligations.

B. Standardization in the TBT Chapter of the TPP

By examining the substantive provisions of the TPP's chapter on technical barriers to trade, it will become clear that international standardization, harmonization, and regulatory coherence measures are key tools utilized in the TPP to promote predictability, stability, transparency, good governance and the rule of law. In particular, international standards play a prominent role, and are indeed the engine behind the TPP's regulatory coherence agenda. As a preliminary matter, the TPP's Chapter 8 on Technical Barriers to Trade incorporates by reference most of the

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138 *See generally*, Bollyky, *supra* note 19; Rodrigo Polanco, *The Trans-Pacific Partnership Agreement and Regulatory Coherence*, *in* Trade Liberalisation and International Co-operation: A legal Analysis of the Trans-pacific partnership, 254-6 (Tania Voon ed., Edward Elgar, 2013).

139 *Cf.* Elizabeth Sheargold & Andrew D. Mitchell, *The TPP and Good Regulatory Practices: An Opportunity for Regulatory Coherence to Promote Regulatory Autonomy?*, World Trade Review (2016) (forthcoming), *available at* http://ssrn.com/abstract=2728771 (last visited May 9, 2016) (arguing that the regulatory coherence chapter of the TPP does not break any substantive new ground, but is significant for its affirmation of good regulatory practices).

140 *See generally, e.g.,* Ines Willemyns, *Regulatory Cooperation in the WTO and at the Regional Level: What Is Being Achieved by CETA and TPP?* (Apr. 1, 2016). *Available at* SSRN: http://ssrn.com/abstract=2768058 (last visited May 12, 2016) (arguing that neither the TPP nor CETA succeeds in enacting adequate disciplines on regulatory barriers to trade in services).

substantive provisions of the WTO TBT Agreement.[141] The aim of the TBT Chapter is to "to facilitate trade, including by eliminating unnecessary technical barriers to trade, enhancing transparency, and promoting greater regulatory cooperation and good regulatory practice."[142] The TBT Chapter contains 11 sections of substantive and procedure rules, plus the addition of seven annexes covering specific rules related to wine and distilled spirits,[143] information technology products,[144] pharmaceuticals,[145] cosmetics,[146] medical devices,[147] proprietary formulas for pre-packaged food and food additives,[148] and organic products.[149]

The TBT Chapter relies heavily on international standards. In Article 8.5(1), the parties "acknowledge the important role that international standards, guides and recommendations can play in supporting greater regulatory alignment, good regulatory practice and reducing unnecessary barriers to trade."[150] On the question of what constitutes an international standard, the TPP parties agree to conform to the decisions of the WTO Committee on Technical Barriers to Trade.[151] The TBT Chapter echoes many of the coordination, cooperation, information sharing, and transparency measures set forth in the Regulatory Coherence Chapter. However, some divergences are noteworthy.

The TBT Chapter introduces specific rules for the mutual recognition of conformity assessment bodies of other treaty parties. Conformity assessments are tests and certifications of substantive compliance with a regulation by an entity, governmental or private. TPP parties are required to give national treatment (non-discriminatory recognition) to each party's conformity assessment body. This facilitates trade by ensuring that a firm's products need only be tested and certified once before accessing other TPP markets. Article 8:6 requires that each party "shall accord to conformity assessment bodies located in the territory of another Party treatment no less favourable than that it accords to conformity assessment bodies located in its own territory or in the territory of any other Party."[152] TPP members are also required to apply the same or equivalent procedures for accreditation or licensing purposes to conformity assessment bodies located in the territory of other parties.[153] Strikingly, Article 8:6, Section 9 seems tailored to ensure that organizations like ISO are treated on an equal footing with national conformity assessment bodies. It is worth citing Section 9 in full:

> Further to Article 9.2 of the TBT Agreement, a Party *shall not refuse to accept*, or take actions which have the effect of, directly or indirectly,

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141 TPP, *supra* note 3, ch. 8 (Technical Barriers to Trade), art. 8.4 (Incorporation of Certain Provisions of the TBT Agreement).
142 *Id.* art. 8.2 (Objective).
143 *Id.* annex 8-A.
144 *Id.* annex 8-B.
145 *Id.* annex 8-C.
146 *Id.* annex 8-D.
147 *Id.* annex 8-E.
148 *Id.* annex 8-F.
149 *Id.* annex 8-G.
150 *Id.* art. 8.5 (International Standards, Guides and Recommendations), sec. 1.
151 *Id.* art. 8.5 (International Standards, Guides and Recommendations), sec. 2.
152 *Id,* art. 8.6 (Conformity Assessment), sec. 1.
153 *Id.*

> requiring or encouraging the refusal of acceptance by other Parties or persons of conformity assessment results from a conformity assessment body because the accreditation body that accredited the conformity assessment body:
> (a) operates in the territory of a Party where there is more than one accreditation body;
> (b) *is a non-governmental body*;
> (c) is domiciled in the territory of a Party that does not maintain a procedure for recognising accreditation bodies;
> (d) *does not operate an office in the Party's territory*; or
> (e) is a for-profit entity.[154]

Taken as a whole, the language of Section 9 could not describe ISO more perfectly: ISO is a not for profit, non-governmental body operating mainly in Geneva, with no presence in any of the TPP countries. However, the conformity assessments of private organizations like ISO shall be accorded the same treatment and deference as the accreditation bodies of treaty members.

The transparency mechanisms of the TBT Chapter also extend beyond the means contemplated in the Regulatory Coherence Chapter. It provides access to representatives of other treaty parties to "participate in the development of technical regulations, standards and conformity assessment procedures by its central government bodies"[155] by providing interested parties a reasonable opportunity to comment on proposed measures and by taking such comments into account prior to adoption of the regulation.[156] Parties are also encouraged to consider the use of electronic tools and public outreach or consultations in the development of technical regulations.[157] Moreover, Parties are enjoined to encourage non-governmental bodies in its territory to comply with the participation measures discussed here.[158]

Under the guise of transparency, the TBT Chapter establishes avenues for private organizations to receive unprecedented recognition, in the form of equal treatment with national accreditation or conformity assessment bodies, as well as new ways for non-governmental bodies to participate in the regulatory work of national bodies. Ironically, such measures may in practice undermine transparency goals. For example, under the TPP, member governments are required to publish, use notice and comment procedures, and justify any changes to certification or conformity assessment processes.[159] However, no provision requires a private non-governmental organization like ISO to follow the same procedures. In fact, the substantive contents of ISO standards are not available for public or scholarly viewing, but may only be purchased.[160] While each standard is not expensive on its own, with over twenty-thousand standards, it would be prohibitively costly to comprehensively examine applicable standards in any one industry. Nonetheless,

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154 *Id.* art. 8.5 (International Standards, Guides and Recommendations), sec. 9 (internal footnotes omitted and emphasis added).
155 *Id.* art. 8.7 (Transparency), sec. 1.
156 *Id.* art. 8.7 (Transparency), Footnote 4 to sec. 1.
157 *Id.* art. 8.7 (Transparency), sec. 2.
158 *Id.* art. 8.7 (Transparency), sec. 3.
159 *Id.* art. 8.5 (International Standards, Guides and Recommendations), secs. 1, 3, 11; *see also* art. 8.7 (Transparency), Footnote 4 to sec. 1.
160 *See supra* note 103.

despite the lack of transparency and public availability, ISO's certifications or conformity assessments would receive mutual recognition under Section 9 of Article 8.5 of TBT Chapter, even though they may be adopted without the same procedure safeguards that bind member states. Thus, one may characterize this aspect of the TBT Chapter as strikingly lop-sided - being far less restrictive of international standard setting organizations than of member states.

The subject matter specific annexes of the TBT Chapter also contain similarly problematic provisions aimed at standardization. The approach adopted in the regulation of pharmaceuticals and cosmetics are typical of the overall tone and methodology taken in the annexes. The Annex on Pharmaceuticals requires parties to "seek to collaborate through relevant international initiatives, such as those aimed at harmonization"[161] and to "consider relevant scientific or technical guidance documents developed through international collaborative efforts with respect to pharmaceutical products when developing or implementing regulations for marketing authorisations of pharmaceuticals products."[162] Most significantly, the Pharmaceuticals Annex sets the format and content of applications for marketing authorizations of new drugs, requiring the use of principles found in the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use Common Technical Document.[163] Vietnam negotiated for an extended period, to January 1, 2019, to comply with this provision. The Annex on Cosmetics contains similar provisions on harmonization initiatives,[164] requiring reliance on relevant scientific or technical guidance documents developed by international collaborative efforts,[165] and mandating a risk-based approach to regulating cosmetics.[166] Lastly, the Cosmetics Annex makes mandatory the use of relevant international standards when a member adopts good manufacturing guidelines, allowing a deviation only when the standards "would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued."[167]

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161 TPP, *supra* note 3, annex 8-C (Pharmaceuticals), sec. 5.

162 *Id.* annex 8-C (Pharmaceuticals), sec. 6.

163 *Id.* annex 8-C (Pharmaceuticals), sec. 11. "With respect to applications for marketing authorisation for pharmaceutical products, each Party shall accept for review safety, efficacy, and manufacturing quality information submitted by a person seeking marketing authorisation in a format that is consistent with the principles found in the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use Common Technical Document (CTD), including any amendments thereto, recognising that the CTD does not necessarily address all aspects relevant to a Party's determination to approve marketing authorisation for a particular product."

164 *Id.* annex 8-D (Cosmetics), sec. 5.

165 *Id.* annex 8-D (Cosmetics), sec. 6.

166 *Id.* annex 8-D (Cosmetics), sec. 7.

167 *Id.* annex 8-D (Cosmetics), sec. 13. "Where a Party prepares or adopts good manufacturing practice guidelines for cosmetic products, it shall use relevant international standards for cosmetic products, or the relevant parts of them, as a basis for its guidelines except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued."

C. Harmonization Mechanisms in Practice in the TPP: Fifty Ways to Adopt a Standard

Let's consider the effect of these myriad harmonization and standardization measures in terms of mapping onto the four treaty quadrants laid out above in Section III.C. Movement between the quadrants may occur purely as a function of standard-setting by private standardization organizations. I identify six new distinct methods in the TPP by which standards could harden into norms/regulations or alter the content of norms/regulations. These are by no means the only means, but merit examination because they are explicitly codified in the TPP as substantive obligations. For purposes of simplification only, I illustrate each of the methods in terms of the resulting movement leftward along the horizontal access from shallow to deep (from Quadrant D to A, and B to A), but the analytical framework is applicable for movements in other directions (from C to B, or A to D, for example) as well. In other words, the following examples highlight how international standards become deep, binding norms. The simplified mono-directional nature of the illustrations serves two purposes. First, it makes the analysis easier to follow. Second, it highlights why we should scrutinize the work of international standard setting bodies more closely because the power they wield under the TPP is considerable as a result of these six methods for their standards to transform into deep, binding norms.

There are six possible mechanisms for international standardization bodies (ISBs) to affect the nature of substantive norms under the TPP. The first four of the methods are endogenous to the TPP and last two are hybrids, originating in exogenous events at the WTO, but subsequently incorporated into the TPP. The mechanisms are: (1) direct domestic adoption, enforced by mutual recognition, of the certification procedures and decisions of ISBs,[168] (2) the participation of ISBs in notice and comment regulatory rule making procedures,[169] (3) the participation of ISBs in international cooperative efforts aimed at harmonization and mutual recognition,[170] (4) implementation by the TBT Committee of the TPP of new standards with respect to either the annexes of the TBT Chapter or the overall TBT Chapter,[171] (5) formal adoption of standards set by ISBs by the WTO TBT Committee, which are incorporated into the TPP,[172] and (6) any recognition of the legal or binding status of ISB standards through either the WTO dispute settlement process or the TPP dispute settlement process under Article 28 related to the Technical Barriers to Trade Chapter, although not the Regulatory Coherence Chapter.[173]

Let us consider a specific example related to the use of water as an ingredient in cosmetic products. This falls within the ambit of good manufacturing practices, and there is an applicable ISO standard: ISO 22716: 2007, Cosmetics - Guidelines on Good Manufacturing Practices.[174] The United States Food and Drug Administration

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168 *See, e.g.,* TPP, *supra* note 3, art. 8.6 of ch. 8 (Technical Barriers to Trade).
169 *See, e.g.,* TPP, *supra* note 3, art. 25:2 of ch. 25 (Regulatory Coherence).
170 *See, e.g.,* TPP, *supra* note 3, art. 8.9 of ch. 8 (Technical Barriers to Trade).
171 *See, e.g.,* TPP, *supra* note 3, arts. 8.11 & 8.12 of ch. 8 (Technical Barriers to Trade).
172 *See, e.g.,* TPP, *supra* note 3, art. 8.5 of ch. 8 (Technical Barriers to Trade).
173 *Id. supra* note 3, ch. 28, Dispute Settlement.
174 *Catalogue,* International Organization for Standardization, http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=36437 (last visited May 13, 2016).

(FDA), in its June 2013 guidance for industry on cosmetic good manufacturing practices, has explicitly considered and decided to incorporate, modify or exclude specific aspects of ISO 22716 into its non-binding industry guidance.[175] The FDA does not explicitly state which aspects of ISO 22716 were excluded or modified, nor does it explain its reasons, stating only that its determinations are "based on [our] experience."[176] The FDA guidelines calls for industry to determine if the water used as a cosmetic ingredient is used as-is (directly from the tap) or has been treated through deionization, distillation, or reverse osmosis.[177] They also call for procedures to test water for quality, water treatment effects, and risks of contamination.[178] Now, here are the ways that ISO 22716 may harden into a regulatory norm as a result of the TPP's TBT Chapter's Cosmetics Annex, which requires that:

> Where a Party prepares or adopts good manufacturing practice guidelines for cosmetic products, it shall use relevant international standards for cosmetics products, or the relevant parts of the, as a basis for its guidelines except where such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.[179]

First, either the FDA's guidelines or ISO 22716 could be extended mutual recognition by other TPP parties as the binding regulations on good manufacturing practices. Ironically, the fact that the FDA fails to explain where and why it deviated from ISO 22716 in its guidelines would be a contravention of U.S. TPP obligations under the Cosmetics Annex,[180] and the FDA guidelines would have to be amended if or when the TPP enters into force. Second, ISO itself could, pursuant to Article 2 of the Regulatory Coherence Chapter of the TPP, participate in notice and comment procedures at the FDA, should it either decide to amend its guidelines or issue a binding rule related to cosmetics manufacturing. Presumably, nothing would preclude ISO from advocating that its ISO 22716 should be adopted in full by the FDA. A third possibility is that ISO could participate in international cooperative efforts, such as the work of the U.S.-Canada Regulatory Cooperation Council to push for adoption of its standards as the means for regulatory harmonization. If this occurs, even at the bilateral or regional level, the TPP's regulatory coherence mechanisms would then kick in to "amp up" or "super-charge" such efforts into the mega-regional level. Fourth and fifth, the TPP Committee on Technical Barriers to Trade, established by Article 8.11 of the TPP, or the WTO's TBT Committee, respectively, could adopt ISO 22716 as a part of its regular review and monitoring work on international standards. Lastly, it is also possible that a TPP party could force adoption ISO 22716 in a case arising under either WTO dispute settlement processes or TPP dispute settlement related to the Technical Barrier to Trade Chapter.

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175 U.S. Food and Drug Administration, Guidance for Industry, Cosmetic Good Manufacturing Practices 3 (Feb. 12, 1997, revised Apr. 24. 2008 and Jun. 2013), http://www.fda.gov/downloads/Cosmetics/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/UCM358287.pdf (last visited May 13, 2016).

176 *Id. at 3.*

177 *Id. at 8.*

178 *Id.*

179 TPP, *supra* note 3, Ch. 8, annex 8D (Cosmetics), art. 13.

180 *Id.*

The most striking aspect of the foregoing analysis is the diversity and proliferation of methods by which a privately developed standard, ISO 22716, could enter the pantheon of hard law through regulatory coherence mechanisms embedded in the TPP. In the relatively closed universe of public international law, it is extraordinary to have so many avenues for a private code to be adopted and implemented as a mandatory regulatory norm. It brings to mind the lyrics of the Simon & Garfunkel song "Fifty Ways to Leave Your Lover."[181] This article highlights only the six most obvious methods to adopt an international standard. There are probably forty-six others.

V. Some Closing Thoughts on Implications

This section explores, in brief, the normative implications of the harmonization and standardization mechanisms considered above with respect to both the new generation of international trade treaties in general and the TPP in particular. This is only the first of a series of articles examining standardization as a powerful engine of regulatory harmonization.

A. Governance Concerns and Institutional Design

Of the numerous methods established by the TPP to advance regulatory coherence and harmonization, the use of international standards is the most potent and fundamental. The TPP creates a thick network of procedural and substantive obligations that have the effect of hardening standards into norms. The result is a new regulatory governance framework in which standards play a leading role. The recognition that standardization is the primary mechanism for regulatory harmonization is the first step in focusing future studies on the global governance, transparency, and democratic implications of standardization. How can we make the work of international standardization bodies more open and transparent? How can we incentive our domestic regulatory institutions to meaningful participate in the development of such standards? Which aspects of the institutional work and architecture of TPP committees need to be carefully structured to interact meaningfully with standardization bodies? What roles should international organizations play?[182] Full participation by corporations, civil society, and public-private collaboration in the work of international standardization organizations will contribute to greater chance of TPP treaty success.

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[181] Simon & Garfunkel, *50 Ways to Leave Your Lover*, Lyrics, *available at* http://www.azlyrics.com/lyrics/paulsimon/50waystoleaveyourlover.html (last visited May 13, 2016).

[182] *See, e.g.,* Tim Buthe, *The Globalization of Health and Safety Standards: Delegation of the Regulatory Authority in the SPS Agreement of the 1994 Agreement Establishing the World Trade Organization*, 71 Law & Contemp. Probs. 219 (2008) (using principal-agent theory to conceptualize international delegation as a form of institutionalized co-operation).

B. Sovereignty and Regulatory Autonomy

A number of scholars have studied the relationship between regulatory coherence,[183] harmonization,[184] and regulatory autonomy. However, the central question, "do regulatory coherence and harmonization measures lead to better regulations?" remains fundamentally unanswered. The answer should be an empirical one. Do international standards result in good rules that are (1) locally responsive the needs and risk tolerances of different populations and (2) not disguised protectionism?

C. Legal Transplantation and Regulatory Convergence Concerns

A possibility for accelerated legal transplantation and convergence emerges as a direct result of the standardization mechanisms studied in this article. Private codes of conduct and standards will achieve wide market penetration more quickly as a result of the approaches adopted in the TPP. Is such regulatory convergence a good thing? Are there implementation lessons we can learn from a comparative law analysis?

D. Public-Private Blurring

The increasing use of industrial self-policing through standardization and harmonization mechanisms encourages the incorporation of diverse soft-law approaches to trade policy toolbox. While the increasingly blurred lines between private, public, and hybrid regulations has been well studied[185], and is a core aspect of the privatization critique, little attention has been paid to the role of international standardization bodies. One particularly under-studied area is the role self-certifications play in conformity assessments for a wide variety of goods and services.[186] Detailed empirical studies on the role international standards play in self-certifications would be particularly beneficial.

E. Cross-Cultural Communication and Capacity-Building Challenges

The TPP members represent a wide spectrum of diversity with respect to culture, business practices, legal traditions, regulatory structures, economic development, involvement in international organizations, and integration into complex global supply chains. Each of these divergences presents unique cross-cultural communication challenges. Effective technical assistance, capacity building,

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183 *See generally,* Alberto Alemanno, *The Regulatory Cooperation Chapter of the Transatlantic Trade and Investment Partnership: Institutional Structures and Democratic Consequences*, 18 J. Int'l Econ. L. 625 (2015); Sheargold & Mitchell, *supra* note 139.

184 *See* Bacchus, *supra* note 67.

185 *See* Abbot & Snidal, *supra* note 17.

186 Very little literature exists in this field. *See, e.g.,* Mahesh Chandra, *ISO Standards from Quality to Environment to Corporate Social Responsibility and Their Implications for Global Companies*, 10 J. Int'l Bus. & L. 107 (2011); *see also,* Diller, *supra* note 110.

and training are important aspects of successful implementation of regulatory coherence and cooperation efforts. Success in these areas must reflect a sensitive approach to cross-cultural communication.[187] Of course, understanding these issues is also critical in legal education, as we must train the next generation of scholars, practitioners, civil society leaders, lawyers, and government officials to employ these new regulatory tools in a balanced and thoughtful way. Here too, cultural competency and managing cultural communication conflicts must be a critical part of the curriculum.

V. Conclusion

The Trans-Pacific Partnership has attracted a lot of controversy. It has rightfully come under criticism for the secrecy of negotiations and a number of substantive critiques, like reducing access to affordable generic medicines.[188] However, the TPP has successfully dodged much deserved criticism for the power it has arrogated to harmonization and standardization organizations, especially under its Chapters on Technical Barriers to Trade and Regulatory Coherence. This arrogation or delegation of regulatory power presents new-found challenges to transparency, and makes standardization the least-studied of the methods for regulatory harmonization. Alarm bells should ring. At a minimum, these trends merit closer scholarly attention. I hope this article is the first of many to raise the alarm and lead to deep exploration of the normative, policy, economic, educational, and empirical implications of the issue.

[187] The author has forthcoming articles on the cross-communication challenges posed by regulatory coherence and on the need to thoughtfully design regulatory cooperation measures to maximize the quality of regulations while minimizing externalities and inefficiencies.

[188] Médecins Sans Frontières, *Briefing Note: Access Campaign, Trading Away Health: The Trans-Pacific Partnership Agreement (TPP)*, *available at* http://www.doctorswithoutborders.org/sites/usa/files/Access_Briefing_TPP_ENG_2013.pdf (last visited May 9, 2016).

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The Two Noble Kinsmen: Internal and Legal Transparency in the WTO and Their Connection to Preferential and Regional Trade Agreements

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ABSTRACT

The proliferation of Preferential Trade Agreements (PTAs) and Regional Trade Agreements (RTAs) has given rise to significant debate on the need to measure, understand and possibly regulate the impact these agreements have on the multilateral trading system under the umbrella of the World Trade Organization (WTO). This article will discuss the two Doha Transparency Mechanisms (legal transparency) regarding regional trade agreements, as they appear in two General Council decisions from 2006 and 2010. I will argue based on a closer look and a consistent interpretation of Paragraph 10 of the Doha Ministerial Declaration that there is another type of transparency that is relevant to the discussion on PTAs/RTAs, namely "internal transparency." "Internal transparency stricto sensu" highlights the significance of trust in the WTO institutional processes, such as negotiations, decision-making, dispute settlement and trade monitoring that the representatives of developing member states should have in order for the WTO system to function productively. "Internal transparency lato sensu" is introduced in this article as an extension to include any decision-making deficits, exclusionary and asymmetrical outcomes specifically in the area of unchecked Preferential Trade Agreement proliferation. Instead of a conclusion, the article offers some proposals for more a meaningful progress in the WTO with respect to PTAs/RTAs The proposals aim at raising the profile of both legal and internal of transparency and posit that raising the profile of one will inevitably lead in improvements in the other.

CONTENTS

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I. Introduction

The proliferation of Preferential Trade Agreements (PTAs) and Regional Trade Agreements (RTAs)[1] has given rise to significant debate on the need to measure, understand and possibly regulate the impact these agreements have on the multilateral trading system under the umbrella of the World Trade Organization (WTO).[2] PTAs and RTAs were not only understood as a possibility in the world trading system, they were also formally allowed by the WTO Agreements. However, as the numbers of PTAs/RTAs were rising, concerns started being raised in the WTO: should these agreements be monitored? The answer was yes. Reporting mechanisms were created and more discussions followed on the compatibility of these agreements to the WTO ones, as well as their economic and political impact on the world trading system.

After the Seattle failure and the inability to conclude the Doha Round the issue of PTAs/RTAs has acquired new dimensions. As WTO members were unable to reach agreements under the auspices of the organization, they resorted to trade deals outside, with other like-minded parties. In the last decade, news on world trade has been dominated by the discussions on Mega-Regionals, and the WTO no longer is as newsworthy. The Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP) and the European Union (EU)-Canada Comprehensive Economic Trade Agreement (CETA) have been, for better and for worse, in the front page of major world newspapers, while the recent WTO Ministerial in Nairobi barely made it to any newspapers at all.

In the WTO, transparency mechanisms were created in order to keep a formal list of signed PTAs/RTAs. This paper will examine first this version of formal or legal transparency linked to regionalism. Second, I will argue that there is another

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[1] For definitions *see* next section. In this article all non-WTO trade agreements will be referred to as Preferential Trade Agreements and Regional Trade Agreements and occasionally as Free Trade Agreements. The exact differences between the three will be briefly addressed in the next section. This article will also use the term "Preferential Trade Agreements" instead of "Preferential Trade Arrangements". The GATT uses the term "arrangements", however, I argue that the two terms can be used in this context interchangeably.

[2] *See,* among many, Jo-Ann Crawford & Roberto V. Fiorentino, *The Changing Landscape of Regional Trade Agreements,* World Trade Organization paper (2005), *available at* https://www.wto.int/english/res_e/booksp_e/discussion_papers8_e.pdf; Martin Roy et al, *Services Liberalization in the NewGeneration of Preferential Trade Agreements (PTAs): How Much Further than the GATS?* 6 World Trade Rev. 155-92 (2007); and more recently Sébastien Miroudot & Ben Shepherd, *The Paradox of 'Preferences': Regional Trade Agreements and Trade Costs in Services* 37 The World Economy 1751-72 (2014); Bilateral and regional trade agreements: Commentary and analysis, Vol. 1 (Simon Lester et al. eds., 2015); Denis Medvedev, *Beyond Trade: The Impact of Preferential Trade Agreements on FDI Inflows*, 40:1 World Development 49-61 (2012); Joost Pauwelyn & Wolfgang Alschner, *Forget About the WTO: The Network of Relations Between Preferential Trade Agreements (PTAs) and 'Double PTAs'* (2014), *available at* SSRN http://ssrn.com/abstract=2391124 (last visited Jun. 10, 2016); Chad Bown et al., *What Do We Know About Preferential Trade Agreements and Temporary Trade Barriers?*, *in* Trade Cooperation: The Purpose, Design and Effects of Preferential Trade Agreements 433-62 (A. Dür & M. Elsig eds., 2015).

type of transparency that is relevant to the discussion on PTAs/RTAs, namely "internal transparency." In this analysis I will also identify deficits in the two transparencies. Finally, I will conclude with some proposals to raise the profile of both forms of transparency and posit that raising the profile of one will inevitably lead in improvements in the other. The two notions are complementary and can work together, just like John Fletcher and William Shakespeare collaborating in writing the play "The Two Noble Kinsmen."[3] In other words, if marginalized countries are more meaningfully integrated in the WTO, PTAs and RTAs will not be as impactful on their position in the global economy. Or, if the WTO established transparency mechanisms function optimally, this will lead to bringing small and medium economies out of the sidelines and help their participation in world trade.

The article will proceed as follows: First, I will briefly discuss the existing legal framework for PTAs and RTAs in the WTO context. This includes both provisions in the WTO Agreements as well as the (limited) jurisprudence from the dispute settlement process. In the second part I will describe the two Doha Transparency Mechanisms regarding regional trade agreements, as they appear in two General Council decisions from 2006 and 2010.[4] The article will then move to explore the asymmetrical elements that PTAs and RTAs introduce in the world trading system in Part III, and the potential clash with trade liberalization in Part VI. Part V will move to elaborate on how the Sutherland Report, which is to date the most comprehensive WTO self-assessment document, failed to capture any criticism for their proliferation and their impact on the organization. Part VI moves beyond the criticism on the failure of the Sutherland Report to address the trade liberalization problems and asymmetrical elements for developing countries that RTAs and PTAs inherently produce. It further argues that based on a closer look and a consistent interpretation of Paragraph 10 of the Doha Ministerial Declaration[5], the proliferation of PTAs and RTAs should have been flagged in the WTO as another facet of the internal transparency problems of the WTO. Part VII returns to the Doha transparency mechanisms and discusses how the December 2015 Nairobi Ministerial Declaration[6] pushes forward the notion that concrete action must be taken on PTA/RTA monitoring. Finally, instead of a conclusion, the article offers some proposals for more a meaningful progress in the WTO with respect to PTAs/RTAs. A combination of both a firm and a flexible stance is necessary to address this expanding phenomenon in international trade regulation.

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3 John Fletcher & William Shakespeare, Two Noble Kinsmen, (E. M. Waith ed., Oxford English Texts Series, Oxford University Press, 1998) (1634). For the controversy regarding the paternity of the text *see* the introduction by E.M. Waith and also for distinguishing parts written by each author Gerard Ledger & Thomas Merriam, Shakespeare, Fletcher, and the Two Noble Kinsmen, 9 Literary & Linguistic Computing 235-48 (1994). For a long time, there was controversy over the attribution of the text to each of the authors.

4 Transparency Mechanism for Regional Trade Agreements, General Council Decision of 14 December 2006, WT/L/671 (Dec. 18, 2006) and Transparency Mechanism for Preferential Trade Agreements, General Council Decision of 14 December 2010, WT/L 86 2010 (Dec. 16, 2010).

5 World Trade Organization, Doha Ministerial Declaration, WT/MIN(01)/DEC/1 (Nov. 20, 2001), 41 I.L.M. 746 (2002), para. 10 [hereinafter Doha Declaration].

6 World Trade Organization, Nairobi Ministerial Declaration, WT/MIN(15)/DEC/1 (Dec. 19, 2015).

One clarification is necessary here regarding the transparency terminology used in this article. When referring to "internal transparency", the article, drawing from Article 10 of the Doha Ministerial Declaration first refers to "internal transparency *stricto sensu*" to decision-making deficits of developing countries in the WTO. It highlights the significance of trust in the WTO institutional processes, such as negotiations, decision-making, dispute settlement and trade monitoring that the representatives of member states should have in order for the WTO system to function productively.[7] However, as I argue in Part VI, this notion should be expanded to include other phenomena with the same effect in the WTO. This, which can be called "internal transparency *lato sensu*"[8] is introduced as an extension of decision-making deficits. Power imbalances in the WTO that have led to developing countries' exclusion have also created other asymmetrical outcomes, specifically in the area of Preferential Trade Agreement proliferation. Finally, the mechanisms introducing an obligation of WTO member states to report information within the organization, to publish their trade-related legislation, disclose the PTAs and RTAs they enter into with others, and other rule of law obligations that exist in order to benefit other member states' their traders and consumers can be called "Legal Transparency." The two transparencies intersect, and as I will propose in the concluding section, improving the one will help improve the other.

II. The Legal Framework for PTAs/RTAs

The exception of PTAs/RTAs is considered the most important exception to the Most Favored Nation (MFN) principle.[9] The basic PTA rules are XXIV of the General Agreement on Tariffs and Trade (GATT) under the title "Territorial Application - Frontier Traffic - Customs Unions and Free-Trade Areas", together with the Understanding on the Interpretation of Article XXIV of the GATT 1994,[10] Article V of the General Agreement on Trade in Services (GATS) and the Enabling Clause. These provisions introduce five types of Preferential or Regional Trade Agreements, included in the WTO Agreements[11] and deemed to generally be WTO-compatible.

During the initial negotiation of the GATT, in the 40s, there was discussion to preserve only those preferential schemes that were long-standing, but this

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7 Doha Declaration, *supra* note 5, para. 10 (internal transparency definition and commitment).

8 I use the term "transparency *stricto sensu*" to distinguish it from the extension of transparency which I will be proposing, which I call "transparency *lato sensu*".

9 Michael J. Trebilcock,. & Robert Howse. The Regulation of International Trade 193 (3d ed. 2005).

10 General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).

11 Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 2 (1999), 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994).

suggestion did not prevail.[12] The so-called London Draft discussed the inclusion of existing and future Custom Unions within the GATT 1994.[13] The notion of Free Trade Agreements (FTAs) was added later on.[14] Mavroidis et al. reject the claim that this inclusion was put forward in order to accommodate the subsequent creation of the European Communities.[15] Preferential trade exceptions were negotiated to some extent, and resulted to a relaxed scheme, which is based on three obligations: to notify, to liberalize among members to the Regional Trade Agreement or the Customs Union (internal requirement) and not to raise protectionism towards non-members (external requirement).[16]

An interpretation consistent with the principle of *pacta sunt servanta* evidently favors any agreement the Contracting Parties made. Even if RTAs are not encouraged in the WTO, at least they are tolerated. Article XXIV paragraph 4 discusses the overall framework for such RTAs:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

Paragraph 5 explicitly proclaims that:

> … the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area.

Customs Unions are described in Paragraph 8 (a) of Article XXIV as follows:

> For the purposes of this Agreement: A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories so that
>
> (i) duties and other restrictive regulations of commerce (…) are eliminated with respect to substantially all trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
> (ii) … substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade territories not included in the union.

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12 Douglas Irwin et al., The Genesis of the GATT 109 (2008).
13 *Id.*
14 *Id.* at 122.
15 *Id.* at 167-68.
16 Mitsu Matsushita et al., The World Trade Organization, Law, Practice and Policy 555 (2006).

Paragraph 5 (a) of Article XXIV limits Customs Unions by explaining that:

> with respect to a customs union … the duties and other regulations of commerce imposed at the institution of any such union … in respect of trade with contracting parties not parties to such union … shall not *on the whole* be higher or more restrictive than the *general incidence* of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union …[17]

Similarly, second category of RTAs, Free Trade Areas, are regulated in the same Paragraph 8 of Article XXIV, under (b):

> A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce … are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

Article XXIV 5 (b) also restricts the scope of Free Trade Areas:

> with respect to a free trade area … the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area … to the trade of contracting parties not included in such area … shall not be higher or more restrictive than *the corresponding duties* and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area …

Free Trade Areas and Customs Unions essentially overlap since their members have to liberalize trade among them. The difference between the two is that a Customs Union additionally establishes a common external commercial policy.[18] Also with respect to Customs Unions the effect in trade restriction is examined overall, unlike Free Trade Areas where individual instruments are investigated.

The third- hybrid- category, discussed in Article 5 under both (a) and (b) comprises the interim agreements necessary for the formation of a Customs Union or a Free Trade Area. Such interim agreements must be concluded within a "reasonable length of time" according to Paragraph 5 (c) of Article XXIV. According to the Understanding on Article XXIV, a reasonable length of time does not exceed the duration of ten years.[19]

Very important in terms of setting the foundations for transparency in this context is paragraph 7 of Article XXIV which reads as follows:

> (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union

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17 Emphasis added.

18 *See* on this matter of distinguishing between the two, Anne O. Krueger, *Free Trade Agreements Versus Customs Unions* 54 J. Dev. Econ. 169-87 (1997).

19 Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994 para. 3, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 2 (1999), 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994).

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> or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.
> (b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify in accordance with these recommendations.
> (c) Any substantial change in the plan or schedule referred to in paragraph 5 (c) shall be communicated to the CONTRACTING PARTIES which may request the contracting parties concerned to consult with them if the change seems likely to jeopardize or delay unduly the formation of the customs union or of the free-trade area.

The fourth type of such agreements appears in Paragraph 2 (c) of the Enabling Clause that is now part of the GATT. The Enabling Clause establishes a PTA. According to paragraph 2 (c) the differential and more favourable treatment of Paragraph 1 applies also to:

> Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribe by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another.

The fifth is Economic Integration Agreements under Article V of the GATS (entitled "Economic Integration"), according to which:

> This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:
> (a) has substantial sectoral coverage, and
> (b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through,
> (i) elimination of existing discriminatory measures, and/or
> (ii) prohibition of new or more discriminatory measures,
>
> either at the entry into force of that agreement or on the basis of a reasonable time-frame …

Article V paragraph 5 of the GATS further requires an advanced notice period of at least 90-days. Article V *bis* of the GATS discusses labor market integration

agreements, also notified, just like Agreements of Article V GATS to the Council for Trade in Services. Arguably, Article V is stricter than Article XXIV, since the former discusses "substantial sectoral coverage", including trade volume and modes of supply[20] while the latter extends to "substantially all trade."

To date, 258 Regional Trade Agreements and 26 Preferential Trade Agreements have been notified under the GATT/WTO system and are in force either between countries (the majority),[21] or between countries and existing PTAs and Customs Unions.[22] Very few cases have been brought before the Dispute Settlement Body with respect to PTAs and RTAs. The limited amount of jurisprudence is considered not surprising,[23] especially in view of the complex landscape these agreements create and the content of Article XXIV and others. The original burden of proof for a complaint relating to article XXIV and its equivalents is easy to meet; all RTAs and PTAs are deviations from the Most Favored Nation rule by definition. As the burden of proof shifts to the defendant, it is up to them to demonstrate that the PTA or RTA is compatible with their GATT obligations. The lack of adequate monitoring mechanisms also contributes to this confusion and reluctance to litigate.

The cases that brought the issue of RTAs and PTAs to be examined before the Dispute Settlement Body are *Turkey - Textiles*[24] and *Argentina - Footwear (EC)*[25] mainly, but also, *Canada Autos,*[26] *Brazil - Tyres*[27] and *U.S. - Steel Safeguards*.[28]

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20 *See* David A. Gantz, Liberalizing International Trade after Doha: Multilateral, Plurilateral, Regional, and Unilateral Initiatives 138 (2013).

21 Viet D. Do & William Watson, Economic Analysis of Regional Trade Agreements 7-22 at 8 (2006).

22 The World Bank has created a comprehensive database to assemble data for FTAs notified before the WTO and those that have not been notified yet. *See* Global Preferential Trade Agreement Database *available at* http://wits.worldbank.org/gptad/library.aspx (last visited Jun. 10, 2016).

23 Matsushita et al., *supra* note 16 at 582-89, *see also* Petros Mavroidis, *If I Don't Do It Somebody Else Will (Or Won't)*, Mimeo (2005).

24 Appellate Body Report, *Turkey - Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R (Oct. 22, 1999); Panel Report, *Turkey - Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R (May 31, 1999) (adopted Nov. 19, 1999 as modified by Appellate Body Report, *Turkey - Restrictions on Imports of Textiles and Clothing Products* WT/DS34/AB/R (Oct. 22, 1999))

25 Appellate Body Report, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14, 1999); Panel Report, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/R (June 25, 1999) (adopted Jan. 12, 2000 as modified by Appellate Body Report, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14. 1999)).

26 Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry,* WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000); Panel Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R (Feb. 11, 2000) (adopted June 19, 2000 as modified by Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry,* WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000)).

27 Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, (Dec. 3, 2007); Panel Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (Jun. 12, 2007) (adopted Dec. 17, 2007 as modified by Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R (Dec. 3, 2007)).

28 Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/

Turkey - Textiles focused on Customs Unions and the Appellate Body ruled that a Customs Union may be inconsistent with the GATT, and in *Argentina - Footwear*, the Panel discussed some GATT-consistency aspects of the Southern Common Market (MERCOSUR).[29] A test for RTAs and PTAs under the GATT has three components: first, a procedural requirement (the notification), second, a substantive internal requirement, the obligation to liberalize all trade amongst PTA/RTA members, and third, a substantive external requirement, the obligation not to raise the overall level of protection.[30]

In a recent case between Peru and Guatemala, the Panel and the Appellate Body members were asked to determine the relevance of a Free Trade Agreement between the two countries signed in 2011[31] to the WTO Agreements. In particular, Peru argued that it had a right based on the FTA and upon agreement with Guatemala to maintain the price range system on certain agricultural products under scrutiny in this case.[32] Peru asserted that under WTO law the price range system would be illegal, but this is not the case as it is consistent with the FTA and the FTA prevails.[33] Guatemala on the other hand argued that the WTO Panel cannot discuss the FTA as it is not related to the WTO covered agreement.[34] The Panel discussed the chronology of the negotiations and the entry into force of the Peru, Costa Rica, Honduras, Panama and Guatemala FTA.[35] The Panel continued with a limited but substantive analysis,[36] but concluded that since the FTA has not entered into force, it was not necessary for the Panel to rule on the content of the FTA and its relationship to the WTO covered Agreements.[37]

This dictum implies that if the FTA had been in force, the Panel would have answered the question of the relationship between the FTA and the WTO Agreements (the GATT and the Agreement on Agriculture).[38] The Appellate Body

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DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (Nov. 10, 2003); Panel Report, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R, and Corr.1 (Jul. 11, 2003) (adopted Dec. 10, 2003 as modified by Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R (Nov. 10, 2003)).

29 Also Peter Van den Bossche, The Law and Policy of the World Trade Organization: Text, Cases and Materials at 699 (2008).

30 Matsushita et al., *supra* note 16, at 555.

31 Tratado de Libre Comercio Guatemala-Perú signed between Guatemala and Peru in December 2011, *avalilable at* http://www.sice.oas.org/Trade/GTM_PER_FTA_s/GTM_PER_ToC_s.asp (last visited Jun. 10, 2016).

32 Panel Report, *Peru - Additional Duty on Imports of Certain Agricultural Products*, ¶ 7.24, WT/DS457/R, WT/DS457/R/Add.1 (Nov. 27, 2015) (adopted Jul. 31, 2015 as modified by Appellate Body Report, *Peru - Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R (July 20, 2015)).

33 *Id.* ¶ 7.25.

34 *Id.* ¶ 7.27.

35 *Id.* ¶¶ 7.30-7.33.

36 *Id.* ¶¶ 7.34-7.42, esp. 7.40 seq.

37 *Id.* ¶ 8.1.f.

38 *See* Stephanie Hartmann, *Recognizing the Limitations of WTO Dispute Settlement - The Peru-Price Bands Dispute and Sources of Authority for Applying Non-WTO Law in*

further affirmed this finding, saying first that the FTA was not relevant in the interpretation of the Agreement on Agriculture[39] and second that the Panel "did not err in declining to make findings as to whether the FTA modified the WTO rights and obligations between Peru and Guatemala."[40] In one sense, the decisions show that the Panels and the Appellate Body, if relevant, are willing to go into depth in discussing PTAs/RTAs and FTAs. However, the courts carefully avoided actually engaging in the controversial questions that such cases raise.

III. THE DOHA TRANSPARENCY MECHANISMS

The Doha Round has been known, among other things, for not having produced any agreements in almost over a decade since its launch.[41] However, the General Council adopted two decisions, one in 2006 and one in 2010, establishing two transparency mechanisms, one for Preferential Trade Agreements and one for Regional Trade Agreements. Arguably, both mechanisms address issues covered in the Doha agenda. More specifically, the preamble of the Doha Ministerial Declaration emphasizes the compatibility of Regional Trade Agreements and the WTO:

> We stress our commitment to the WTO as the unique forum for global trade rule-making and liberalization, while also recognizing that regional trade agreements can play an important role in promoting the liberalization and expansion of trade and in fostering development.[42]

Within this framework, paragraph 29 of the Doha Declaration further provides that:

> We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional

WTO Disputes 48 GEO. WASH. INT'L L. REV 617-79 (2016), Joost Pauwelyn, *Interplay between the WTO Treaty and Other International Legal Instruments and Tribunals: Evolution after 20 Years of WTO Jurisprudence* (2016), *available at* SSRN http://ssrn.com/abstract=2731144 (last visited Jun. 10, 2016).

39 Appellate Body Report, *Peru - Additional Duty on Imports of Certain Agricultural Products*, ¶ 6.4.c, WT/DS457/AB/R, WT/DS457/AB/R/Add.1 (Jul. 20, 2015) (adopted Jul. 31, 2015).

40 *Id.* ¶ 6.5.

41 *See* at the WTO website Beginda Pakpahan, *Deadlock in the WTO: What Is Next?*, *available at* https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/art19.htm (last visited Jun. 10, 2016) and also among many on this topic James Scott & Sophie Harman, *Beyond Trips: Why the WTO's Doha Round Is Unhealthy*, 34 THIRD WORLD Q. 1361-76 (2013); Bernard Hoekman & Petros Mavroidis, *WTO 'à la Carte' or 'Menu du Jour'? Assessing the Case for More Plurilateral Agreements*, 26 EUR. J. INT'L L. 319-43 (2015); Stephen Woolcock, *Getting past the WTO Deadlock: The Plurilateral Option?* (2013), *available at* http://eprints.lse.ac.uk/55842 (last visited Jun. 10, 2016)/; Erik Dickinson, *The Doha Development Dysfunction: Problems of the WTO Multilateral Trading System*, 3 THE GLOBAL BUS. L. REV. 6 (2013).

42 Doha Declaration, *supra* note 5, para. 4, preamble.

> trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.[43]

As such, with the increasing number of Regional Trade Agreements being signed by WTO member states, the regulatory turn on "procedures applying to existing WTO provisions" focused on the lack of a functioning multilateral surveillance mechanism for RTAs.[44] Thus, the Negotiating Group on Rules focused on transparency since October 2002[45] and in 2006 the General Council adopted the first decision on transparency entitled "Transparency Mechanism for Regional Trade Agreements" (RTA/2006 Decision).[46] In 2010, the General Council adopted the second decision, entitled "Transparency Mechanism for Preferential Trade Agreements" (PTA/2010 Decision).[47] Both decisions can be immediately implemented on a provisional basis, as is explained in paragraph 47 of the Doha Declaration,[48] even though the Doha Round is treating all negotiations as a single undertaking. The scope of the two instruments differs in that the first discusses any sub-multilateral trade agreements among WTO member states, while the second discusses any non-reciprocal preferential treatment measures adopted on behalf of more developed countries in order to assist less and least-developed WTO member states.

The most important contributions of the new RTA mechanism to the existing system provided in Article XXIV of the GATT are the early notification mechanism and the procedures for consideration and publication of RTAs. The PTA mechanism also establishes a similar consideration and publication mechanism, although slightly less stringent with respect to the process and the time-frames involved.

The early notification mechanism introduced in the RTA/2006 Decision in part A paragraph 1 provides that:

> (a) Members participating in new negotiations aimed at the conclusion of an RTA shall endeavour to so inform the WTO.
> (b) Members parties to a newly signed RTA shall convey to the WTO, in so far as and when it is publicly available, information on the RTA, including its official name, scope and date of signature, any foreseen timetable for its entry into force or provisional application, relevant contact points and/or website addresses, and any other relevant unrestricted information.
> 2. The information referred to in paragraph 1 above is to be forwarded to the WTO Secretariat, which will post it on the WTO website and will periodically provide Members with a synopsis of the communications received.

Paragraph 3 of Part B in the RTA/2006 decision clarifies the prompt notification period discussed in Paragraph 7 of Article XXIV GATT, defining it as "no later

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43 *Id.* para. 29.

44 *See* Roberto V. Fiorentino et al., *The Landscape of Regional Trade Agreements and WTO Surveillance, in* Multilateralizing Regionalism: Challenges for the Global Trading System 56 (Patrick Low & Richard Baldwin eds., 2009).

45 *Id.* at 57.

46 Transparency Mechanism for Regional Trade Agreements, General Council Decision of 14 December 2006, WT/L/671, Dec. 18, 2006.

47 Transparency Mechanism for Preferential Trade Agreements, General Council Decision of 14 December 2010, WT/L 86 2010, Dec. 16, 2010.

48 Doha Declaration, *supra* note 5, para. 48.

than directly following the parties' ratification of the RTA or any party's decision on application of the relevant parts of an agreement, and before the application of preferential treatment between the parties." Paragraph 4 requires that the full text of the RTAs is notified to the WTO.

The mechanism described in the RTA/2006 Decision under "Procedures to Enhance Transparency" applies to both RTAs and PTAs, but with respect to PTAs it is further elaborated on in the PTA/2010 Decision. In particular, the RTA/2006 Decision provides that after notification, RTAs are considered by Member states within the year of the date of notification. The WTO Secretariat also prepares a factual presentation in which it "shall refrain from any value judgment" and which cannot be used as a basis for dispute settlement. Already in this provision we can see the tension between multilateralism and regionalism and the reluctance of the WTO as an institution to take a firm stance for or against such RTAs. Another crucial contribution of this mechanism appears in paragraph 13, according to which:

> All written material submitted, as well as the minutes of the meeting devoted to the consideration of a notified agreement will be promptly circulated in all WTO official languages and made available on the WTO website.

Additionally, paragraph 21 further discusses the electronic database to be established and maintained by the Secretariat, which "should be structured so as to be easily accessible to the public." Finally, Part E outlines the two committees entrusted with the implementation of the transparency mechanism, first the Committee on Regional Trade Agreements (CRTA) for RTAs and second the Committee on Trade and Development (CTD) for PTAs. Paragraph 19 authorizes the WTO Secretariat to provide technical support to developing and least-developed countries, another new feature introduced under the RTA/2006 Decision.

Besides the more lenient time-frames, the PTA/2010 Decision clarifies the role of the Secretariat and the CTD in the process of consideration of PTAs. An elaborate description of the contents of the factual presentation prepared by the WTO Secretariat is described in paragraph 9 of the PTA/2010 Decision:

> [T]he Secretariat may also include in the factual presentation, as appropriate, the following elements: background information, scope and coverage (products and countries), exceptions, S&D provisions, specific rules concerning the application of the scheme (graduation, eligibility for additional preferences), rules of origin, provisions affecting trade in goods (IP, labour, environment, TBT, SPS, trade remedies, if applicable), specific customs-related procedures, composition of merchandise imports from beneficiary member, fulfillment of TRQs, relationship with other PTAs by the same Notifying Member and imports under the PTA in the last three years, if applicable.

Similarly there is an electronic database of PTAs, on the WTO website which is available to the public. Figure 1 gives a summary of the consideration process flow chart established in both Decisions.[49]

[49] Fiorentino et al., s*upra* note 44, at 63.

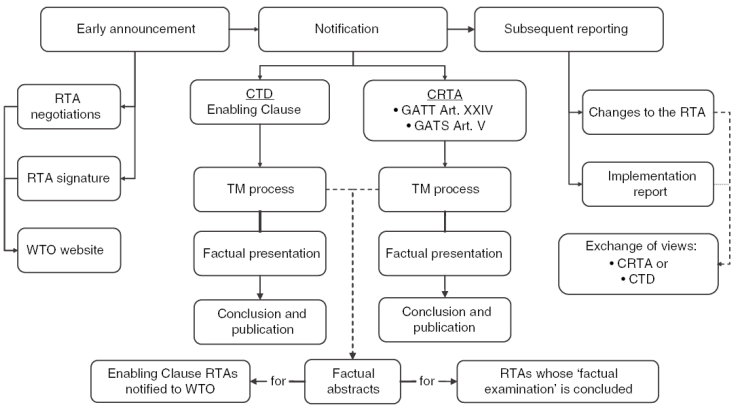

Figure 1: Processes established by the RTA/2006 and PTA/2010 Transparency Mechanism Decisions[50]

These Decisions are a serious attempt to address the issues that Working Groups faced under the GATT when considering Customs Unions and Free Trade Areas. There have been very few cases in which such Working Groups have reached a conclusion on the compatibility of such agreements and the GATT.[51] Transparency, namely disclosure, consideration and publication, is a significant first step in that direction. Still, neither decision, similarly to Articles GATT XXIV and GATS V provides for any consequences, should member states violate this process. As such, the enforcement record of both decisions is fragmented at best.[52] The WTO website indeed has two portals, one for PTAs and one for RTAs.[53] It appears however that not all RTAs and PTAs are notified there and overall, even the ones notified are not properly evaluated by the WTO.[54] Another view is that the existing system has been overwhelmed by the legal definitions included in Articles XXIV GATT and V GATS, another issue impeding the RTA and PTA review process.[55]

Notably, an agreement was recently signed between Canada and the European Union, CETA, or the Canada-European Union Trade Agreement.[56] Canadian Prime Minister Stephen Harper and EU President Jose Manuel Barroso discussed the

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50 *See Transparency Mechanism for RTAs,* World Trade Organization, *available at* https://www.wto.org/english/tratop_e/region_e/trans_mecha_e.htm (last visited Jun. 10, 2016).

51 Van den Bossche, *supra* note 29, at 709 & n. 387.

52 Fiorentino et al., *supra* note 44, at 60.

53 *Preferential Trade Agreements, available at* http://ptadb.wto.org (last visited Jun. 10, 2016); *Regional Trade Agreements, available at* http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx (last visited Jun. 10, 2016).

54 Matsushita et al., *supra* note 16, at 554.

55 Gantz, *supra* note 20; Robert Gilpin, Global Political Economy: Understanding the International Economic Order 189 (2011).

56 *EU and Canada Strike Free Trade Deal*, EU Press release, Brussels Oct. 18, 2013, *available at* http://trade.ec.europa.eu/doclib/press/index.cfm?id=973 (last visited Jun. 10, 2016).

significance of the Agreement in a news conference, where Mr. Harper acknowledged that "This is a big deal. Indeed it is the biggest deal our country has ever made. This is a historic win for Canada."[57] The translation and approval processes, in the EU member states' languages, and by provincial parliaments in Canada and as provided in the EU has been cited as the reason why the agreement had not been published for quite a long time.[58] The Canadian government first published a summary of the agreement, which Trade Minister Ed Fast argued it provides "everything Canadians need to know"[59] and only later the full text.[60] Even though the translation and notification procedures are reasonable in international relations, under the RTA/2006 Decision, the parties should already notify the WTO under the early announcement process or the bilateral trade agreement. Even though both Canada and the European Union are two of the strongest transparency proponents in the WTO, the two parties have failed to maintain a consistent attitude towards transparency, even after negotiations were concluded and the text was finalized. Essentially, the CETA example is indicative of the low enforcement capabilities of both General Council Decisions. More recently, there was another leak of the text of the agreement currently negotiated between the EU and the United States, TTIP, which produced more civil society backlash particularly in Europe on the lack of transparency in the negotiaitons' process.[61]

IV. Asymmetrical aspects of PTAs/RTAs

The multilateral trading system established by the GATT and the WTO does not prevent its members from concluding bilateral or multilateral trade agreements of a more limited scope (namely among only few WTO member states). Regional Trade Agreements used to be traditionally signed among countries in terrestrial proximity but currently the term in the WTO refers to reciprocal trade agreements between two or more partners. They include Free Trade Agreements and Customs Unions. Preferential Trade Agreements involve unilateral trade preferences. They

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57 Paul Waldie, *Canada*, *EU Unveil 'Historic' Free-Trade Agreement*, The Globe and Mail (Oct. 18 2013).

58 *Id.*

59 Stuart Trew, *Is Canada Legally Bound to Release the CETA Text?*, Council-of-Canadians's blog (Nov.8 2013) parts *available at* http://rabble.ca/blogs/bloggers/council-canadians/2013/11/canada-legally-bound-to-release-ceta-text.

60 Canada-European Union: Comprehensive Economic and Trade Agreement (CETA), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng.

61 The text was leaked by Greenpeace and published in https://ttip-leaks.org (last visited Jun. 10, 2016). *See also* Sewel Chan, *Greenpeace Leaks U.S.-E.U. Trade Deal Documents*, N.Y. Times May 2, 2016; Peter Buxbaum, *Leaked TTIP Documents Met With Furor in Europe, Silence in U.S.: EC Trade Commissioners Says Positions Outlined in Texts Will Not Make It to Final Accord*, *available at* http://www.globaltrademag.com/global-trade-daily/news/leaked-ttip-documents-met-with-furor-in-europe-silence-in-u-s (last visited Jun. 10, 2016); Trevor Timm, *The TTIP and TPP Trade Deals: Enough of the Secrecy*, The Guardian, May 4 2016.

include Generalized System of Preferences schemes as well as other non-reciprocal preferential schemes granted a waiver by the General Council.

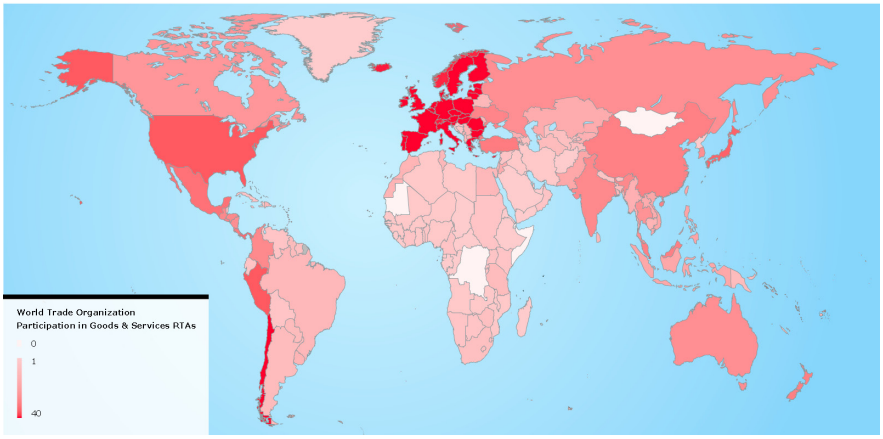

Figure 2: Map of RTA participants[62]

PTAs and RTAs are exceptions to the Most Favored Nation rule of Article I:1 of the GATT. In essence, both the GATT/WTO and PTAs/RTAs aim towards trade liberalization, albeit at a different scale, and while the WTO is based on the principle of non-discrimination, the same does not apply to PTAs/RTAs, which have a discriminatory logic in their rationale.[63] The two schemes pursue the same goal using contradictory rules, creating some reasonable frustration with respect to their compatibility.[64] The unexpressed rationale for such agreements is that more liberalization, even if it occurs at a bilateral level, is better than no liberalization at all. Moreover, the GATT Founding Members at the time most likely did not want to annul their regional trade relations agreements, so instead of dealing directly with a possibility of conflict between multilateralism and preferential access to certain markets, they included an exception. Thus, it is very likely that the same subject matter is covered by PTAs/RTAs and the WTO rules, creating the potential for conflict.[65]

This asymmetry is intensified due the large volume and the importance of regional agreements.[66] We need to go no further than point to the European Union,

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62 Participation in Regional Trade Agreements, *available at* https://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm (last visited Jun. 10, 2016).

63 Fiorentino, *supra* note 44, at 54-55.

64 Ironically an argument can be made that the WTO could aspire to be a global customs union or regional trade agreement, *see* as an analogy Murray Kemp & Henry Wan, *An Elementary Proposition Concerning the Formation of Customs Unio*ns, 6 J. Int'l Economics 95, 96 (1976).

65 Thomas Cottier & Marina Foltea, Constitutional Functions of the WTO and Regional Trade Agreements 43-76, at 53 (2006).

66 *See* Figure 3 for data on numbers of Regional Trade Agreements concluded between 1948 and 2014.

the North American Free Trade Agreement (NAFTA), MERCOSUR and the Association of Southeast Asian Nations (ASEAN). These agreements have strong impact for the trade amongst their members and are only four of the hundreds of bilateral and multilateral agreements that essentially provide an exception to the cardinal GATT rule of non-discrimination. As such, concerns have been raised that such agreements undermine "the transparency and predictability of trade relations."[67]

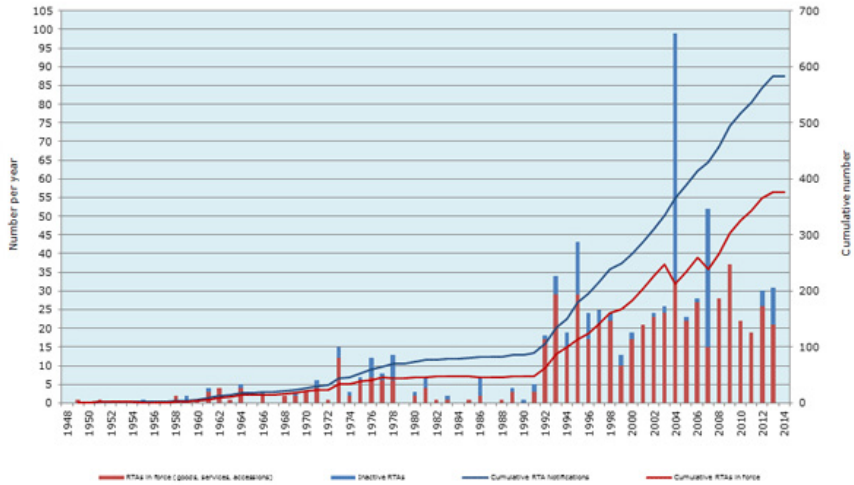

Figure 3: Regional Trade Agreements Concluded between 1948 and 2014[68]

Concerns with respect to the exclusionary nature of PTAs and RTAs are not unwarranted. A particular statement of U.S. Trade Representative Robert Zoellick in Cancun during the 2003 WTO Ministerial shows that advanced economies, when they cannot achieve the type of agreements they want in the multilateral trading system, resort to coalitions of the few. In Cancun, developing countries finally actively demanded that their needs be part of the agenda, or else they would not allow for the negotiations and the new Round to move any further. Instead of embracing these requests, even in the slightest, the U.S. Trade Representative retaliated with turning to a form of "coalitions of the willing." It is interesting to see how Paul Blustein reported Zoellick's reactions after the G-20's Cancun stand-off:

> Reflecting his frustration over the events in Cancún was an op-ed he wrote in the Financial Times on September 22, 2003, a few days after the meeting. He blasted his adversaries - Brazil was mentioned five times - for having fostered a "culture of protest that defined victory in terms of political acts rather than economic results." He made it clear that *he was going to reward cooperative*

67 Fiorentino, *supra* note 44, at 28.

68 Regional Trade Agreements, Facts and Figures, *available at* https://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited Jun. 10, 2016).

> *countries and punish uncooperative ones by intensifying his "competitive liberalization" strategy of pursuing trade deals on multiple levels*:
> [Zoellick wrote]: "The key division at Cancún was between the can-do and the won't-do. For over two years, the U.S. has pushed to open markets globally, in our hemisphere, and with sub-regions or individual countries. As WTO members ponder the future, the U.S. will not wait. We will move towards free trade with can-do countries."
> America's market of 300 million free-spending consumers, in other words, would be used as both a carrot and a stick. *Countries that shared Washington's enthusiasm for freer trade would obtain preferential access to that market by signing bilateral and regional agreements eliminating most trade barriers between them and the United States. Meanwhile, the ranks of the reluctant would be left at a disadvantage; their products would be subject to the tariffs that Washington maintained on MFN terms for members of the WTO*. Eventually, they would recognize that their self-interest lay in joining the U.S.-led bandwagon, the result being that small deals would prove to be "building blocks" toward bigger ones and, ultimately, a worldwide one.[69]

This passage highlights the exclusionary underpinnings behind the will of powerful countries to enter PTAs and RTAs. Arguably, there exist strong links between the statement by Bob Zoellick and the finalization of TTP, as well as the advanced stage that TTIP negotiations are at now. The difference of obtaining consensus in the realm of the WTO versus plurilaterally is significant; indeed the Green Room problems exclude smaller states from initial consultations, but eventually they are added in the negotiations and can meaningfully, alone or in coalitions, engage in discussions on legal and economic parameters of new WTO agreements. If the forum of negotiations is outside the WTO altogether, third parties can in no way be part to any of the process.[70]

V. PTAs/RTAs and Trade Liberalization

The debate on regional integration as an optimum versus the multilateral path as the best way to foster trade liberalization has yet to produce concrete and conclusive results. On one hand it can be argued that regional trade integration leads to faster trade liberalization, even if it occurs outside the WTO. Economic ties amongst smaller groups may be stronger, the costs of negotiations are lower since fewer parties are involved and elimination of tariffs inside the PTA or the RTA can occur much faster than in the multilateral framework. Coupled with this idea is that political reasons (not only economic) may lie behind deeper integration, as is the case for the (arguably unique in this respect) European Union. This argument favors PTAs and

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69 Paul Blustein, Misadventures of the Most Favored Nations 174 (Public Affairs 2009) (emphasis added).

70 *See also* Nicholas Lamp, *The Club Approach to Multilateral Trade Lawmaking* (Queen's University Legal Research Paper No. 2015-005, 2014), *available at* SSRN: http://ssrn.com/abstract=2574864 (last visited Jun. 10, 2016).

RTAs as they appear to be creating more trade.[71] Another interesting phenomenon in the RTA proliferation has been the rise of "new players" in international trade, such as the trading bloc of South American countries,[72] the Asian Tigers,[73] Brazil, Russia, India, China and South Africa (BRICS) and Middle Income countries, fundamentally changing the landscape of international trade.

On the other hand, several studies on customs unions and free trade areas suggest that the trade-diversion effects may be greater than the trade-creation, especially since PTAs and RTAs favor trade amongst participants, resulting in less trade with members of the PTAs and non-members.[74] Trade economists have in fact argued that regionalism leads to factionalization, and PTAs may be optimal to protectionism, but they will always fall to the second-best spot[75] compared to a functioning global free trade system, since multilateralism in the WTO context entails a global vision lacking in regionalist integration models.[76]

Moreover, regional trading agreements cannot be fully open to accession from third parties. If they remained opened to membership, the original parties would have fewer incentives to commit to lowering trade tariffs for fear of considerable changes in value of their preferences with the accession of a new party. Such problems are not as prevalent in a multilateral context. For example, the accession of China, a huge country and a great trading partner, may have taken years to conclude but the commitment to trade liberalization always supports accession of new members instead of exclusion. The exclusionary potential is however prevalent in regionalism.

The intensified attention on PTAs and RTAs in the Doha Declaration reflects the current "regionalization" of international trade (or "new regionalism")[77] which is portrayed as a group of systems which are "not attempting to shield themselves from the global economy and are rather trying to maximise their participation in it."[78] However the inefficiency of existing transparency mechanisms as well as the utilization of Preferential Trade Agreements as a way out of negotiation difficulties at the multilateral level have rendered PTAs "stumbling blocks" for world trade for smaller economies which cannot negotiate such agreements as equals and rely on the GATT MFN for access to other countries' trade markets.[79]

With respect to transparency and monitoring, despite the existence of substantial mechanisms, in addition to Article XXIV and the Understanding on Article XXIV, Article V of the GATS and the Generalized System of Preferences,

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71 Fiorentino, *supra* note 44, at 695.

72 Which GANTZ, *supra* note 20, calls the Jaguars.

73 TREBILCOCK, *supra* note 9, at 197 discussing the rapid growth in intra Asian trade, and GANTZ, *supra* note 20.

74 Fiorentino, *supra* note 44, at 696.

75 ROBERT LAWRENCE, REGIONALISM, MULTILATERALISM AND DEEPER INTEGRATION, 29-30 (1996).

76 TREBILCOCK, *supra* note 9, at 195.

77 For its characteristics *see* CHAD DAMRO, THE POLITICAL ECONOMY OF REGIONAL TRADE AGREEMENTS 23-42, 27 (2006).

78 JAMES MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO 127 (2002). *See* more recently GANTZ, *supra* note 20 at 201.

79 Nordström Håkan, *Participation of Developing Countries in the WTO - New Evidence Based on the 2003 Official Records*, *in* WTO LAW AND DEVELOPING COUNTRIES 170 (George A. Bermann & Petros C. Mavroidis eds., 2007).

their enforcement momentum is low, at best. The web of RTAs and PTAs has grown very rapidly in the last decade. In contrast to the Doha Development Round, where all agreements must be considered under a single undertaking and also need to be agreed upon by consensus, regionalism has significantly expanded, to cover for the regulatory space of trade liberalization that multilateralism does not seem to achieve, albeit only for small groups, producing regulatory cooperation in trade matters that have not occurred at the WTO among all member states.

The WTO has committed institutionally to monitor, consider and publish the RTAs and PTAs. As it remains unclear whether in fact such regional initiatives undermine the multilateral agenda of the WTO, consideration beyond a superficial examination is rendered difficult. Similarly, not all agreements have been published as we saw previously, illustrated by CETA and TTIP. A possible solution for this problem is to introduce some form of a penalty system for failure to properly notify and publish such agreements in the WTO. Another more obvious solution is to raise the budget for the monitoring mechanisms, partially remove their member-driven elements and assign a new part of the WTO Secretariat specifically to monitoring duties. Rather than relying on Working Groups of member state committees to carry out the vast amount of monitoring, it might be preferable to rely on the administration instead. Working Groups can be introduced at a second stage, after the collection of sufficient economic data and the drafting of initial but extensive reports.

As RTAs and PTAs have multiplied over the years, they have been described as a "spaghetti bowl", or a "noodle bowl" or even a "lasagna dish." [80] Pasta-metaphors aside, RTAs and PTAs create a very large web of agreements that can have negative effects on all those left outside of these cooperative structures and compromises general trust in the multilateral structure of trade negotiations. Keeping track of them alone consumes a part of the WTO resources. One proposal in order to remedy these detriments is to place a cap on the number of the Agreements.[81] Introducing a straightforward cap on PTAs and RTAs may cause a sort of revolution in the WTO and never reach consensus. Thus one form of moratorium could be based either on trade volume covered, or a set of products that can be agreed on by all WTO members to remain outside the scope of PTAs and RTAs. If the United States and the European Union are serious about their commitment to multilateralism then such an agreement can give them an opportunity to show it. Additionally WTO members could discuss the possibility for compensatory mechanisms in case of Agreements, which are found to violate WTO rules.

Finally, we should note here that there is one set of PTAs that should not be scrutinized nor be altered as they would end up reducing development assistance or otherwise negatively affect developing and least-developed countries agreements giving preferential treatment to least-developed countries should be sustained, as they are key to their economies and trade[82] or at least be converted to import

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80 Jagdish Bhagwati, *US Trade Policy: The Infatuation with FTAs,* Academic Commons (1995); *Id*., *The Noodle Bowl*,: *Why Trade Agreements Are All the Rage in Asia*, The Economist , 3 Sept. 2009.

81 Paul Blustein, Misadventures of the Most Favored Nations 277 et seq. (Public Affairs 2009).

82 Håkan, *supra* note 79, at 170.

subsidies that would benefit them equally.[83] Moreover there is an additional positive spillover of PTAs for least-developed countries. During smaller scale negotiations smaller countries can refine their negotiating tactics. An interesting example is the case of Zambia and Mauritius as participants in the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC). The participation of the two countries in both Regional Trade Agreements has assisted them in preparations for negotiations in the WTO context by providing training, raising awareness, and overall giving a more familiar forum with countries facing similar issues for the exchange of trade information and ideas.[84]

The official rhetoric in the WTO context does not emphasize the exclusionary potential of such agreements at all. In the next section we will see how one of the most important self-assessment documents, the Sutherland Report, confronted with the issue of development and regionalism, did not engage in meaningfully pointing out any of the negative impact that such PTAs and RTAs may have, for either the international trading system as a whole or for its weaker members.

VI. THE SUTHERLAND REPORT ON PTAS/RTAS AND DEVELOPMENT

In view of the WTO 10th anniversary in 2005, the then Director-General Supachai Panitchpakdi commissioned a report from a consultative board consisting of the former Director-General of the WTO, Peter Sutherland and a few select members of governments, academics and policy-makers. The result was a report entitled "The Future of the WTO: Addressing Institutional Challenges in the New Millennium."[85] Previously, in 1983, GATT Director-General Arthur Dunkel had similarly commissioned the "Leutwiler Report", which actively pushed towards the initiation of the Uruguay Round and the establishment of a robust multilateral trading system. The Sutherland report looks at the functioning of the WTO as an institution.

The report purports to be an evaluation of the WTO and to discuss legitimacy concerns concerning the WTO. In its nine chapters, the report discusses central issues such as the relationship between the WTO and Globalization and Sovereignty (Chapters I and III), the erosion of non-discrimination mostly due to national protectionism and Regional and Preferential Trade Agreements (Chapter II), the problems of the consensus voting rule, political reinforcement, process efficiency and the WTO's variable geometry (Chapters VII and VIII), the relationship of the

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83 Limão Nuno & Marcelo Olarreaga *Trade Preferences to Small Developing Countries and the Welfare Costs of Lost Multilateral Liberalization*, *in* WTO LAW AND DEVELOPING COUNTRIES 36-58 (George A. Bermann & Petros C. Mavroidis eds., 2007).

84 Sanoussi Bilal & Stefan Szepesi, *How Regional Economic Communities Can Facilitate Participation in the WTO: The Experience of Mauritius and Zambia*, *in* MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES 389-90 (Peter Gallagher et al. eds., 2005).

85 The Future of the WTO: Addressing Institutional Challenges in the New Millennium, *available at* https://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf [hereinafter Sutherland Report].

WTO with other international organizations (Chapter IV), transparency and civil society participation (Chapter V), the dispute settlement system (Chapter VI) and challenges and improvements of administrative nature for the Secretariat and the Director General (Chapter IX).

Even though the report includes some (albeit very limited) constructive criticism for the WTO, it is largely an apologetic document, a defense of the WTO[86] and those aspects of globalization that provide fertile ground for the economic paradigm under which the organization operates. It has been criticized as a "trade liberalization gospel"[87] which is "trapped in [its] functionalist straightjacket." Its conclusions are seen as unconvincing,[88] as being an attempt to defend "the *status quo* by WTO insiders."[89] Indeed, the members of Consultative Board are linked to the WTO; the report was written only by them, without the participation of civil society actors, and it even mentions that one goal of the report is to "revisi[t] some of the fundamental principles of the trading system that, in our view, have been greatly misunderstood or misrepresented."[90] Among the academics discussing the Sutherland Report, a small fraction who have or have had an institutional affiliation with the organization are the only ones who agree with the analysis and conclusions of the Report.[91] The usefulness of the Sutherland Report does not lie in providing answers for the legitimacy problems of the WTO, as it seems to be giving the WTO a perfect score. However, it helps delineate some issues, and thus we can sketch a rough territory where the WTO needs improvements.

The report did not adequately address the central issue of development in the WTO, in the form of the negotiating asymmetries for developing countries as well as the incomplete and fragmented understanding of development needs, coupled with a blind trust on the trade liberalization paradigm. For as long as trade negotiations resulted in lower trade tariffs, the legitimacy issues facing the international trading system (the GATT at the time) remained less visible. Developing countries voiced their frustration on a number of occasions, but the institutional response, reflecting developed countries' convictions was that as long as developing countries stay on the trade train, they will eventually gain some speed, reduce poverty and create prosperity for themselves. Since 1995 and the Uruguay Round results, we have yet to witness a successful trade round. Legitimacy as a derivative of trade negotiations and their resulting tariff reductions is no longer a plausible narrative in WTO discourse. Thus, in the ten-year anniversary of the WTO, the Sutherland Report had the opportunity to reframe the issue of development in the WTO. In view of the Doha Development Round, the Report could take advantage of the opportunity and

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86 Joost Pauwelyn, *The Sutherland Report: A Missed Opportunity for Genuine Debate on Trade, Globalization and Reforming the WTO*, 8 J. Int'l Econ. L. 329 (2005).

87 Deborah Z. Cass, *The Sutherland Report: The WTO and Its Critics*, 2 Int'l Org. L. Rev. 153, 154 (2005).

88 Armin Von Bogdandy & Markus Wagner, *The Development of the WTO-Remarks on the Sutherland Report*, 2 Int'l Org. L. Rev. 167, 168 (2005).

89 Pauwelyn, *supra* note 86, at 329. *See also* on page 7 of the Sutherland Report, *supra* note 85, the short bios of the Consultative Board, all of whom have long-standing careers in international organizations.

90 Sutherland Report, *supra* note 85, at 5.

91 For example, *see* William J. Davey, *The Sutherland Report on Dispute Settlement: A Comment*. 8 J. Int'l Econ. L. 321 (2005); Mitsuo Matsushita, *The Sutherland Report and Its Discussion of Dispute Settlement Reforms*, 8 J. Int'l Econ. L. 623 (2005).

revisit the liberalization paradigm. Instead, citing a number of "empirical studies" and in sync with the Report's tone, development and internal transparency concerns are barely addressed. It is their own "autarkic, inward-looking policies" and "their own protection" that "undermined the developing countries' export performance by creating a 'bias against exports.'"[92] Countries which benefit from preferential rules become "over-reliant on preference."[93]

The "it's-not-us-it's-you" tone of the report continues during the second theme, which dominated the criticism of the report. The openness of the organization towards civil society and NGOs is deemed satisfactory; the Secretariat does not have sufficient resources to do more; and, some of these organizations are intransparent themselves in the way they operate on a day-to-day basis. This type of reasoning was greatly criticized, and rightfully so, in the literature. Such a line of argumentation, not only fails to address but indeed fuels legitimacy problems, carries little normative value and does not contribute to a good governance model.

The Report falls short of explicitly and systematically discussing larger institutional problems and power asymmetries in the WTO, as well as the balance between legitimate national concerns for regulation and the principle of non-discrimination. State sovereignty has been eroded through participation in the WTO. The WTO has a long reach and affects a large segment of the domestic legal orders of its members, because of the pervasive nature of trade. Additional Agreements, especially the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), Technical Barriers to Trade (TBT) and GATS can leave economists hard-pressed to think of areas where the WTO has no relevance. The Sutherland Report adopts an analysis that treats the WTO as one of many intergovernmental organizations and the reduction of state sovereignty as a product of the proliferation of organizations. This obscures the fact that trade regulation is highly intrusive on national legislations and since the Uruguay Round the WTO has extended its reach in a vast area of jurisdiction. As such, national parliaments are *de facto* sidestepped. Any legitimacy discussion surely does not need to propose the demise of the current trading system, intrusive as that system may be or seem. Instead, the Report could have pointed out avenues for the re-politicization of interest areas in order to re-introduce debates and participation of stakeholders that would have been part of national deliberation processes had the WTO not acquired jurisdiction in these areas. Both for underestimating the deflation of sovereignty, and for failing to remedy the legitimacy issues that deflation causes, the report falls critically short.

Chapter V of the Report contains some discussion on internal transparency, that is, negotiating asymmetries among WTO member states, especially present in the tension between developed and developing countries.[94] Internal transparency ironically is discussed in the context of justifying the need for secrecy of negotiations. Interestingly, despite the Doha Development Round and its challenges, and its explicit mention in Paragraph 10 of the Doha Declaration, the report does not elaborate on how internal transparency is compromised in the WTO by the treatment of developing countries.[95]

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92 Sutherland Report, *supra* note 85, para. 92.

93 *Id.* para. 101.

94 Robert Wolfe, *Decision-Making and Transparency in the 'Medieval' WTO: Does the Sutherland Report Have the Right Prescription?*, 8 J. Int'l Econ. L. 631, 639 (2005).

95 Pauwelyn, *supra* note 86, at 336-37.

Paragraph 222 of the report interestingly notes that developing countries participate much more in the Dispute Settlement Process than in the GATT, and "developing countries - even some of the poorest (when given the legal assistance now available to them) - are increasingly taking on the most powerful. That is how it should be." This statement is largely exaggerated. In fact, there still exist WTO member states that have never participated in the dispute settlement system, not even as third parties. Isolated examples like that of Antigua and Barbuda show that perhaps the system works, but it works for those who use it, which is not the overwhelming majority of the WTO. Also despite its victory against the United States during dispute settlement, the subsequent effective inability to implement the report should warrant a revision of the implementation rules. When cross-retaliation is allowed only within the domestic market of the winner, and the winner is a micro-state, then cross-retaliation is meaningless; no sector can be large enough to harm the strong state that stood on the other side of litigation. That is *not* "how it should be."

Once again in the report, the opportunity is missed to discuss at a pragmatic level how to bring developing countries not up to speed with trade, but on equal footing with their counterparts at an institutional level.[96] The repeated failures to conclude a negotiating round in Doha and later in Bali demonstrate that the institutional and collective reluctance to tackle internal transparency as a serious issue comes at a high cost that threatens the WTO's main function. This institutional reluctance is evident in the Sutherland Report. The Green Room issue is barely addressed. Emphasis is instead placed on the need for confidentiality of negotiations, a discussion on variable geometry and a gospel for the current negotiation arrangements that perpetuate the internal transparency deficits and are, in relative terms, archaic, since they are reminiscent of the GATT days.

Some discussion on least-developed countries appears later in the report[97] but does not explore their real problems with the WTO. They are mentioned as "unfortunately, insignificant in terms of world trade (even collectively)." However, as it appears from the Doha Round, collectively they can contribute to blocking further decision-making and their accession process takes a very long time (despite their "insignificance") as we will see in the next section on accessions and internal transparency *lato sensu*.

It is important to note here that even though the Sutherland Report rightly observes that the institutional and monetary resources of the WTO are not unlimited, this does not mean that focus on one form of transparency necessarily needs to occur at the expense of the other.[98] This perspective fails to capture the fact that institutional and pecuniary constraints reflect a lack of support from member states, another issue that should be remedied. Also, considering the extent of the WTO's legitimacy crisis, addressing these legitimacy problems should be a first priority for the organization, both at the internal and at the external level.

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96 Dan Sarooshi, *The Future of the WTO and Its Dispute Settlement System*, 2 Int'l Org. L. Rev. 129, 151 (2005).

97 Sutherland Report, *supra* note 85, at 67 et seq., para. 306 et seq.

98 Donald McRae, *Developing Countries and 'The Future of the WTO'*, 8 J. Int'l Econ. L. 603 (2005).

The Report discusses Preferential Trade Agreements and regionalism.[99] Although it mentions that the vast majority of the PTAs and RTAs have not been notified and all but one have never been examined for compatibility with the WTO Agreements, the Report does not encourage the organization to expose this state of affairs.[100] It engages in a discussion on whether such agreements promote or undermine the world trading system, only to conclude that the evidence and research is inconclusive. The systemic reluctance to discuss Regional Trade Agreements remains. We can hypothesize that this occurs at the expense of the less powerful players in the WTO.[101] Insofar PTAs are not even notified with the WTO, and power asymmetries are caused and perpetuated by PTAs the transparency deficit in this respect is massive, and it results both from the lack of disclosure and marginalization of member states.

VII. Expanding the notion of internal transparency

Internal transparency in the WTO is defined as "the issue of effective participation of developing countries in WTO decision-making."[102] In 2001, internal transparency was included as an issue in Paragraph 10 of the Doha Ministerial Declaration as follows:

> Recognizing the challenges posed by an expanding WTO membership, we confirm our collective responsibility to ensure internal transparency and the effective participation of all Members. While emphasizing *the intergovernmental character of the organization*, we are committed to *making the WTO's operations more transparent*, including through more effective prompt dissemination of information, and to improve dialogue with the public. *We shall therefore at the national and multilateral levels continue to promote a better public understanding of the WTO and to communicate the benefits of a liberal rules-based multilateral trading system.*[103]

Paragraph 10 of the Doha Declaration addresses both internal and external transparency, namely the relations between the WTO and citizens and civil society at large, although it only mentions the former by name. Arguably, Paragraph 10 could be divided in two to discuss internal transparency until the first period, and external for the rest of the paragraph. However, certain elements in the part after the first period can be seen as qualifiers for internal transparency: the WTO's intergovernmental character refers not only to the membership to the WTO and the conference of rights and duties reserved exclusively for states and not for other non-state entities, but also, *can* be a reference to sovereign equality as the foundation

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99 Sutherland Report, *supra* note 85, para. 68; paras. 75-87.

100 Pieter Jan Kuijper, *Do Parallels with Other International Organizations Help*, 2 Int'l Org. L. Rev. 191, 194 (2005).

101 *Id.*

102 Van den Bossche, *supra* note 29, at 150.

103 Doha Declaration, *supra* note 5 (emphasis added).

of international treaty-making competence. Sovereign equality is alluded to as it is possibly seen as a counterbalance, a cardinal notion in the foundation of international law that aspires to offset the problematic notion that some countries are not participating as effectively as others, as the first sentence implies. Even if internal transparency were formally recognized in the Doha Declaration, immediately after this recognition was tampered by an indirect reference to sovereign equality, significantly downplaying its importance.

The last sentence of paragraph 10 makes the notion of internal transparency even murkier. Issues of transparency are directly linked to lack of *public* understanding, without it being further clarified whether developing countries and their constituents are also victims to such a "misunderstanding" or this is a reference only to external transparency relating specifically to non-state stakeholders, citizens, consumers and for profit and non-profit entities. Finally, the last sentence, perhaps the most problematic of the entire paragraph is the one directional notion that only benefits are to be reaped from the liberal rules-based system that is the WTO. Even more here lie the notions that first, the problem with the WTO is not the lack of benefits, or that such benefits come from its liberal rules-based nature, but that all the above have somehow been lost in translation and not been communicated properly to those who are interested or care, or are affected by these rules; and second, that the very nature of the WTO as a legal system is decided and set, and what needs and can be negotiated is the communication of the benefits. This reduces Paragraph 10 to a debate on the WTO's public relations' agenda, and obscures the real issues that exist within the organization and that have resulted to a negotiations' standstill.

Since the Doha negotiation's deadlock, it is evident that internal transparency problems entail a lot more than an anomaly in the WTO's communications' strategies. This conclusion is also evident through literature that discusses law and development in the WTO; the lack of effective participation of developing countries is due to more embedded issues that date before the creation of the WTO, and even before the conclusion of the GATT, and are not unique to the international trading context.[104] Moreover, when one explores exclusionary practices from some WTO member states against others in general, problems appear outside the development framework as well.

Thus, I argue that the definition of internal transparency should not be pegged to developing countries. Instead, it should be extended for three reasons. The first is the need to remain more faithful to the letter of the Doha Declaration. Paragraph 10 stipulates that internal transparency problems are linked to the expanding WTO membership, without an explicit mention of developing countries. Therefore, other participation hurdles caused by the increasing size of the organization should be considered under paragraph 10.

Second, there are some similarities in the legal framework that addresses development in the WTO and two other sets of exceptions, namely regionalism and accession. A set of exceptions are set forth to address a different issue each time, putting in question the validity of cardinal rules in the WTO and whether they

[104] *See* on the contextualization of development in public international law and WTO law Maria Panezi, *Mapping the Territory: Contextual Jurisprudence, Legal Pluralism and WTO Law and Development: A Response to William Twining's Internal Critique Thesis from the Point of Transnational Jurisprudence*, 4 Transnational Legal Theory 574-606 (2013).

function as intended. In other words, it is paradoxical why such sets of exceptions are necessary to rules that represent the liberal rules-based trading system, which provides its members with benefits only. Third, the contextual parameters of the three sets of two-tiered processes exhibit similarities. There exist most importantly obvious stronger-versus-weaker state (or groups of states) dynamics, which further influence the processes followed to conclude these rules, their content and their monitoring mechanisms (when those are in place).

For these reasons I argue that internal transparency should extend to the exclusionary properties of Preferential and Regional Trade Agreements. Or, one could argue that developing countries' participation problems are issues of internal transparency *stricto sensu* while PTAs/RTAs belong to internal transparency *lato sensu.* Extending the definition of internal transparency to non-development related exclusionary problems can help us better understand the issue of non-effective participation to the world trading system, and can also help address fairness questions that do not exclusively appear in the development context.

A WTO member state can be facing exactly the same issues of complete disregard for its economic needs and inability to do much about it in the WTO context because of being left out from Preferential Trade Agreements. The agreement signed between the European Union and Canada (CETA), the Mega-Regional signed among Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States and Vietnam (TPP) and the one that is currently being negotiated between the European Union and the United States (TTIP) can easily exacerbate the problems from extant subsidization practices from all three parties for their products at the expense of small economies. Canada, the European Union and the United States already dominate the world trading system. New agreements between them without the obligation to extend the privileges agreed through Most Favored Nation to anyone else can block entire sectors of global markets from any chances for prosperity. Additionally, a significant amount of intransparency exists with respect to PTAs in the WTO.

VIII. The renewed Nairobi Transparency Commitment

The 10th WTO Ministerial Conference took place in December 2015 in Nairobi, and it resulted in the signing of the Nairobi Ministerial Declaration. In the Declaration, WTO member states acknowledge the very little progress achieved on the Doha Development Agenda. However, for the first time since 2001, the Doha Round has been effectively marginalized in the negotiations, and it may only be a matter of time before it is declared unsuccessful and closed.[105] This is conceded in Paragraph 30 of the Declaration, which contains a clear mention of the divide that the Doha Development Agenda has brought about and the desire for new approaches necessary in the WTO negotiations.

[105] *See* for example the speech by Cecilia Malmström, Commissioner for Trade, "The WTO after Nairobi - Your Views on the Way Ahead", Civil Society Dialogue meeting of April 26, 2016, *available at* http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154474.pdf.

The Nairobi Declaration also addresses the issue of Regional Trade Agreements and their relationship to the WTO. In Paragraph 28 the Declaration mentions that:

> We reaffirm the need to ensure that Regional Trade Agreements (RTAs) remain complementary to, not a substitute for, the multilateral trading system. In this regard, we instruct the Committee on Regional Trade Agreements (CRTA) to discuss the systemic implications of RTAs for the multilateral trading system and their relationship with WTO rules. With a view to enhancing transparency in, and understanding of, RTAs and their effects, we agree to work towards the transformation of the current provisional Transparency Mechanism into a permanent mechanism in accordance with the General Council Decision of 14 December 2006, without prejudice to questions related to notification requirements.

There are two crucial observations made in this paragraph: first, the note that RTAs cannot be a substitute for the WTO and the multilateral trading system. Second, WTO member states recognize the need to take further action with respect to the proliferation of RTAs, and they link this to the transparency mechanisms we discussed in the previous section. We will look at each of the two observations in turn.

The large web of RTAs and the recent conclusion of Mega-Regionals, such as TPP and CETA indicate that the proliferation of a parallel system of trade obligations outside and beyond the WTO has not only considerable breadth, in terms of the number of countries participating, but also depth. The pervasiveness of RTAs is becoming progressively more obvious, as very large economies join these agreements. This increases the effects of marginalization of countries left out of the agreements which may want to join lest their trade interests are *de facto* negatively affected by being excluded. In some cases (like the TPP) there are provisions for joining in later, which mitigate these exclusionary properties to a certain extent. But that is not always the case, especially when two large trading partners (like the United States and the European Union, or the European Union and Canada) enter comprehensive "trade and …" partnerships which can inflate the already large trading volume between the two parties. An understandable effect in the future could be that of negotiations of more RTAs among the smaller states which are affected by such FTAs.

Whether these agreements "complement" the WTO system as the Nairobi Declaration purports to do, is yet to be seen. In many cases the jurisdictional reach of the WTO and the FTAs do not overlap. In other words, the areas covered by the FTAs are not at all discussed in the WTO context. In that sense, indeed FTAs would be complementary. However, to reach this conclusion the multilateral system and the spaghetti bowl have to be compared side-by-side through both an economic and a legal lens. Such scrutiny is not done through any official mechanisms at the WTO level, nor at any perhipheral organizations.

This brings me to the second element of Paragraph 28, namely Transparency and Free Trade Agreements. The Nairobi Declaration reiterates the need for a coherent link between monitoring and the expansion of regionalism in the WTO. This has been recognized several times before, and the realization of the deficit resulted in the mechanisms we discussed in the previous section. To reaffirm this commitment, however, WTO member states took an additional step, and established the permanence of the previously provisional mechanisms. A very large number

of RTAs remain without notification in the WTO[106]- and by consequence without any scrutiny. As transparency is gaining significant space in the WTO regulatory framework, the extension and consolidation of monitoring processes are very important steps in the right direction with respect to RTAs. Additional steps need to be taken in order to support these mechanisms with the provision of sufficient resources, funds and personnel in order to better perform the tasks. WTO member states cooperation is necessary too. Members need to report in a timely manner the agreements they enter into. This helps with another aspect of RTA transparency, the disclosure of the agreements to the public earlier and in a fuller form. Latterly, a number of leaks have shown that there is desire for these agreements not only to be scrutinized on a peer-to-peer basis in the WTO, but also by civil society actors.

Finally, the WTO member states should engage further in discussing the type of examination they expect for RTAs from the monitoring mechanisms. There are three more specific problematic areas: first, a number of agreements have not been notified; second, existing (notified) agreements have not been extensively examined on their compatibility with the WTO Agreements; and third, there still exists no absolute clarity on the exact legal consequences where there is a mismatch between the WTO Agreements and an incompatible RTA. Perhaps the WTO system defers this discussion to the Dispute Settlement process. It would be beneficial if this discussion were formally introduced in the WTO, as it would further demonstrate that WTO member states are committed to promoting (and ensuring) the complementarity between RTAs and WTO Agreements.

IX. Mutual transparency spillovers: Three proposals in lieu of a conclusion

The landscape I described above alludes to fundamental changes in the world trading system. The WTO has extended numerous efforts to remain relevant in this context, and somehow manage the growing number of trade agreements outside its auspices. I will attempt in this last part, instead of a conclusion, to offer three proposals for the future of the relationship between the WTO and the spaghetti/noodle bowl of PTAs/RTAs.

First, it appears that the tide of PTAs/RTAs that are being signed is very strong - too strong not to be taken very seriously in the WTO. The organization needs to be extremely sensitive to the changing nature of the world trading system. Making the transparency mechanisms permanent is a step in the right direction. Such initiatives need to multiply and acquire a more extensive mandate - the WTO needs more resources and formal mechanisms of assessment for PTAs and RTAs that are active and permanent. Beyond the substantive contribution of monitoring mechanisms in the WTO, the emphasis on transparency signals to the world trading system that the WTO is closely scrutinizing the complex web of these agreements

[106] Members renew attempts to deepen WTO scrutiny of regional trade agreements, *available at* https://www.wto.org/english/news_e/news16_e/rta_08apr16_e.htm (last visited Jun. 10, 2016) and Committee on Regional Trade Agreements Submission from the United States, WT/REG/W/103.

as they potentially have systemic implications for the covered Agreements. PTAs and RTAs result in closer economic integration and further trade liberalization but cannot replace the world trading system. The WTO by not only acknowledging but becoming a progressively active "third party" in the process (through constant monitoring) can help ease the asymmetries that the spaghetti bowl produces.

Second, the two forms of transparency discussed in this article, internal (persistence of power asymmetries) and legal (formal monitoring mechanisms) are complementary. If developing countries get proper assistance in the WTO, both through better rules and technical assistance, their negotiating position will improve, and as such, they will be able to negotiate PTAs and RTAs in terms that are better for themselves.[107] Developing and least-developed countries can gain a lot from actively participating in monitoring of others' PTAs and RTAs in transparency and review mechanisms. This might prompt them to sign regional trade agreements with their key exporters and importers. Their more integrated participation in the world trading system, even in the form of regional agreements can help increase their trade volume and promote liberalization of crucial sectors, mitigate some of the international fora participation concerns and hurdles (as negotiators will gain experience in more limited settings and can transfer that know-how before the WTO). This will be most valuable for least-developed countries and countries with very low GDP which in the WTO are represented jointly by larger developing economies. The relationship between the two transparencies is interwoven but there still needs to be a conscious, continuous and specific effort on behalf of the WTO to link the two forms of transparency.

Third, some measures need to be taken initially in order to further clarify rules on PTAs/RTAs and mitigate the negative effects of Mega-Regionals on smaller countries. Not doing anything and letting various agreements play out until problems arise is not a proper response, multilateralism may be seriously compromised without any formal checks. One proposal could be to place some form of moratorium, a cap on further PTAs and RTAs until the remaining ones have been properly notified and an additional mechanism is put in place to ensure the compatibility of the obligations they create between their signatories with WTO rules.[108] The WTO can also offer to "plurilateralize" smaller agreements, if members would like to open up participation in them. This may prove more difficult as members to smaller agreements would not want to dilute their rights and the exclusivity gained from participation.

Another idea, instead of a moratorium, would be to attach legal consequences to the failure to notify an agreement, or some privileges for notifying them properly. For example, if an agreement has not been notified, then it cannot be taken into account by the Panels and the Appellate Body on a potential dispute between two WTO members. This would add an additional layer to the analysis of the Peru-Guatemala case;[109] a Free Trade Agreement would need to not only be in force

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107 Bilal & Szepesi, *supra* note 84, at 389-90.

108 Blustein, *supra* note 81, at 277 et seq.

109 *See* conclusions, Appellate Body Report, *Peru - Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, WT/DS457/AB/R/Add.1 (July 20, 2015) and ¶¶ 7.25 et seq., Panel Report, *Peru - Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R, WT/DS457/AB/R/Add.1 (Nov. 27, 2014) (adopted Jul. 31, 2015 as modified by Appellate Body Report, *Peru - Additional Duty on Imports of Certain Agricultural Products,* WT/DS457/AB/R (July 20, 2015)).

but also notified before the WTO in order for the court to consider it. This would give an incentive to WTO members to notify agreements, as usually the Dispute Settlement System is preferred to most other systems of settlement of disputes. If this were to be adopted, it should be seen as a *lex specialis* provision, not a *contra legem* approach to the Vienna Convention on the Law of Treaties. The Dispute Settlement Body has an unprecedented hybrid legal/political nature, with proper adjudicatory procedures (including a permanent appeals tribunal) and a political branch at the end of the process, and FTA members may very likely prefer their disputes adjudicated here. To require a notification of the FTA prior to adjudication does not seem like a burdensome requirement if parties want this agreement potentially taken into account when discussing their WTO rights and obligations.

The WTO remains the most important international trade forum. It is crucial to reinforce the multilateral platform that has been successful for so many decades, since 1947. Yet, adaptability to the changing landscape of world trade is equally essential for the organization. A more assertive stance that acts upon improving the two transparency forms discussed above will assist both the WTO and its member states support multilateral solutions over regional and more limited ones. A combined approach, in the spirit of the unique collaboration of William Shakespeare and John Fletcher may very well produce two noble kinsmen that can help the WTO improve its legitimacy profile.

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